IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner and Respondent, vs. STEPHEN EDWARD HAJEK and LOI TAN VO, Defendants and Appellants.	**CAPITAL CASE** No. S049626 (Santa Clara County Superior Court No. 148113)

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent where necessary in order to present the issues fully to the Court. Appellant does not reply to respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any specific contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the

positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in respondent's brief; references are supplied to the arguments in appellant Vo's Opening Brief on Appeal.

I. California's death penalty statute unconstitutionally permits prosecutors standardless discretion in capital charging.

Appellant Vo and co-defendant Hajek each assert that California's capital punishment scheme unconstitutionally permits prosecutors standardless discretion in capital charging, resulting in arbitrary and capricious imposition of capital punishment depending on the county in which charges are brought and the prosecutor assigned to the case. (Vo AOB, arg. 27, p. 401 et seq; Hajek AOB, arg. I, p. 40 et. seq.) Appellant Vo adopts by reference the argument set forth by co-defendant Hajek in his AOB.

The arbitrary pursuit of capital punishment where that punishment is not sought in similar or more aggravated cases violates equal protection of law, due process of law, as well as the Eighth Amendment prohibition against cruel and unusual punishment.

Respondent argues only that this Court has declined to grant relief on similar claims brought by other capital defendants, and this Court should do so again. (Respondent's Brief, Arg. I, p. 45.)

Appellant Vo respectfully requests that this Court reexamine its previous holdings denying relief; the disparate treatment of similarly situated defendants is the very picture of the arbitrariness that the

constitution forbids. (*Furman v. Georgia* (1972) 408 U.S. 238.) "Death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) "[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Equal protection, moreover, requires that a statewide scheme must provide sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 532.)

Not only does the standardless discretion permitted prosecutors result in disparate outcomes among the many counties in the state, but also within the same county, as appellant's counsel noted in pleadings filed at trial. (See, CT 1540-1541, CT 2069-2087.) Appellant Vo refers to and incorporates herein Argument 26 of his AOB, asserting that the refusal to provide for inter-case proportionality review deprived him of a reliable sentencing determination.

The prosecutor assigned to appellant's case was Peter Waite. On February 4, 2009, Mr. Waite received a public reproval from the State Bar of California. According to news accounts, the State Bar's public reproval was based on Mr. Waite's misconduct in another case, withholding

exculpatory material from the defense. (See, "HOMICIDE DA REBUKED" by Howard Mintz, San Jose Mercury News, 02/22/2009, attached hereto as Exhibit A.) Appellant Vo respectfully requests that this Court take judicial notice of the public reproval.

As set forth in Argument 29 of appellant Vo's AOB, incorporated herein, the record of this case demonstrates that Prosecutor Waite committed misconduct in argument. Many other arguments demonstrate prosecutorial over-reaching with the objective of obtaining a death sentence for appellant Vo and co-defendant Hajek: Waite's refusal to permit the co-defendants to be tried separately; his vigorous opposition to necessary continuances; his use against appellant Vo of evidence which was only relevant to Hajek; his reliance on an expansive, uncharged, and unproven conspiracy theory; overcharging; and the use of multiple unsupported theories of capital murder so that no one theory needed to garner a unanimous vote among jurors.

The decision whether to seek death in appellant's case was up to Waite. Taken as a whole, his decisions and actions with respect to appellant Vo reflect a desire to win a death sentence at all costs. The misconduct in an unrelated case, resulting in public reproval, does not prove inappropriate behavior in appellant's case, but it certainly tarnishes any

presumption that Waite's practices were to act in good faith and out of a desire only to seek justice.

The multiple, egregious errors in appellant's case require reversal. However, appellant urges that the standardless discretion afforded prosecutors not only permits but encourages prosecutors to engage in the arbitrary and capricious pursuit of death, as seen in appellant's case. That capriciousness is highlighted by the arbitrariness in charging practices not only between California counties, but within the county in which these charges were brought. (See, Pierce and Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 Santa Clara L. Rev. 1 (2005); California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration Of the Death Penalty in California* (2008). Respondent declines even to address the issue; respondent's answer to specific examples of disparate charging in Santa Clara County around the time of appellant's trial is "Don't look there."

The disparate capital charging encouraged by permitting prosecutors standardless discretion is indefensible. It invites the very arbitrariness condemned by the United States Supreme Court in *Furman*. It insulates the prosecutorial overreaching condemned by the United States Supreme Court

in *Berger v. United States* (1935) 295 U.S. 78, 88, holding that due process dictates that a prosecutor's "interest" may not be that he "win a case, but that justice shall be done." It can in no way promote confidence in the judicial system when the charging decision is permitted to be as random as a lightening strike, and examination of its arbitrariness is dismissed outright, no matter how compelling the showing. (See, Steven F. Shatz & Nina Rivkind, *The California Death Penalty: Requiem for Furman?* 72 N.Y.U.L.REV. 1283 1306-17 (1997).) For these reasons, appellant Vo respectfully requests that this Court revisit its rulings declining to perform inter-case proportionality analysis, and declining to find unconstitutional the problem of arbitrary and capricious, standardless capital charging practices.

II. **The trial court erred in denying Appellant Vo's motion to sever his trial from that of the co-defendant.**

Reversal is required because the trial court erred in refusing to sever appellant Vo's trial from that of his co-defendant, Hajek. (Vo AOB, Arg. 1, pp. 123-159.)[1] Co-defendant Hajek also raises a claim that severance was

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[1] Appellant Vo refers to and incorporates herein other errors flowing from the denial of severance, including but not limited to the following arguments in his AOB: Arg. 2 (denial of necessary continuances); Arg. 4 (admission of evidence concerning co-defendant Hajek's conversation with a witness before the offense, stating Hajek's violent intent); Arg. 5 (admission of taped conversation between appellant Vo and co-defendant Hajek, in which Hajek made inculpatory statements and Vo's responses are inaudible); Arg. 6 (the prosecution's uncharged conspiracy theory); Arg. 7 (admission of co-defendant Hajek's extrajudicial statements, resulting in the denial of the right to confront and cross-examine); Arg. 8 (insufficient evidence that Vo killed, intended to kill, or harbored reckless disregard for human life, or participated in the uncharged alleged conspiracy, or otherwise was criminally culpable for the homicide); Arg. 12 (admission of evidence of co-defendant Hajek's musical interests, alleged Satanism, and other alleged bad acts); Arg. 17 (improper instructions undermined the constitutional requirement of proof beyond a reasonable doubt as to appellant Vo); Arg. 18 (instructions on aiding and abetting improperly relieved the prosecution of its duty to prove each element as to each defendant separately); Arg. 19 (appellant Vo's jury was burdened by instructions regarding Hajek's conduct and mental defenses, and no limiting language was given); Arg. 20 (instructions improperly permitted the jury to infer guilt from alleged evidence of motive); Arg. 25 (the trial court improperly refused to permit a separate jury to decide appellant Vo's penalty); Arg. 28 (penalty instructions failed to provide adequate guidance, and required jurors to consider factors and evidence that was wholly irrelevant to appellant Vo); Arg. 29 (the trial court refused to preclude improper argument by the prosecutor, including his urging that the defendants be considered jointly and that the jury consider factors applicable only to one defendant); Arg. 30 (denial of the motion for new

(continued...)

improperly refused by the trial court. (Hajek AOB, Arg. II, pp. 52 et seq.)

Respondent argues that the defenses proffered were not in conflict, and that the benefits of a joint trial outweighed the defendants' interests in separate trials. (RB, Arg. II, pp. 45-53.) Respondent is incorrect, and ignores the enormous and constitutionally intolerable damage to appellant Vo's ability to defend because he was tried with co-defendant Hajek.

As to the issue of severance, the two defendants are in significantly different postures. Whether or not co-defendant Hajek suffered harm from the joint trial, appellant Vo unquestionably did.

A. Factual Background.

The vast bulk of the evidence indicated that co-defendant Hajek was responsible for the homicide: he had a grudge against the victim's grand-daughter; he bragged in advance (outside Vo's presence) about committing violent acts; he alone had blood on his clothing; he made self-incriminatory statements; he threatened the family of the homicide victim after his arrest; and his statements and writings after the offenses pointed to his guilt.[2]

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[1](...continued)
trial); and Arguments 22 and 33 (cumulative error).

[2] Appellant specifically refers to and incorporates herein Argument 6 of his AOB and Argument X of this brief, addressing the alleged conspiracy theory. Respondent urges that a conspiracy and joint intent can be inferred from the vast array of evidence proffered by the trial prosecutor.
(continued...)

Hajek had a prior criminal history; he also suffered from a serious mental illness.

A great deal of evidence was admitted regarding Hajek's mental illness, a major component of his defense at the guilt phase and the penalty phase. This evidence was inapplicable to appellant Vo; and worse, it suggested to the jury that Vo had more responsibility because he was not mentally ill. Indeed, the prosecutor so argued. (See, e.g., Vol 22, RT 5556, RT 5573.)

Appellant Vo was admittedly present in the home during some of the events, and admittedly participated in certain crimes that day. However, he had no prior criminal record; he did not participate in the events precipitating Hajek's grudge against the victim's granddaughter, or know her; he did not know of Hajek's intent or his statements that he planned violence; there was no physical evidence that he committed the homicide, and no evidence he knew about it until after it was committed; Vo admitted

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[2](...continued)
The alleged conspiracy evidence included prior criminal acts involving Hajek only; statements made by Hajek only, before and after the crime; Hajek's threat against a witness. That appellant Vo kept letters which Hajek sent him, the prosecution contended, meant that Vo somehow agreed with Hajek's often bizarre statements. The alleged conspiracy included allegations of torture, revenge, and sadism, based on Hajek's statements and writings.

the extent of his participation, but made no statements admitting participation in the homicide; and he was profoundly remorseful that he had gone with Hajek on that terrible day.

B. Severance Was Required.

There is a reasonable probability that the jury would have reached a different determination at the guilt phase, had appellant Vo been tried separately from co-defendant Hajek. The trial court's denial of severance allowed the prosecution to proceed with an "uncharged conspiracy theory," the effect of which was to give the prosecution the enormous strategic windfall of saddling appellant Vo with the all of the bad acts and extrajudicial statements of co-defendant Hajek. (Vo AOB 152.) Much of this inflammatory evidence would have been excluded had Vo been tried separately. (Vo AOB 153.) Severance should be granted where "evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant." (*Zafiro v. United States* (1993) 506 U.S. 534, 539.)

The mental health evidence introduced by co-defendant Hajek in the joint trial raised the expectation that appellant Vo would introduce similar mental health evidence. (Vo AOB 155.) The prosecution used appellant Vo's lack of mental-health evidence to suggest his guilt, and also

impermissibly used mental health evidence against both defendants during closing arguments. (*Ibid.*) The jury was not instructed to disregard these arguments. Had appellant Vo been granted a separate trial, the mental health evidence pertaining to co-defendant Hajek would not have been admissible.

The joint penalty trial, moreover, ensured that appellant Vo could not receive the individualized determination of sentence that the Eighth Amendment mandates. The Supreme Court has held that a jury's decision to sentence a defendant to death must possess the "precision that individualized consideration demands." (*Stringer v. Black* (1992) 503 U.S. 22, 231.) Moreover, the jury was not given limiting instructions that some evidence could only be used in assessing the appropriate sentence for one of the two individual defendants. (Vo AOB 149.) Instead, appellant Vo's jury was permitted to consider Hajek's prior offenses (and speculate that Vo was criminally inclined by association); his alleged threats against the family dog; his alleged Satanism (inferred by the prosecutor from his musical choices); his interest in Japanese animation (argued by the prosecutor to suggest Hajek was or wanted to be in an Asian gang); and Hajek's alleged sadism (leading to factually unsupported argument by Hajek's counsel that Vo was the actual killer and sadistic).

Demonstrating without question the irreconcilability of the defenses, Hajek's counsel was permitted at penalty phase to introduce a hearsay statement of Hajek, denying responsibility for the homicide. (Vol. 23, RT 5892.) Hajek's statement amounted to an accusation that Vo was personally responsible for the killing, but it was backed by no other evidence; and the accusation was one Vo could not adequately test by confrontation and cross-examination because Hajek did not take the stand. Vo similarly could not confront and cross-examine Hajek on numerous other extra-judicial statements as well, none of which would have been presented at a separate trial.[3] The cumulative effect of these errors was to deny appellant Vo due process and a fair trial.

As set forth more fully in appellant Vo's AOB, California Penal Code §1098 governs joinder and severance in California state prosecutions. In *People v. Massie* (1967) 66 Cal.2d 899, 916-917, this Court held that a trial court must not refuse consideration of reasons advanced in support of a motion for separate trial, but instead must exercise its discretion, stating:

> [T]he court should separate the trials of codefendants in the face of an incriminating confession, prejudicial association

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[3] Appellant Vo argued that the use of these statements made by the co-defendant violated the principles of *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123. (See, e.g., CT 1536-1537.) See Argument 7 of Vo's AOB, incorporated herein.

> with codefendants, likely confusion resulting from evidence on multiple counts, [or] conflicting defenses . . ..

(*Massie*, at 917; footnotes omitted.) In *Zafiro v. United States*, *supra*, 506 U.S. 534; 539 [122 L.Ed.2d 317, 325], the United States Supreme Court recognized that co-defendants should be granted separate trials if

> **there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant.** For example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. ... Evidence that is probative of a defendant's guilt but technically admissible only against a co-defendant also might present a risk of prejudice. See *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. [citation].

(*Id.*, at p. 539. Emphasis added.)

Co-defendants have mutually exclusive defenses where acceptance of one party's defense will preclude acquittal of the other defendant. (*United States v. Gonzalez* (9th Cir. 1984) 749 F.2d 1329, 1333.) When co-defendants with mutually exclusive defenses are both convicted, this demonstrates that the conflict in evidence alone impermissibly led the jury to infer both were guilty. (*People v. Hardy* (1992), 2 Cal.4th 86, 168.) In

this case, appellant Vo's and co-defendant Hajek's defenses were mutually exclusive. (Vo AOB 150.) Co-defendant Hajek's defense was twofold: he argued both that his mental defect precluded him from forming the mens rea required for first-degree murder, and that appellant Vo was the true killer. (Vo AOB 151.) Appellant Vo's defense presented and stressed evidence that co-defendant Hajek was the true killer. The fact that both appellant Vo and co-defendant Hajek were convicted suggests that this conflict in evidence alone led the jury to infer that both defendants were guilty.

Respondent argues perfunctorily that "This was a classic case for a joint trial" (RB at 47); that "their defenses did not conflict" (*Ibid.*); that it matters not whether the victim was killed by co-defendant Hajek, Vo, or both (RB 48); that appellant Vo "did not need a mental defense to succeed on his theory" and thus was not harmed by the jury's consideration of Hajek's extensive evidence of mental illness (RB 49); that "much" of the evidence would have been admissible against Vo in a separate trial (RB 49-50); and that there was no confrontation clause violation when co-defendant Hajek's extrajudicial statements were admitted against Vo (RB 50-52). Respondent's contentions are without merit as to appellant Vo.

In respondent's view, the legislative preference for joinder virtually amounts to a directive as a matter of law. This case, however, demonstrates

as to appellant Vo the "gross unfairness . . such as to deprive the defendant of a fair trial or due process of law" condemned by this Court when severance is wrongly denied. (*People v. Cleveland* (2004) 32 Cal.4th 704, 726, cited at RB 46-47.)

Respondent's assertion that the co-defendant's "defenses did not conflict" and that "the two defense theories permitted the jury to accept both" (RB 47) is disingenuous at best. Respondent conveniently ignores the details of the defenses, as well as the evidence and argument at the trial itself. The defenses were actively in conflict from the start: appellant Vo took the stand and testified that he did not commit or assist in the homicide, did not know about it in advance, did not share any intent to kill or harm anyone in the Wang family; and while co-defendant Hajek's primary defense was that he was mentally ill and lacked the requisite mental states for conviction of capital murder, his defense also sought to place blame on appellant Vo throughout the trial, culminating in admission of Hajek's extrajudicial denial of the killing. However, co-defendant Hajek made numerous self-inculpatory extrajudicial statements, which were admitted against appellant Vo at trial. Only a sturdy set of blinders – one assuredly not possessed by jurors who were constantly urged by the prosecution to view the two defendants together in deciding both guilt and penalty –

permits respondent's crabbed and misleading conclusion that these defenses were not conflicting.

Respondent minimizes the impact on Vo's right to due process by flatly stating that "no California decision has ever found an abuse of discretion [on the basis of conflicting defenses] or reversed the judgment solely on that basis." (RB 48, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41, and *People v. Avila* (2006) 38 Cal.4th 491, 575, *inter alia.*) However, this Court has emphasized that in a contest between administrative convenience and constitutional due process, the latter prevails. Vo's case is a prime example of a case presenting such a conflict.

This Court has stated that "to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty."[4] (*People v. Hardy* (1992) 2 Cal.4th 86, 168, quoted in *People v. Coffman, supra*, 34 Cal.4th at p. 42.) However, this Court has also

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[4] The prosecution obviously sought to exploit the conflicting defenses of appellant Vo and co-defendant Hajek, and have the jury infer that both were guilty; to that end, it crafted a broad uncharged conspiracy theory, attributing to Vo everything in the arsenal about co-defendant Hajek. The guilt and penalty phase defenses of these defendants were irreconcilable, as each pointed to the other as the guilty party.

articulated the test for severance where defenses are irreconcilable in other ways. In *Hardy*, this Court quoted with approval federal cases holding that irreconcilable defenses mandating severance "'exist where the acceptance of one party's defense will preclude acquittal of the other.'" (*People v. Hardy*, *supra*, at p. 168, quoting *United States v. Zipperstein* (7th Cir. 1979) 601 F.2d 281, 285.[5]

Respondent glosses over the many and detailed reasons that appellant Vo's trial was unfair because severance was denied (Vo AOB Arg. 1, pp. 123-159), preferring an unfocused and piecemeal approach which, similar to the prosecutor's approach at trial, *attributes to appellant Vo* both conduct and motivations that belong to co-defendant Hajek. Nowhere in respondent's argument is there an analysis of how very

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[5] Federal courts have applied the same analysis. (See, e.g., *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 899-900, quoting *United States v. Throckmorton* (9th Cir. 1996) 87 F.3d 1069, 1072 [irreconcilable defenses exist when "'the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant'"]; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1086 [irreconcilable defenses "exist when acquittal of a codefendant would necessarily call for conviction of the other"]; *United States v. Rose* (1st Cir. 1997) 104 F.3d 1408, 1415 [irreconcilable defenses exist "if the tensions between the defenses are so great that the finder of fact would have to believe one defendant at the expense of another"]; *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173, 178-181.)

different appellant Vo's trial would have been if it had been a separate trial of Vo alone. Instead, respondent points to a few matters it claims would have been admissible against Vo in a separate guilt trial (RB 49-50), and then argues that Vo's right to confrontation was not abridged by the extrajudicial statements of co-defendant Hajek. (RB 50-52.)

Initially, respondent simply implies that Hajek's reliance on a mental defense at the guilt phase had no impact on the jury's consideration of Vo's defense, because these were not technically "conflicting" defenses in its view. (RB 49.) Respondent ignores the broader problem of the co-defendant's mental defense infringing on a fair trial for this particular defendant, altering appellant Vo's trial with an issue wholly inadmissible and inappropriate for Vo's jury to consider. As noted above, the prosecutor used co-defendant Hajek's mental illness defense as an opportunity to argue that appellant Vo, in contrast to Hajek, was more culpable because he offered no mental defense (see, e.g., Vol 22, RT 5556, RT 5573), a tactic he could not have undertaken in a separate trial.[6]

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[6] This Court held in *In re Spencer* (1965) 63 Cal. 2d 400, 412-413 that:

> If the defendant does not specifically place his mental condition into issue at the guilt trial . . . the psychiatrist may not testify at that trial. If defendant does specifically place his mental condition into issue at
>
> (continued...)

Next, respondent asserts that an earlier altercation between Hajek and the homicide victim's granddaughter "provided the motive for both appellants' subsequent actions against the Wangs." (RB 49-50.) However, respondent's assertion is unsupported by the trial record. Respondent's assertion, like that of the trial prosecutor, is based on pure speculation that appellant Vo [a] knew of Hajek's homicidal plans, and [b] agreed to participate, because [c] he was allegedly "in love" with a young woman who was with Hajek during the earlier altercation. There is no proof of any sub-part of this bald speculation; it is in no way proof beyond a reasonable doubt of planning, participation in an alleged murderous conspiracy, guilty

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[6](...continued)
the guilt trial, he can offer no valid complaint as to the testimony of the psychiatrist at that trial.

The *Spencer* case involved a court-appointed psychiatric examination outside the presence of counsel. Appellant Vo's case involves the co-defendant offering a mental defense, with no such mental defense offered by appellant Vo, and the prosecutor seeing an opportunity to argue that appellant Vo therefore had greater culpability.

As this Court has made clear, the absence of a potential statutory mitigator at the penalty phase is not an aggravator. (*People v. Riel* (2000) 22 Cal.4th 1153, 1223 [absence of a mitigating factor is not itself aggravating]; *People v. Davenport* (1985) 41 Cal.3d 247, 288-290 [same].) By analogy, surely on due process grounds the same holds true at the guilt phase of a capital trial, when a prosecutor seeks to exploit the absence of a mental health defense to guilt.

intent, or of homicidal guilt itself.[7]

Respondent continues to build on baseless speculation, averring that co-defendant Hajek's pre-crime statement to witness Tevya Moriarty that he intended to commit murder would have been admissible against appellant Vo in a separate trial. (RB 50.) But there was absolutely no evidence that appellant Vo [a] knew of co-defendant Hajek's statement to Moriarty, [b] that he knew of Hajek's intent and plan, or [c] that he otherwise knowingly or actually participated in the killing. Hajek's hearsay statement would have been excluded from a separate trial, because there is no nexus at all – and no evidentiary link establishing any tie – between Hajek's alleged statement to Moriarty and Vo's alleged knowledge or intent in the incident.[8]

As to a third and final example of its contention that "most" evidence would have been admissible against Vo in a separate guilt phase trial, respondent only argues on an assumption, *arguendo*, that an entry in appellant Vo's diary about a crime co-defendant Hajek committed without him would not have "substantially" prejudiced Vo – a virtual admission that

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[7] Speculation of this sort is not uncommon in schoolyards, and it even appears in office settings. It is an embarrassment that it would be employed in a judicial setting, and an affront to the very foundations of our justice system, particularly in a capital case.

[8] Appellant refers to and incorporates herein Argument 6 of his AOB and Argument X of this brief, addressing the alleged conspiracy theory.

it would not have been admitted in a separate trial. (RB 50.) No reasonable judge would have admitted that evidence as "proof" that appellant Vo had anything to do with co-defendant's planning, intent, or actions in this case.

Respondent offers but one response to the many ways that appellant Vo's penalty trial was rendered unfair and unconstitutional by its joinder with the penalty trial of co-defendant Hajek: a hypertechnical assertion that the Confrontation Clause was not violated by the admission of Hajek's extrajudicial statement denying he had committed the homicide (RB at 50-52) – a statement which under the facts of this case was nothing less than an accusation that appellant Vo was the perpetrator. Respondent fails to discuss all of the other reasons the joint penalty trial was unconstitutional, as set forth in Argument 1 of appellant Vo's AOB and related claims, and these should be considered conceded by respondent.[9]

Co-defendant Hajek's mental health expert related, in Hajek's

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[9] On many occasions, this reply brief notes that respondent has made no response at all to some of Mr. Vo's claims. In particular, on many issues there is a conspicuous absence of discussion of Mr. Vo's federal constitutional claims. In these instances, the reasonable and appropriate inference is that "respondent has abandoned any attempt to support the judgment [against this particular attack], and that the ground urged by appellant for reversing the judgment is meritorious." (*Berry v. Ryan* (1950) 97 Cal.App.2d 492, 493, cited with approval in *Smith v. Williams* (1961) 55 Cal.2d 617, 621; but see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

penalty defense, a denial by Hajek that he had killed the victim. Hajek himself did not testify and could not be cross-examined. The prosecution relied on a theory of appellant Vo's guilt by association with Hajek, since there was substantial evidence of Hajek's planning and guilt and none as to appellant Vo. The co-defendant's extra-judicial statement denying the killing was, therefore, an enormous gift to the prosecution in its quest for a death sentence against appellant Vo, one that it could not have offered while seeking a death sentence against co-defendant Hajek. At the penalty phase, this witness for co-defendant Hajek was an important conduit for allegations the prosecutor could use against Vo. This circumstance also illustrates perfectly the absolute, irreconcilable conflicts between co-defendant Hajek's defense – he had a right to offer whatever exculpatory evidence he could at the penalty phase – and appellant Vo's right to a fair trial.

Respondent argues that there was no problem with the admission of Hajek's hearsay statement because it was not "testimonial" under *Crawford v. Washington* (2004) 541 U.S. 36, 51 (RB at 51), and on the theory that a statement of a co-defendant that is "redacted" to eliminate a reference to the other defendant does not violate *Bruton*, citing *Richardson v. Marsh* (1987)

481 U.S. 200.[10] (RB at 51.) Respondent's positions are without support.

First, co-defendant Hajek's extrajudicial denial of the killing *was* testimonial in nature; it was made to a retained witness with the expectation that the witness would testify at the trial. The High Court in *Crawford* endeavored to explain the distinction between offhand comments and "testimonial" evidence:

> The text of the Confrontation Clause . . . applies to "witnesses" against the accused – in other words, **those who "bear testimony**." 2 N. Webster, *An American Dictionary of the English Language* (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* **An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.** The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: "**ex parte in-court testimony or its functional equivalent**--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial **statements that declarants would reasonably expect to be used prosecutorially**," Brief for Petitioner 23; "extrajudicial

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[10] *Richardson v. Marsh*, *supra*, 481 U.S. 200, involved a redacted confession of a co-defendant that did not necessarily implicate the petitioner, which was not the situation here. Also unlike this case, the jury was instructed to only use that evidence against the co-defendant who made that statement, and the Court's discussion focused on the assumption that jurors follow their instructions. (*Id.*, at 208, fn. 3.)

> statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "**statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial**," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. **The statements are not sworn testimony, but the absence of oath was not dispositive.** Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, e.g., *Campbell*, 30 S.C.L., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, *Pleas of the Crown*, at 52. Yet Hawkins and others went out of their way to caution that **such unsworn confessions were not admissible against anyone but the confessor**. [Citation and footnote omitted.]

(*Crawford v. Washington, supra,* 541 U.S. 36, 51-52; emphasis added.) In *Davis v. Washington* (2006) 547 U.S. 813[11], the United States Supreme Court clarified that statements are <u>not</u> testimonial when

> . . . the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. **They are testimonial when the circumstances objectively indicate** that there is no such ongoing emergency, and **that the**

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[11] The circumstances in *Davis v. Washington* involved a telephone call to 911, during an emergency.

> **primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.**

(*Id.* at 822; emphasis added.) The footnote immediately following this quote in *Davis* is instructive, in that it does not limit *Crawford*'s holding to the circumstance of police interrogation:

> Our holding refers to interrogations because . . . the statements in the cases presently before us are the products of interrogations – which in some circumstances tend to generate testimonial responses. **This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial** . . ..

(*Davis v. Washington, supra,* 547 U.S. 813, 822, fn. 1; emphasis added.)

Respondent, ignoring the above guidance from the High Court, argues that the statement of co-defendant Hajek implicating appellant Vo as the killer was non-testimonial because it was not made to "government officers." (RB at 51.) In fact, the expert witness who reported the statement was retained by, and therefore a representative of, the government agency representing co-defendant Hajek, the Santa Clara Public Defender's Office. That was not formally a prosecution agency, but because the defenses of the co-defendants were adverse, it functioned as a second prosecutor as to appellant Vo, seeking to undermine Vo's defense in order to bolster Hajek's own. Even if the statement was not garnered at the behest of a governmental agency, though, it would still be "testimonial" in

nature because it was developed in anticipation of this very trial.

Second, the basic constitutional framework for considering the impact of co-defendant Hajek's extrajudicial statement remains that set forth in *Bruton v. United States* (1968) 391 U.S. 123. The admission of a co-defendant's inculpatory statement without permitting cross-examination is constitutionally intolerable.[12]

Third, it matters not in the assessment of whether severance was required that co-defendant Hajek's extrajudicial statement was technically "not admitted for the truth," "but to show the basis for the psychiatrist's

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[12] See also, *United States v. Al-Muqsit* (8th Cir. 1999) 191 F.3d 928, holding that admission in a non-capital case of a co-defendant's post-arrest statement, which claimed that the charged robbery was planned by the codefendant and "another individual," violated defendant's rights under the confrontation clause. The replacement of defendant's name with "another individual" served as a damaging piece of evidence that went directly to the heart of the petitioner's defense. Because there was conflicting evidence on whether the petitioner had planned the robbery with the co-defendant, the appeals court could not say that admission of the co-defendant's statement was harmless beyond a reasonable doubt.

See also, *Vincent v. Seabold* (6th Cir. 2000) 226 F.3d 681, holding that the petitioner's confrontation rights were violated in this non-capital case by admission of a non-testifying accomplice's confession, in violation of the Supreme Court's decision in *Williamson v. United States* (1994) 512 U.S. 594. While the accomplice's confession inculpated him in that it placed him at the crime scene, it also attempted to distance himself from the murder and to shift the blame away from himself onto petitioner and the other codefendant.

expert opinion." (RB 51.)[13] This was an enormously prejudicial accusation against Vo, by the only person present that day besides the victims; no reasonable person could believe the jury would fail to consider it. This evidence would not have been admitted for any purpose in a separate trial of appellant Vo.

Fourth, respondent is grasping at straws with its argument that co-defendant Hajek's extrajudicial statement posed no problem because he merely said he did not commit the killing, rather than saying directly that appellant Vo committed the killing. (RB 51.) There were only two choices: this was not a case in which the evidence suggested a possible third-party killer. The jury was directed at penalty phase to consider the circumstances of the crimes. There were no "circumstances" in the prosecution's case as condemning to appellant Vo as co-defendant Hajek's extrajudicial statement that Hajek had not killed. The prejudice to appellant Vo from the denial of severance is unquestionable.

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[13] There was no instruction to the jury limiting this evidence to consideration in deciding the appropriate sentence for co-defendant Hajek only. Nor could such an instruction have "un-rung the bell." The United States Supreme Court so held in *Bruton v. United States*, *supra*, 391 U.S. 123.

C. Conclusion.

For all these reasons, and others set forth more fully in appellant Vo's AOB, reversal is required.

III. **Appellant Vo's trial was rendered fundamentally unfair by the trial court's refusal to grant continuances necessary for his defense, to timely appoint second counsel, and to ensure the availability of necessary funding before and during the trial.**

Appellant Vo's right to counsel and his ability to defend against capital charges were unreasonably and unconstitutionally burdened by three interlocking errors by the trial court: (1) denial of and delay in appointing second counsel to provide necessary assistance in this complex case; (2) a funding system for conflict cases which delegated decisions on funding to an office left seriously underfunded by other cases, which office in turn denied and delayed critical funding for appellant's counsel, investigation, and experts; and (3) the trial court's unreasonable refusal to continue the trial to permit counsel time to prepare. (Vo AOB, Arg. 2, pp. 160-223.) Respondent distorts the factual record in its summary, and erroneously contends that none of these errors has merit. (RB, Arg. III, pp. 53-76.) An integrated, true assessment establishes, to the contrary, that these errors were rooted in not only funding obstacles, but a judicial misapprehension of the scope of appellant Vo's defense, particularly at the penalty phase.

This argument is framed as three distinct trial court errors which together deprived appellant Vo of his right to counsel. (*Gideon v. Wainright* (1963) 372 U.S. 335; *Strickland v. Washington* (1984) 446 U.S.

668, 685; *United States v. Cronic* (1984) 466 U.S. 648; see discussion of the legal foundations in Vo's AOB, Arg. 2, pp. 182-191, incorporated herein.) Respondent chooses not to address the deprivation of appellant Vo's right to counsel, addressing instead each set of underlying errors *seriatim*.

The underlying errors did not occur each in isolation. While appellant submits that each error was sufficient to require reversal, together they amounted to an extraordinary interference with trial counsel's ability to properly represent appellant Vo in this capital trial. That extraordinary judicial interference with counsel's ability to provide adequate representation amounts to a breakdown of the adversary process, warranting a presumption of prejudice. (*United States v. Cronic*, *supra*, 466 U.S. 648.)

The record amply demonstrates that Vo's was an unusually complex[14] capital case, with two defendants presenting fundamentally inconsistent defenses. Virtually all of the specific factors that this Court has identified as requiring the appointment of second counsel – the complexity of the issues, large number of witnesses, complicated testimony,

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[14] Respondent's brief quotes the trial court acknowledging the case was "complicated." (RB 55-56, citing 4 CT 1044.)

extensive pretrial motions[15] – are present here. (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 433-434.) Indeed, the trial court eventually did permit appointment second counsel; presumably it found that ample justification.[16] However, when Ms. Bachers was forced to withdraw for medical reasons in December, 1995 (1/17/95 RT 56), the case was left without second counsel until Jeanne DeKelver was belatedly appointed on February 10, 1995. (10 CT 2741.) Jury selection began on February 14, 1995. (6 CT 1646-1647.)

As set forth in more detail in Mr. Vo's AOB and below, counsel repeatedly requested continuances before and during trial, stating on the record that he was not prepared and could not adequately represent

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[15] One additional factor was identified in *Keenan v. Superior Court*, *supra*: "other criminal acts alleged." (*Ibid.*, at 433-434.) No other crimes were introduced against appellant Vo at trial. During the pretrial period, appellant Vo's counsel tried a separate charge, and appellant Vo was acquitted. (1 RT 48, 50.) Co-defendant Hajek, however, was convicted of a robbery, and evidence of that crime was before the jury in this capital case.

Respondent mischaracterizes the period during which appellant Vo's counsel litigated the other charge as mere idle time, repeatedly (RB 58-62.)

[16] The record does not include an appointment order for Marianne Bachers, who served for a time as second counsel. However, counsel's assertion that she began work in May, 1994 (1/17/95 RT 50-51) was not challenged in the record.

appellant Vo.[17] The trial court rejected these necessary continuances, displaying irritation that counsel was not prepared, and essentially deciding that the case was going forward because the co-defendant was ready.[18] (See, e.g., 1/17/95 RT 66-67.) Counsel's assertion of his own incompetence is quite unusual in the trial record of a capital case; and furthermore, it was supported by specific details about his incomplete investigation and lack of preparation. The trial court's annoyance is not, and cannot be, a constitutionally permissible substitute for providing adequate counsel; nor does an adverse co-defendant's readiness to proceed protect a defendant whose counsel is not.

Finally, there were multiple layers of legal difficulties with the trial court's unreasonable denial and delay in response to requests for necessary funding, as set forth more fully in appellant Vo's AOB and below, even though the right to ancillary services is constitutionally protected. (*Ake v. Oklahoma* (1985) 470 U.S. 68; see also, Penal Code § 987.9.) One essential problem, unique in undersigned counsel's experience in capital

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[17] As set forth more fully in Argument 3 of Vo's AOB, and Argument IV herein, the trial court unreasonably refused the request of appellant Vo's counsel to withdraw because he was unprepared to adequately defend the case.

[18] Appellant Vo refers to and incorporates herein Argument 1 of his AOB, and Argument II herein, concerning the trial court's erroneous refusal to sever his trial from that of co-defendant Hajek.

cases, is that Santa Clara County's Conflicts Administrator was delegated the task of providing authorized funds for ancillary services, as well as paying appointed conflict counsel for their time; and when that organization ran out of money because a separate large, multi-defendant case was then pending, it just stopped paying for both ancillary expenses and counsel's services in this case, mid-trial. That office had a conflict of interest, and appellant Vo was the loser. (See, *Holloway v. Arkansas* (1978) 435 U.S. 475.)

Respondent[19] prefers to think of these circumstances as mere technical difficulties at worst, discussing each as if it was minor, none requiring reversal, respondent never considers the impact on appellant Vo's

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[19] Respondent's counsel is a staff attorney with the Attorney General's office; that office employs many attorneys on salary, provides legal and technical support, and allocates necessary expenses from its budget. There are five attorneys listed as counsel on the cover sheet of Respondent's Brief.

The trial prosecutor likewise was a member of an office with many attorneys and institutional support. The same was true for counsel for co-defendant Hajek, then a staff attorney with the Public Defender, and now the director of that office.

Institutional legal offices may encounter budget problems, but they *never* encounter the situations presented here; because they are not solo attorneys, they always have backup, both in terms of personnel and the costs of litigation. On the prosecution side, they also do not bear the heavy burden of their performance possibly meaning that an accused client is wrongly convicted or sentenced to death.

right to counsel – to adequate representation, to be able to meet the challenges that the State (and co-defendant) would certainly present at the trials of guilt and penalty. If the right to counsel is to be meaningful – and it must be, for an adversarial system to find justice[20] – respondent's position must be soundly rejected.

A. Error in Denying and Delaying Appointment of Second Counsel.

Keenan v. Superior Court, *supra*, 31 Cal.3d 424, 433-434, held that it is an abuse of discretion for a trial court to fail to address the specific reasons that counsel put forth justifying the need for second counsel in a capital case. Second counsel may be required due to the complexity of issues, other criminal acts alleged, a large number of witnesses, complicated scientific and psychiatric testimony, and extensive pretrial motions, all of which are circumstances of appellant Vo's capital trial; in addition, the joint trial with an adverse co-defendant added substantially to the complexity of

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[20] In *Strickland v. Washington*, *supra*, 446 U.S. 668, 685, the High Court ruled:

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

the trial.

Respondent argues that the trial court did not commit error in initially denying Vo's request for *Keenan* counsel in 1991 (RB 54-58), and glosses over the fact that the trial court eventually approved appointment of second counsel in 1994, implicitly but necessarily finding that appointment of counsel was required. Respondent also finds no problem in the facts that second counsel was forced to withdraw for medical reasons – and the subsequent second counsel who served at trial was appointed only four days before jury selection began. Indeed, respondent wishes to have it both ways: on the one hand, no second counsel was needed (RB 54-58), but on the other hand, "second counsel [who withdrew] was appointed well in advance of trial." (RB 57.) Respondent points to motions that lead counsel was able to file on his own (RB 56) and what he was able to present at penalty phase (RB 57), concluding *ipso facto* that because there is evidence counsel presented some evidence and performed some ordinary functions of a lawyer, there was no harm.

After two requests for the appointment of second counsel were denied, appellant Vo's counsel requested a hearing on November 15,1991, arguing that a second attorney was necessary "based upon the facts and circumstances of this case." Counsel was sworn and testified to specific

factors making the case more complex. (5 CT 1003-1004; 11/20/91 RT 3-21.) The trial court refused to appoint second counsel, viewing this Court's decision in *Keenan* as uniquely based on time pressures, and rejecting the complexity of the case as a basis for second counsel; the trial court noted that appellant's case had not been set for trial, and declared that two counsel were unnecessary for penalty phase preparation. (11/20/91 RT 16-20.)

The denials of the motions for second counsel were an abuse of discretion, and contrary to this Court's holding in *Keenan* v. *Superior Court*, *supra*, 31 Cal.3d 424; the predictable effect in this complex capital case was to undermine appellant Vo's right to counsel, and his Eighth Amendment right to reliable and non-arbitrary proceedings in his capital trial. (See, Vo AOB, pp. 195-198.)

It was not until the prosecuting district attorney re-filed charges considerably later, in March, 1994, that the trial court finally granted appellant Vo's *Keenan* request, and belatedly granted his request for a penalty phase mitigation expert. (9 CT 2373 - 2377.)[21] A new motion for *Keenan* counsel was filed and granted in March, 1994, but it proved

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[21] The case was essentially in abeyance in the trial court from August 28, 1992, when the trial court dismissed three alleged special circumstance allegations and various weapons enhancements (5 CT 1349) until an amended Information was filed by the District Attorney on March 2, 1994 (6 CT 1442-1453), following an appeal.

difficult to find an attorney to serve in this role. Marianne Bachers began work as second counsel in May, 1994. (1/17/95 RT 50-53.) With her expertise in pretrial motions, instructions, and penalty phase investigation, lead counsel had delegated to her a great deal of preparation for pleadings and all of the penalty phase; however, Ms. Bachers was forced to withdraw for medical reasons in December, 1994. (1/17/95 RT 53-58; 6 CT 1507-1508.) Counsel moved for a continuance, as he was unprepared for trial. (6 CT 1508; 6 CT 1512; 6 CT 1546.) Replacement second counsel, Jeanne DeKelver, was appointed on February 10, 1995 (10 CT 2741), immediately before trial began on February 14, 1995 (6 CT 1646), and her first appearance before the jury was March 30, 1995, after the jury was seated. (7 CT 1692.)

In denying the requested continuance to prepare for trial and permit replacement second counsel to assume the duties previously assigned to Ms. Bachers, the trial court continued to display disdain for the notion – approved and explained in detail in *Keenan* – that second counsel may be (and was in this case) necessary in a complex capital case, to permit counsel to provide the diligent and competent service contemplated by the Sixth Amendment right to counsel. Unlike the rejection of appellant Vo's motions for appointment of second counsel in 1991, which relied heavily on

the timing and stage of the case (which had not even been set for trial (11/20/91 RT 16-20)), the trial court expressed irritation in 1995 that appellant Vo's counsel was not ready to proceed after four years (see, 6/5/95 RT 5658) – ignoring the long hiatus prompted by the dismissal of special circumstance allegations and the ensuing appeal, the late appointment of second counsel, and second counsel's withdrawal for medical reasons.

Respondent urges this Court to accept the trial court's finding that lead counsel's showing in 1991 was "simply conclusionary [sic]; that it's a complicated case," and that second counsel was not required because lead counsel was "experienced." (RB 55-56; 4 CT 1044.) As argued in appellant Vo's opening brief, this finding was erroneous and an abuse of discretion.

Trial counsel presented the following matters, under oath, as justifications demonstrating the complexity of the case: appellant Vo was charged with murder, three special circumstances, attempted murder, kidnapping and other charges; the facts were confusing and vague; a co-defendant was also charged; there were at least 40 witnesses to be interviewed, some of whom did not speak English; complex motions would be needed; expert consultation would be required regarding blood evidence;

should capital punishment be sought, an extensive investigation of appellant Vo's background would be needed; his history was complicated as he was born in Vietnam, and his family had lived as refugees; some family members were out of the area; an assessment of appellant's mental health would be needed; expert consultation would be needed regarding the co-defendant's expected psychiatric history; and discovery indicated that the prosecutor believed that appellant Vo was involved with a gang and possibly other crimes. (11/20/91 RT 3-14.)

Appellant Vo's trial counsel addressed exactly the kinds of matters that this Court identified as requiring the appointment of second counsel in *Keenan v. Superior Court*, *supra*, 31 Cal. 3d 424:

> [T]he [trial] court declared that a criminal attorney should be capable of defending a capital case without the assistance of a second lawyer. But this view fails to take into account the showing made by Schwartzbach of the reasons why a second attorney is justified under the facts of this particular case, e.g., the complexity of the issues, the other criminal acts alleged, the large number of witnesses, the complicated scientific and psychiatric testimony, and the extensive pretrial motions, as to some of which review would be sought in the event of adverse rulings. [Fn. omitted.] Thus the court abused its discretion in failing to address the specific reasons advanced by Schwartzbach in support of the motion.

(*Ibid*, at 433-434.) Counsel again addressed these factors shortly before trial in 1995, explaining that he had delegated preparation of the penalty phase to Ms. Bachers and that he was unable to proceed, but his arguments

for continuance were summarily rejected. (6/5/95 RT 5658; see below regarding denials of continuance.)

Respondent next urges this Court to find any error harmless, arguing that counsel "presented an impressive defense," called a number of witnesses, and there is "no reasonable probability Vo would have fared better had *Keenan* counsel been appointed sooner" given what respondent characterizes as "extensive evidence of his guilt." (RB 57-58.) First, this Court can only achieve a finding of harmlessness by ignoring – as respondent does – that [1] trial counsel explained before, during, and after trial that he was unprepared; [2] that counsel asked many times before trial for second counsel; and [3] that Mr. Vo sought removal of his counsel mid-trial for lack of preparation, a motion in which his counsel joined. Second, respondent's contention that there is evidence of appellant Vo's guilt (RB 58)[22] fails to consider that denial of second counsel also affected critical

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[22] Respondent argues an alleged "motive" of love for a girl and loyalty to a friend, "expressing no surprise at the unfolding of events," and so on in support of its theory that appellant Vo "was not an innocent party." (RB 58.) Appellant Vo himself admits to grave mistakes that day, but not killing or intending to kill, nor joining in the apparent plan of his co-defendant, of which he was unaware; *no evidence* supports the prosecution theory that Vo knew of Hajek's plan, intended to kill, or actually did kill.

By contrast, Hajek told a third party the night before that he intended to kill, he was the one who had blood on his clothing, and a great deal of the

(continued...)

issues at penalty phase: namely, whether a death sentence is appropriate for *this* particular defendant.

The denials of motions for second counsel early in the case were an abuse of discretion, as was the refusal of the trial court to permit a reasonable continuance for substitute second counsel to become familiar with the case and perform the necessary functions previously assigned to former second counsel. These errors deprived appellant of his fundamental rights to the effective assistance of counsel, due process, to defend, and his right to reliable and non-arbitrary proceedings at both phases of his capital trial. Reversal is required.

B. Denial of Necessary Funding

Appellant Vo contends that his rights to the effective assistance of counsel, to due process of law, to defend, and to reliable and non-arbitrary

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[22](...continued)
evidence introduced was about Hajek – his grudge evidently leading to these events, his psychiatric problems, his actions, his statements before and after the crime. Respondent also asserts that appellant Vo "continu[ed] to maintain a relationship with Hajek following their arrest" (RB 58), apparently based on the fact that the co-defendant sent communications to Vo in jail; these communications were one-sided, all instigated by co-defendant Hajek, and they therefore demonstrate in no way at all that appellant Vo intended to maintain a relationship with Hajek. As set forth elsewhere in this brief, respondent's arguments about appellant Vo's alleged guilt of a capital offense are unsupported by substantial evidence. (See Argument XIX of this brief.) Argument of counsel is not evidence.

proceedings in his capital case were violated by the trial court's delay in providing authorized funds and counsel's fees[23], and by the denials of funding based upon the trial court's unreasonable and unconstitutional view of the scope of mitigating evidence, as well as its overly narrow view of the scope of counsel's responsibilities in a capital case. (Vo AOB, pp. 202-213.)

The delays in fees and funding occurred mid-trial, between April and June, 1995,[24] and were solely because the Conflicts Administrator ran out of money, having spent its allotment on a different multi-defendant case.[25]

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[23] In *Corenevsky v. Superior Court* (1984) 36 Cal. 3d 307, this Court held that "we emphasize that an indigent defendant has specific statutory rights to certain court-ordered defense services at county expense; that an indigent defendant has a constitutional right to other defense services, at county expense, as a necessary corollary of the right to effective assistance of counsel; that such rights must be enforced, and a court's order directing payment for such services must be obeyed, even if a county has no specifically appropriated funds for those purposes."

[24] Jury selection began on February 14, 1995. (6 CT 1646-1647.) Jurors were selected and sworn on March 29, 1995. (7 CT 1690-1691.) The guilt trial began on March 30, 1995 (7 CT 1692), and the prosecution's case in chief concluded on April 20, 1995. (7 CT 1790.) Guilt phase deliberations began on May 10, 1995 (7 CT 1818), and the jury reached a verdict on May 22, 1995. (8 CT 2097, 2114.) The penalty phase began on June 6, 1995 (8 CT 2213), and penalty phase deliberations began on June 20, 1995. (10 CT 2618.) The delays in payment and denials of funding thus occurred in the midst of trial.

[25] The constitutional right to effective assistance of counsel does not include the qualifier, "assuming there is money left over from other cases."

(continued...)

(See, Vo AOB, pp. 202-205.)

Before the delays in payment of authorized funds and counsel's fees was resolved, the trial court, viewing the task at penalty phase as "very simple" (6/7/95, RT 33-34), refused the bulk of additional funds requested to complete penalty phase investigation and preparation, stating that re-interviews were largely unnecessary, and that as to family members (since some had been "interviewed"), appellant Vo should just decide who he wanted to call. (6/7/95, RT 34-38.) This breathtakingly misguided view ignores the solid body of constitutional law regarding the breadth and importance of mitigation evidence at the penalty phase[26], the critical

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[25](...continued)
Appellant Vo contends that the Conflicts Administrator had a conflict of interest, and chose to make payments in the other case and not to Mr. Vo's counsel; and that the non-payment created a personal conflict of interest for Mr. Vo's unpaid counsel, who were forced to proceed without funds to pay their personal expenses or for necessary trial investigation and preparation. (See Vo AOB, pp. 187-190.)

Appellant Vo's right to equal protection of law was also violated. His co-defendant's counsel, the Public Defender, was also publicly funded but not burdened by non-payment of counsel or for necessary investigation. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530-532; Article I, § 7(b) and Article IV, § 16(a) of the California Constitution.) Similarly, the District Attorney receives public funding, providing the State's counsel with a regular paycheck and necessary trial expenses.

[26] See, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8; *Penry v. Lynaugh* (1989) 492 U.S. 302, 317. This Court's decision (continued...)

function of defense counsel in the adversary system[27], and the scope of trial counsel's duties to meet the standard of care at the penalty phase[28]. Authorization for ancillary funding to permit counsel to meet their obligations is not only provided by statute (Penal Code § 987.9), but such resources are also constitutionally guaranteed. (*Ake v. Oklahoma* (1985) 470 U.S. 68.)

Respondent also seconds the trial court's minimalization of the effort required to investigate a capital defendant's history and background where refugee history and cultural factors were a factor.

Respondent argues that the striking funding problems in this case do not warrant reversal. (RB 67-76.) Respondent does not dispute that

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[26](...continued)
in *In re Gay* (1998)19 Cal.4th 771, was rendered after appellant Vo's trial, but its underpinnings were clearly established long before the trial.

[27] See, e.g., *Powell v. Alabama* (1932) 287 U.S. 45, 68-69; *Gideon v. Wainwright* (1963) 372 U.S. 335; *Strickland v. Washington* (1984) 466 U.S. 668, 685; *United States v. Cronic* (1984) 466 U.S. 648 [in some cases the deficiencies of counsel's performance are so fundamental and pervasive that prejudice may be presumed].

[28] See, e.g., *Mak v. Blodgett* (9th Cir.F.2d 1992) 970 F.2d 614, 619; *Boyde v. California* (1990) 494 U.S. 370, 382. More recent decisions clarify counsel's responsibilities in detail – see, e.g., *Williams v. Taylor* (2000) 529 U.S. 362; *Wiggins v. Smith* (2003) 539 U.S. 510 – but do not represent an expansion of counsel's duties existing at the time of trial. See, for example, 1 ABA Starndards for Criminal Justice 4-4.1, commentary, pp. 4-55 (2d ed. 1980); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (c), p. 93 (1989).

counsel's fees and pre-approved funds for investigation and experts remained unpaid mid-trial, as the record demonstrates. (RB 67-69.)

1. Failure to Pay Authorized Funds and Fees.

Respondent characterizes appellant Vo's first funding issue, the failure to pay authorized funds and attorney fees, as an improper delegation of the trial court's duties, and argues that this objection was not raised below. (RB 73.) Respondent is wrong. There was no waiver. Counsel argued extensively the need for ancillary funds and fees to be paid, and properly sought the assistance of the trial court; the trial court recognized the constitutional problems, but threw up its hands.

Respondent fails to address the constitutional claims raised by appellant Vo, that the failure to pay authorized expenses and fees deprived him of his right to counsel, due process, the right to defend, and 8th Amendment reliability in this capital case. Counsel very clearly raised the issue of nonpayment affecting him and his co-counsel personally, and preventing him from being prepared to adequately represent appellant Vo at the penalty trial. (See, e.g., 6/5/95 RT 5660-5667.) Ironically, the trial court itself recognized that the nonpayment due to the pending Nuestra Familia case (6/5/95 RT 5669) was of grave concern, stating ". . . this issue kind of really bothers me, because this really goes to a constitutional

dimension." (6/5/95 RT 5668.) The constitutional issues are adequately preserved for review, and respondent has chosen not to address them.[29]

Respondent ignores the trial court's duty to protect appellant Vo's right to the assistance of counsel, and the trial court's duty to ensure the funds were made available – whether the mechanism of payment was through the Conflicts Administrator or the County. Respondent characterizes these unconscionable delays as merely "inconvenient and frustrating" (RB p. 75), yet fails to acknowledge (as did the trial court) the devastating harm the delays (particularly in combination with other errors) exacted on Vo's ability to prepare both phases of his capital case. California courts are not as sanguine as respondent in deeming such harm merely "inconvenient." For example, in *Gardner v. Superior Court* (2010) 185 Cal. App. 4th 1003, the court recognized that defense resources for investigation and preparation are essential even before the prosecutor makes a final decision to charge the case capitally.

Nor does the trial record establish, as respondent would have it, that any such delays were 1)Vo's defense counsel's fault, or 2) of no consequence, since some services were rendered before payment was

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[29] Where the record shows that the trial court understood the objection, allegations of waiver are unfounded. (*People v. Scott* (1978) 21 Cal.3d 284, 290; *People v. Bob* (1946) 29 Cal.2d 321, 325.)

available.

The trial court could and should have granted a continuance while the problems were worked out (as urgently requested by counsel), and/or it could and should have ordered payment to be made immediately, but it did neither. Whether one calls this "delegation" (AOB 206; RB 73) or abdication, the trial court erroneously refused to protect appellant Vo's right to counsel, his due process rights, and his right to reliable determinations of guilt, death eligibility, and penalty.

Respondent also contends that no objection was made below that the Conflicts Administrator had conflict of interest, and in any event, it was the County rather than that office responsible for making payments. (RB 74.) This is merely a shell game by which respondent seeks to avoid the issue. Respondent contends that the Conflicts Administrator's "function appears to have been purely administrative" (RB 73), and that the county was responsible for setting the budget and making the payments." (RB 74.)

In fact, the Conflicts Administrator admitted that the conflicts office "ha[d] not yet submitted their claims to the county" (5/10/95 RT 5603), and as the issue continued unresolved, the Conflicts Administrator made an *ex parte* request for a hearing to determine whether expenditures were "reasonable and necessary." (6/7/95 RT 8.) These actions indicate that the

Conflicts Administrator was charged with far more than the merely administrative role posited by respondent; this office was actively adverse to appellant Vo's rights and his counsel's ability to adequately proceed.

During proceedings apparently instigated by the Conflicts Administrator, Vo's counsel moved for disqualification of Judge Hastings, arguing inter alia that the judge "is in a conflict of interest position because he is the so-called 987 judge but is also on the board of directors of the Conflicts Administration Program." (6/5/95 RT 5705-6; see also 6/7/95 RT 6.)[30] While the specific phrase "conflict of interest" was not specifically used by trial counsel with respect to the Conflicts Administrator, appellant Vo contends that the factual and legal basis – depletion of funds because of another case, to the detriment of his client – was adequately fleshed out in the trial record, and the record demonstrates that the court understood counsel's objection to refer to a conflict of interest.. If there is any technical imperfection, this Court should nonetheless consider the conflict of interest analysis since the deprivation of funds so adversely affected appellant Vo's right to a fair trial. (See, *People v. Hill* (1998) 17 Cal.4th

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[30] Counsel's motion to disqualify Judge Hastings was denied; as respondent points out, Judge Hastings ruled that he had no conflict "because the budget for conflicts was set by the county, not the court or conflicts administration." (6/7/95 RT 7.)

800, 843, fn 8; *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection is sufficient if the record shows the trial judge understood the issue presented].)

Respondent additionally argues that trial counsel had no conflict of interest in being ordered to move forward with trial despite serious personal financial hardships, citing *People v. Castillo* (1991) 233 Cal.App.3d 36, a non-capital case in which privately-retained counsel sought appointment once private funding ran out. Respondent's reasoning is that if retained counsel can be forced to proceed with no expectation of payment, refusal to pay appointed counsel, such as appellant Vo's counsel, does not constitute a conflict of interest. (RB 75-76.)

Castillo is in no way analogous, much less dispositive, although a more careful reading is instructive. *Castillo* was not a capital case. It did not involve non-payment of appointed counsel, mid-trial, of funds previously authorized by the court; rather it involved the question of appointing previously-retained counsel. Recognizing that in some circumstances such an appointment may be necessary,[31] the *Castillo* court

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[31] "The risk in compelling a defendant to go to trial with unpaid counsel against his wishes and those of his attorney is that the defendant will 'get what he paid for.' " (*People v. Ortiz* [1990] 51 Cal.3d 975, 985.) In *Ortiz*, the client wanted to discharge his retained lawyer, and the lawyer (continued...)

concluded – under the circumstances of that case – that appointment would make the trial court a "guarantor of bad debts." (*People v. Castillo*, *supra*, 233 Cal.App.3d 36 at 54.) The debts in question here were ones already incurred and authorized for payment by the trial court. Respondent does not care to address that distinction.

The trial court denied appellant Vo his right to assistance of counsel and other rights, by declining to ensure that previously-authorized funds and fees were actually dispersed in a timely manner, thoroughly disrupting counsel's ability to provide adequate representation.

2. Denial of Necessary Funds Based on Misunderstanding of Counsel's Duties at the Penalty Phase.

Appellant Vo's second complaint about funding is that the trial court's denial of necessary funds was based on a distorted and confused

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[31](...continued)
wanted to be relieved (because he was not being paid)." (*People v. Castillo*, *supra*, 233 Cal.App.3d 36 at 62-63.)

Ortiz held that "Reversal is automatic, however, when a defendant has been deprived of his right to defend with counsel of his choice. (*People v. Gzikowski* [1982] 32 Cal. 3d 580, 589.)" (*People v. Ortiz*, *supra,* 51 Cal.3d 975, 988; emphasis added.)

As a matter of fact, both appellant Vo and his trial counsel requested that trial counsel be permitted to withdraw because trial counsel was unprepared to proceed. (See, Arg. IV of this brief and Vo AOB, Arg. 3, incorporated herein.) These requests occurred in the same time period as the problems with payment.

understanding of the scope of mitigation and of counsel's duties at the penalty phase. The legal authority is set forth in the AOB, and not addressed by respondent. (Vo AOB, pp. 182-191, 207-213.)

Respondent argues – with no discussion of appellant Vo's rights to counsel, to defend, to due process, or to reliable determinations in his capital trial, and no discussion of any of the constitutional authorities cited by appellant Vo – that the denial of necessary funding by Judge Hastings was a proper exercise of discretion; respondent argues further that any possible error was harmless, and that "there is no reasonable possibility that Vo would have achieved a more favorable outcome absent the error. (*People v. Alvarez* [1996] 14 Cal.4th [155] at p. 234.)" (RB 74-75.)

Respondent's citation of *Alvarez* is mystifying. There, funding was initially authorized for an "aboveboard" trip to investigate mitigating evidence in Cuba, and later withdrawn when the only way to accomplish the life history investigation was with a "surreptitious" trip: "although the end remained proper, the means had become otherwise, threatening harm to international relations and also to the two travelers." (*People v. Alvarez*, *supra*, 14 Cal.4th 155, 234.) If this Court had meant *Alvarez* to be a blanket absolution for denials of funding for penalty phase preparation, it would have said so. Instead, it held that the "ends" of conducting necessary

investigation were justified, but surreptitious "means" were not.

The trial court in appellant Vo's case, viewing the task at penalty phase as "very simple" (6/7/95, RT 33-34), refused the bulk of additional funds requested to complete penalty phase investigation and preparation, stating that re-interviews were largely unnecessary, and that as to family members, appellant Vo should just decide who he wanted to call. (6/7/95, RT 34-38.) This misguided view ignores the solid body of constitutional law regarding the breadth and importance of mitigation evidence at the penalty phase[32], the critical function of defense counsel in the adversary system[33], and the scope of trial counsel's duties to meet the standard of care at the penalty phase. Ancillary funding to permit counsel to meet the obligations of capital advocacy is not only provided by statute (Penal Code § 987.9), but is also constitutionally guaranteed. (*Ake v. Oklahoma* (1985)

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[32] See, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8; *Penry v. Lynaugh* (1989) 492 U.S. 302, 317. This Court's decision in *In re Gay* (1998) 19 Cal.4th 771, was rendered after appellant Vo's trial, but its underpinnings were clearly established long before the trial. See also, Craig Haney, "Evolving Standards Of Decency: Advancing The Nature And Logic Of Capital Mitigation" Hofstra Law Review, Vol: 36, p 835 (2008).

[33] See, e.g., *Powell v. Alabama* (1932) 287 U.S. 45, 68-69; *Gideon v. Wainwright* (1963) 372 U.S. 335; *Strickland v. Washington* (1984) 466 U.S. 668, 685; *United States v. Cronic* (1984) 466 U.S. 648 [in some cases the deficiencies of counsel's performance are so fundamental and pervasive that prejudice may be presumed].

470 U.S. 68.)

There is no justification, and therefore respondent cites no authority, for the proposition that appointed counsel's task is to defer to the uninformed decisions of a client about how to proceed at the penalty phase of a capital trial. As the High Court said many decades ago:

> A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:
>
> > The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

(*Gideon v. Wainwright, supra*, 372 U.S. 335, 344-345, citing *Powell v. Alabama*, *supra,* 287 U.S. 45 at 68-69.) An indigent defendant's rights are not adequately protected merely by the presence of counsel in the courtroom; the means of effectively defending must also be provided.

> "We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally

> unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense . . . [F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system."

(*Ake v. Oklahoma*, *supra,* 470 U.S. 68, 78 (quoting *Ross v. Moffitt* (1974) 417 U.S. 600, 612; See also, Margulies, *Resource Deprivation and the Right to Counsel*, Journal of Criminal Law & Criminology, Vol. 80, No. 3 (Autumn 1989)).

Nowhere in the practice of law is more required of counsel's special skills, careful preparation, and diligence than the penalty phase of a capital trial.[34]

The "heightened standard of reliability" required at every step of a capital prosecution (*Ford v. Wainwright* (1986) 477 U.S. 399, 411) has an obvious application in this context. The importance of facilitating a capital defendant's presentation of mitigating evidence is well established.

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[34] See, e.g., *Mak v. Blodgett* (9th Cir.F.2d 1992) 970 F.2d 614, 619; *Boyde v. California* (1990) 494 U.S. 370, 382. More recent decisions clarify counsel's responsibilities in detail – see, e.g., *Williams v. Taylor* (2000) 529 U.S. 362; *Wiggins v. Smith* (2003) 539 U.S. 510; *Rompilla v. Beard* (2005) 545 U.S. 374 – but do not represent an expansion of counsel's duties existing at the time of trial. (See, for example, 1 ABA Standards for Criminal Justice 4-4.1, commentary, pp. 4-55 (2d ed. 1980); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p. 93 (1989).)

(*McClesky v. Kemp* (1987) 481 U.S. 279, 306; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318.) The right to present such evidence is a hollow right without an opportunity for adequate preparation:

> "To do this . . . counsel must know what mitigating evidence there is, know what evidence may be used to rebut it, and make reasonable decisions about what mitigating evidence to use. Penalty phase investigation and preparation therefore are fundamental to effective advocacy in capital cases."

(Goodpaster, *The Trial For Life: Effective Representation Of Counsel In Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 318 (1983); see also, Wayland, K., *The Importance of Recognizing Trauma Through Capital Investigations and Presentations*, Hofstra Law Review, Vol. 36: 835 (2008); S. Holdman and C. Seeds, *Cultural Competency in Capital Mitigation*, Hofstra Law Review, Vol. 36:883 (2008).)

3. Delays and Denials of Funding Require Reversal.

In *Chapman v. California* (1967) 386 U.S. 18, 23, the High Court held that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . .." This case presents such "infractions.".

As the High Court held in *United States v. Cronic*, *supra*, 466 U.S. 648, in some cases the deficiencies of counsel's performance are so fundamental and pervasive that prejudice may be presumed. Where, as

here, the deficiencies are caused by a state-created impediment, it is constitutionally inappropriate to conduct an analysis of prejudice. For example,

- Where defense counsel fails to consult with the defendant, a defendant seeking to prove counsel ineffective must establish prejudice under Strickland. (See, e.g., *Kleba v. Williams* (7th Cir. 1986) 796 F.2d 947, 954.) But where it is a state-created impediment that prevents counsel from consulting with defendant, the defendant need not prove prejudice. (*Geders v. United States* (1976) 425 U.S. 80.)

- Where defense counsel fails to call certain witnesses, a defendant seeking to prove counsel ineffective must prove prejudice under *Strickland.* (See, e.g., *Strickland v. Washington, supra,* 466 U.S. at pp. 699-700.) But where defense counsel is precluded from calling certain witnesses by a state statute, no prejudice need be shown. (*Washington v. Texas* (1967) 388 U.S. 14.)

- Where defense counsel fails to cross-examine certain witnesses, a defendant seeking to prove counsel ineffective must prove prejudice under Strickland. (See, e.g., *Higgins v. Renico* (6th Cir. 2006) 470 F.3d 624, 634-635; *Welch v. Simmons* (10th Cir. 2006) 451 F.3d 675, 706.) But where defense counsel is precluded from cross-examining a state witness by a state statute, no prejudice need be shown. (*Davis v. Alaska* (1974) 415 U.S. 308.)

In each of these cases, where the impediment was state-created the Court has refused to require defendants to prove prejudice under *Strickland.* (See also, *Bell v. Cone* (2002) 535 U.S. at p. 696, n.3.)

In this case, the fundamental and pervasive impingements on appellant Vo's right to counsel and related trial rights were the fault of the trial court's constitutionally erroneous rulings on funding: [1] refusing

either a continuance or to effectively order payment of pre-authorized expenses and trial counsel's fees, and [2] the denial of necessary funding to complete penalty phase investigation, based on a complete misunderstanding of the scope of mitigation and trial counsel's duties at penalty phase.

C. Unreasonable and Unjustifiable Denials of Continuances

On several occasions, the trial court unreasonably and arbitrarily denied necessary motions for continuance made on behalf of appellant Vo. (Vo AOB, Arg. 2.) These occurred both pretrial, when the original *Keenan* counsel was forced to withdraw for medical reasons without having completed the work she was assigned to do (see, subpart A of this argument, above), and mid-trial, when the trial court refused to ensure adequate funding and/or a continuance to complete penalty phase investigation and preparation. (See subpart B of this argument, above.) These denials of reasonable and well-justified motions for continuance guaranteed that appellant Vo would be deprived of his rights to the effective assistance of counsel, those trial rights counsel is meant to ensure, due process of law, and reliable determinations of guilt, death eligibility, and penalty in Vo's capital trial.

Respondent argues that the trial court properly exercised discretion

in denying continuances, because the case had been pending for over three years. (RB 58-67.) Respondent's statement is misleading. Respondent glosses over the fact that the state took the dismissal of several special circumstances and other enhancements up on appeal, consuming much of that time.[35] Once more, respondent also does not address the constitutional context of this argument, including state-inflicted deprivation of adequate assistance of counsel and the particular 8th Amendment requirements in capital cases.

1. Legal standards.

As set forth more fully in appellant Vo's AOB, pp. 213-222, California law requires that a criminal defendant be afforded a continuance of a proceeding upon a sufficient showing of good cause. (Pen. Code § 1050(e); *People v. Murphy* (1963) 59 Cal.2d 818, 825 [continuance should be granted to afford a reasonable opportunity to prepare defense].)

The granting of a continuance is within the broad discretion of the

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[35] The trial court did not agree to appoint second counsel until after a new information was filed, post-appeal, in 1994. (1/17/95 RT 50-51.) The record reflects that Ms. Bachers began work in May, 1994 (1/17/95 RT 52), and submitted a medical report that she was unable to work in early December, 1994. (1/17/95 RT 56; 6 CT 1507-1508.) Replacement second counsel, Jeanne DeKelver, was appointed on February 10, 1995 (10 CT 2741), immediately before trial began on February 14, 1995 (6 CT 1646), and her first appearance before the jury was March 30, 1995, after the jury was seated. (7 CT 1692.)

court, but "'myopic insistence upon expeditiousness'" in the face of a justifiable request for a delay constitutes a clear abuse of that discretion. In *People v. Courts* (1985) 37 Cal.3d 784, 791, this Court held that the trial court erred in denying a request to continue proceedings to enable defendant to retain counsel. The High Court, in *Ungar v. Sarafite* (1964) 376 U.S. 575, 589, explained that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." In capital cases particularly, trial courts should accommodate such requests "'to the fullest extent consistent with effective judicial administration..'" (*People v. Courts*, *supra*, 37 Cal.3d 784, 790 [quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 209]; see also, *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 875-876 ["discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense"].)

When a request for continuance is made, "'the answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" (*People v. Byoune* (1966) 65 Cal.2d 345, 347 [quoting *Ungar v. Sarafite*, *supra*, 376 U.S. at p. 589].) California courts typically consider the following four factors: (1) The diligence of the defendant; (2) The usefulness of a

continuance; (3) The inconvenience to the court; and

(4) The prejudice to the defendant if the continuance is not granted.

(*People v. Courts*, *supra*, 37 Cal.3d at pp. 791-795; *Owens v. Superior Court of Los Angeles County* (1980) 28 Cal.3d 238, 251.)

Here, as outlined extensively earlier in this argument and not repeated here, the calculation must also include appellant Vo's rights to counsel and ancillary services, to defend, to due process of law, and to reliable determinations of guilt, death eligibility, and penalty. As demonstrated in Mr. Vo's AOB and below, his trial counsel explained in detail, both pretrial and mid-trial, that he was unprepared, and the reasons why he was unprepared – including the absence of second counsel, as well as delays and denials of funding; appellant Vo himself presented his concerns mid-trial, with counsel joining. The trial court, while recognizing that some of these concerns rose to "constitutional dimension," nonetheless refused to even consider the particular reasons offered in support of these necessary continuance motions, thus abusing its discretion, abridging appellant Vo's basic constitutional rights, and denying Vo a fair trial.

2. Pretrial requests for continuance.

At a hearing on December 16, 1994, counsel for appellant Vo presented a medical letter stating that second counsel Marianne Bachers

was completely disabled and would need to be out of work for at least two months. Lead counsel stated that he would not be ready for trial on January 16, 1995. Both the People and counsel for co-defendant Hajek opposed the motion for continuance, which was deemed premature by the trial court. (6 CT 1507-1508.)[36]

At an *in camera* hearing on January 17, 1995, counsel for appellant Vo stated that he was not prepared to proceed (1/17/95 RT 41), and explained the reasons why. (1/17/95 RT 41-66; see Vo AOB pp. 162-166.) The trial court denied the continuance. (6 CT 1546.)

During that hearing, counsel stated clearly that the defense was not prepared to proceed. (1/17/95 RT 41, 60-61, 62-63, 66.) He explained the unusual facts of the case (1/17/95 RT 41), and the complexity of anticipated motions, the antagonistic nature of the co-defendant's defense, the complexity of legal issues, and the need to preserve issues for post-conviction review. (1/17/95 RT 43-45.) Counsel then summarized a history of the case and his actions to prepare, given the circumstances at various points in time. (1/17/95 RT 45-60.) He noted the complex social

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[36] On January 6, 1995, the court addressed the prosecutor's discovery motion and ordered the defendants to produce discovery before jury selection. Counsel for appellant Vo stated that he was not ready because he had no *Keenan* counsel, and that he had "nothing to offer." (6 CT 1512-1515.)

history of appellant Vo, including his family's flight from Vietnam and subsequent refugee status; cultural issues; issues of abuse, neurological status, deprivation; and possible links between his background and his involvement in the offense. (1/17/95 RTR 53, 58, 61-62.)

Counsel humbly admitted that perhaps his decisions over the course of the case were incorrect, and urged the trial court to charge him with any error, rather than punishing the client: "You can relieve me, you can get rid of me, but my client should not suffer if I have made a wrong decision." (1/17/95 RT 59.) "... I've done it as well as I know how to do, and if I have been derelict, which I don't think I have, it should not go to the detriment of my client. He is the one that faces the death verdict, not me." (1/17/95 RT 62-63.) Counsel emphasized that "this matter is not ready, and I believe if Mr. Vo was required to proceed to trial based upon the state of non-readiness at this point, that he would be deprived of competent counsel and the right to put on a defense." (1/17/95 RT 66.)

The trial court, obviously irritated with trial counsel, stated:

> "I have read the transcript of the proceedings on November 20th, 1991, that was heard before Judge Hastings when he denied the request for Keenan counsel. All the arguments you're putting forth are the same arguments you put forth at that time . . .. I don't think this case will ever be prepared, Mr. Blackman, and all the information you need for a competent guilt phase and penalty phase investigation is at your fingertips. It can be done. It will be done. Request for

continuance denied."

(1/17/95 RT 66-67.) Abdicating its responsibilities, the trial court declined to consider any of the specific reasons why a continuance was necessary.

Respondent argues that the trial court properly exercised its discretion in denying the January 17, 1995 motion for continuance, noting that trial counsel agreed in October, 1994 to a January trial date (RB 58), and arguing that trial counsel had not been sufficiently diligent[37] in preparing. (RB 64.)[38] On the other hand, respondent alternatively argues that the loss of second counsel Bachers so soon before trial at most merely "inconvenienced" lead counsel, and – speculating with no evidentiary support – avers that "the bulk of the penalty phase work should have been,

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[37] In other parts of its argument, respondent asserts that counsel "presented an impressive defense." (See, e.g., RB 57-58.) Respondent wishes to have it both ways, so long as this Court upholds the judgment. The consistent thread of respondent's argument is that the trial court has no responsibility for ensuring the right to counsel; and trial counsel has no business asking for time if the court has its mind set on going ahead. Such a position is, however, directly contrary to this Court's interpretation of fundamental trial rights. "[A] trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare [Citations." (*People v. Snow* (2003) 30 Cal.4th 43, 70.)

[38] Note that trial counsel himself urged repeatedly that the court might punish him, but his client should not suffer if counsel had not been sufficiently diligent. (See, e.g., 1/17/95 RT 59, 62-63, 66.) Neither the trial court nor respondent suggested a way to punish a lawyer's lack of diligence in a capital case, besides forcing an unprepared lawyer to trial; neither is concerned with the constitutional trial rights of a capital defendant.

and presumably had been, done by then." (RB 65.)[39] Respondent's position, echoing that of the trial judge who refused to even consider reasons the continuance was needed, is simply that the case was four years old – disregarding what had and had not actually happened during that time period. (RB 65.)

Respondent's extensive reliance on *People v. Beames* (2007) 40 Cal.4th 907 (RB 63) is misplaced. In that case, a continuance motion was presented on the first day of trial; a continuance would have inconvenienced 40 witnesses; the trial court said it would monitor the situation; and no further request for continuance was made.

It was an abuse of discretion for the trial court to refuse to consider the reasons a continuance was needed. It is vastly misleading for respondent to assert the age of the case as a catch-all excuse, because [a] the trial court refused in the first instance to appoint second counsel; [b] the People took up the dismissal of several special circumstance and other allegations, a lengthy process, filing the information that proceeded to trial

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[39] As noted above, the trial record is directly contrary to respondent's airy assertion that trial counsel had "presumably" performed the necessary preparation for trial. No evidence supporting respondent's asserted presumption appears in the record. Indeed, counsel was still not prepared for the penalty phase when that proceeding was imminent; see below.

only on March 2, 1994 (6 CT 1442-1453); [c] trial counsel tried a separate charge against appellant Vo in the interim, and won an acquittal; [d] the initial second counsel only began work in May, 1994, and had to withdraw due to medical problems in December, 1994; [e] all of the penalty phase preparation and work on motions had been delegated to second counsel; [f] lead counsel laid out in detail the complexity of the case, the work remaining to be done, and his lack of preparation; and [g] replacement second counsel was only appointed later, on the very eve of trial.[40]

3. Mid-trial request for continuance.

On June 5, 1995, the trial court denied appellant's *in camera Marsden*[41] motion, and a motion for continuance. (9 CT 2210; 6/5/95 RT 5650-5671.) This was at the very time that counsel was seeking payment of fees and of funds previously authorized, and seeking additional funds necessary to complete the penalty phase investigation (See subpart B of this argument, above), and the day before the penalty phase began on June 6, 1995. (8 CT 2213.)

Appellant complained about a lack of communication with his

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[40] Replacement second counsel, Jeanne DeKelver, was appointed on February 10, 1995 (10 CT 2741), immediately before trial began on February 14, 1995 (6 CT 1646), and her first appearance before the jury was March 30, 1995, after the jury was seated. (7 CT 1692.)

[41] *People v. Marsden* (1970) 2 Cal.3d. 118.

counsel, even on issues of importance to appellant (6/5/95 RT 5650, 5651-5652), a lack of preparation for his own testimony (6/5/95 RT 5654), and antagonism between the trial court and his counsel dating from the pretrial motion for continuance. (6/5/95 RT 5655.) The trial court responded:

> "There was animosity between your attorney asking for a continuance in a case four years old and a case assigned to me as a trial department. I felt four years was an adequate amount of time to present the case. I did express displeasure in the fact that counsel did not announce ready to go to trial."

(6/5/95 RT 5655.) Appellant replied:

> "We weren't. We were just, when we're in trial we were putting the trial together. We weren't ready to go. We weren't prepared. There was a little bit of confusion. It wasn't prepared.
>
> "I know it is difficult to understand because this is a four years case (sic), and I don't know why . . .. I don't understand why we weren't prepared. It was difficult for me to understand that too."

(6/5/95 RT 5655.)

Appellant's counsel supported his client's motion, expressing surprise at the jury's guilt phase verdicts and his own feelings of guilt. (6/5/95 RT 5657.) The trial court expressed extreme displeasure in counsel's lack of preparation:

> "It's beyond my comprehension why after four years this case is not ready to proceed. I know you had Keenan counsel problems, but there's a real question whether a Keenan counsel is really appropriate in this case."

(6/5/95 RT 5658.) In the trial court's view, the case was "very straightforward," but trial counsel contended that the complexity of the case "comes from the inner relationship between the facts and the law." (6/5/95 RT 5658.) The trial court stated:

> "The fact it takes four years to get this case ready for trial I think is just horrendous. This case is not that difficult, and I'm of the firm belief had I not pushed this case out to trial it never would be ready for trial."

(6/5/95 RT 5659.)

Trial counsel reiterated that after withdrawal of the initial *Keenan* counsel, he was "left in a position where the penalty phase is just not at all prepared." (6/5/95 RT 5659-5660.) Trial counsel explained in more detail the problems leading up to his lack of preparation pretrial – again stressing that "**whatever I did wrong should [not] be attributed to Mr. Vo**, particularly in the context of the catastrophic potential consequences in this case . . .." (6/5/90 RT 5660), and again stressing the impact of "extraordinary" financial issues. (6/5/95 RT 5660-5663, 5666-5667.) Counsel was clear that under these circumstances, "we are not ready" and "we are not in fact adequately prepared." (6/5/95 RT 5664, 5666, 5670.)

With respect to the non-payment of authorized funds and counsel, the trial court simply threw up its hands – acknowledging a problem of constitutional dimension, yet refusing to consider any order ameliorating its

impact on the right to counsel or the adequacy of a capital defense:

> "Mr. Blackman, this case has been in preparation for four years. There is not going to be a continuance. We are going to go forward with the penalty phase of this case.
>
> "It irritates me to no end that the county has not paid for the experts, has not paid counsel. I just think, you know, this is deja vu all over again, **whether it is state action that interferes with the adequate preparation of a case I guess is something for the appellate court to decide.** But we've been fighting these financial issues with conflicts cases the entire 15 years I've been on the bench. It is just something beyond the court's control . . .."

(6/5/95 RT 5666.) The trial court additionally stated, "this issue kind of really bothers me, because this really goes to a constitutional dimension." (6/5/95 RT 5668.)[42] Nonetheless, counsel's motion for a continuance to adequately prepare for the penalty phase was denied. (6/5/95 RT 5668.)[43]

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[42] It is extraordinary that the trial court recognized the "constitutional dimension" of the problem of non-payment, yet deferred to this Court ("the appellate court") for a pronouncement, for future reference.

There could be no clearer example of the need for this Court to firmly direct the trial courts and counties to protect the trial rights of indigent defendants, either by providing funds, or by providing necessary continuances, or by other means. According to the trial court, issues of nonpayments in conflict cases had been ongoing in the county for 15 years; this was but one more.

[43] The trial court also stated that the supervising judge, Judge Komar, had been consulted, and trial counsel was ordered to appear before the PC § 987 judge, Judge Hastings, to obtain approval for expert fees, and also "for an audit of your billings as to over the four years as to why you are not prepared to proceed." (6/5/95 RT 5705.) This "audit" was apparently

(continued...)

Again, the trial court abdicated its responsibilities by declining to address the specific reasons a continuance was requested, even though the trial court recognized these might be of constitutional importance.

Respondent maintains that the denial of counsel's mid-trial motion for continuance was not an abuse of discretion (RB 65-67), citing *People v. Zapien* (1993) 4 Cal.4th 929, 972[44] for the proposition that the trial court should consider burdens on witnesses, jurors and the court in assessing whether "substantial justice" will be accomplished by granting the motion. (RB 65-66.) Weighing heavily in respondent's assessment is that co-defendant Hajek's counsel wished the penalty phase to proceed without a

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[43](...continued)
instigated by the Conflicts Administrator's *ex parte* request for a hearing to determine whether expenditures were "reasonable and necessary." (6/7/95 RT 8.)

Thus, in addition to counsel being required to begin the penalty phase of trial without being adequately prepared, and being denied previously authorized funds and counsel fees, and while seeking additional funding needed to complete investigation, trial counsel also was forced *during the penalty phase* to defend previously authorized but unpaid funds – at the behest of the Conflicts Administrator.

[44] In *Zapien*, the defendant alleged that the prosecutor's agents had listened to a confidential defense tape; counsel sought to recuse the prosecutor, and sought a mistrial or continuance to reinterview all the witnesses. The continuance sought was lengthy. In contrast, the continuances sought by Vo would have been vastly less disruptive, and would have allowed for development of mitigation evidence, as was his constitutional right.

significant break. (RB 66, citing 22 RT 5641.) Respondent also stresses that Vo allegedly had "years" to prepare his defense[45], and that the guilt trial had afforded replacement *Keenan* counsel four months to prepare after her appointment. (RB 66.) In a case of this magnitude, such a length of time was insufficient to permit newly appointed counsel to become familiar with this complex case.

None of these points addresses appellant Vo's right to counsel and related rights, nor the specific reasons why his counsel was not prepared and requested a necessary continuance. Respondent's argument is, in short: Four years since arrest; co-defendant was ready; end of story.

However, this Court must not eviscerate the right to counsel and to defend at the penalty phase of a capital trial, nor the right to a necessary continuance, by putting its imprimatur on the rule that respondent implicitly urges: if a case has been pending for a while, and everyone else is ready to go, no continuances will be granted.

This is a case where even the trial court noted circumstances impinging on counsel's ability to proceed in a constitutional way, yet that court declined to protect appellant Vo's rights because the trial was in

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[45] Respondent also says – as the record shows – that "work apparently began in earnest in early 1994," contradicting the claim that counsel had "years." (RB 64.)

motion. Reversal is required.

D. Conclusion.

Respondent's efforts to balkanize and minimize the effects of these serious obstacles to appellant Vo's 6th, 8th, and 14th Amendment rights must be rejected. Reversal is required.

IV. **The trial court violated appellant Vo's right to counsel and right to defend, and unreasonably refused to permit trial counsel to withdraw when counsel was unprepared to adequately defend appellant Vo.**

Appellant Vo contends that the trial court abridged his right to counsel and right to defend, and that the trial court erred in refusing counsel's request to withdraw based on a conflict of interest. (Vo AOB, Arg. 3, pp. 223-231.) Respondent first denies that any conflict of interest was present. Respondent ignores the breadth of the evidence bearing on the abridgement of appellant Vo's right to counsel and right to defend, and indeed does not respond to that constitutional framework; instead, respondent focuses narrowly on counsel's alleged impropriety in failing to provide discovery material and the trial court's denial of the motion to withdraw, as events in isolation. (RB, Arg. IV, pp. 76-80.) Respondent's argument is therefore largely unresponsive to the actual claim for relief set forth in appellant Vo's Opening Brief.

Argument 2 of Vo's AOB sets forth at length several sets of trial court errors resulting in denial of various constitutional trial rights: by denying and delaying the appointment of second counsel; by delegating funding to a seriously underfunded conflicts agency, which denied and delayed funding for the defense; and by refusing necessary continuances to permit counsel to prepare to defend. (Vo AOB, Arg. 2, pp. 160-223.)

Argument 3 of Vo's AOB, which respondent addresses in its Argument IV, focuses on trial court violations of the right to counsel and the right to defend, including but not limited to the motion to withdraw. Rather than repeating at length all of the relevant facts set forth in Argument 2, appellant Vo incorporated them by reference.[46] (Vo AOB, Arg. 3, pp. 223-224.) It is in the context of all of the abridgements of appellant Vo's right to counsel and right to defend that the motion to withdraw must be considered.

Trial counsel's declaration of a conflict of interest and his motion to withdraw (RT 4959) did not occur in a vacuum, as respondent would have it. The trial court had refused to sever appellant Vo's trial from that of the co-defendant. (Vo AOB, Arg.1.) It had refused continuances necessary for the defense (Vo AOB, Arg. 2), even when counsel stated clearly the reasons he was unprepared to adequately represent appellant Vo. (See, e.g.,1/17/95 RT 41- 67.) The trial court refused to provide substitute second counsel until the very eve of trial, and refused to ensure funding for the defense and payment to counsel. The error in denying counsel's motion to withdraw

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[46] Vo's AOB was quite lengthy, and Argument 2 alone was 63 pages. It is not counsel's understanding that this Court either requires or desires extensive repetition of facts and legal authority when two claims for relief share an underlying basis.

needs to be considered in this context.

Following the motion to withdraw, appellant Vo personally presented a *Marsden* motion, on the ground that his counsel was unprepared (6/5/95 RT 5650-5671), and his counsel agreed with that motion and that he was unprepared. (6/5/95 RT 5657.) In the hearing on the *Marsden* motion, which was denied, trial counsel related events in the history of the case that led to his lack of adequate preparation. (CT 2210; 6/5/95 RT 5650-5671.) This trial record is unusual in reflecting the extent of that lack of preparation, and the nature of the trial court errors contributing to counsel's inability to adequately defend. In fact, counsel was irreparably hobbled by the trial court's erroneous decisions.

It is clear that many of those errors occurred before counsel's motion to withdraw. Later events tend to confirm the extent to which the trial court bore animosity toward trial counsel personally, throughout the trial; for example, witness the following exchange between appellant Vo and the trial court:

> Vo: "Well, it seems to me that ever since when we asked for a continuance and you explained to him, you told him, no, kind of chewed him out, seemed like there seemed to be some animosity between you, Your Honor, and toward my attorney. I feel it affected this trial." (6/5/95 RT 5655.)
>
> Trial Court: "There was animosity between your attorney asking for a continuance in a case four years old and a case

> assigned to me as a trial department. I felt four years was an adequate amount of time to present the case. I did express displeasure in the fact that counsel did not announce ready to go to trial." (6/5/95 RT 5655.)

Appellant Vo will not repeat at length all of the context and authorities for his claim that the trial court deprived him of his right to counsel and right to defend, and erroneously denied counsel's motion to withdraw (Vo AOB, Args. 2 and 3), but notes that respondent's brief has chosen to ignore the bulk of the evidence and the legal theories presented in Vo's AOB. Instead, respondent argues that denial of the motion to withdraw and to exclude Dr. Berg's testimony was proper because "counsel's loyalty to Vo was not threatened" and because trial counsel erred in failing to provide discovery of materials in Berg's possession but upon which Berg would not rely. (RB 79-80.)

Respondent misunderstands the law regarding conflicts of interest, positing that a lay understanding of "loyalty" is the sole test. A defendant in a criminal case has a right to the assistance of counsel, including "a correlative right to representation that is free from conflicts of interest." (*Wood v. Georgia* (1981) 450 U.S. 261, 271; see also, *Powell v. Alabama* (1932) 287 U.S. 45, 68-71; *Holloway v. Arkansas* (1978) 435 U.S. 475, 481-487; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 350.) "[A]bsent objection, a defendant must demonstrate that "a conflict of interest actually

affected the adequacy of his representation." (*Cuyler v. Sullivan*, *supra*, 446 U.S. at 348-349.) Once an actual conflict of interest is shown, prejudice is presumed. (*Mickens v. Taylor* (2002) 535 U.S. 162, 173.)

Here, of course, there was an objection. After the trial court stated that it "does not believe [counsel's] explanation, the court does not trust Mr. Blackman in his defense, and the court thinks Mr. Blackman is dealing with the court in bad faith," trial counsel declared a conflict of interest, and requested withdrawal and the appointment of "an attorney before the court who has some respect of the court so [Mr. Vo] is not subjected to a disparate treatment because of what the court believes as to my handling of this matter." (RT 4959.)

The conflict of interest identified by trial counsel was the trial court's antipathy toward counsel himself, resulting in adverse rulings throughout the trial. The conflict of interest was actual: counsel's ability to adequately represent his client was compromised in a constitutionally unacceptable way by the trial court's view that counsel's behavior was unprofessional and that he was acting in bad faith.

In this situation, one aspect of the conflict of interest was between counsel's duty to adequately represent his client, and counsel's personal professional standing with the trial court. For example, on occasions before

and during trial, the trial court refused to timely appoint second counsel and refused necessary continuances (see, Vo AOB, Arg. 2), and the trial court explicitly blamed trial counsel for not being prepared.

There was an obvious divergence of interests between trial counsel's need to protect and defend himself against accusations of misconduct, and trial counsel's duty to zealously defend his client. This was analogous to the situation in *Wood v. Georgia*, *supra,* 450 U.S. 261, wherein the defendants' counsel was retained by and also represented the interests of the defendants' employer. Conflicting goals raise the danger that counsel might act, or fail to act, only in the client's interests. (See, *Holloway v. Arkansas*, *supra*, 435 U.S. 475, 481-487.)

This Court has stated that when appointed capital counsel find that they are unable to fulfill their obligations, counsel are ethically bound to associate counsel or to withdraw as attorney of record. (*People v. Sanders* (1999) 21 Cal.4th 697.) Under the circumstances of this case, trial counsel appropriately moved to withdraw because counsel's own conduct was identified by the trial court as the reason it ordered the testimony of a key witness excluded.

A related but conceptually separate aspect of the conflict of interest arose from the trial court's assertions that trial counsel's conduct was

unprofessional, untrustworthy, and undertaken in bad faith – that trial counsel's conduct was constitutionally inadequate. Trial counsel said as much on numerous occasions, imploring the trial court to grant needed continuances. (See Vo AOB, pp. 213-222.)

The trial court ruled that counsel had improperly refused to turn over discovery as ordered, and therefore the testimony of Dr. Berg was excluded. Respondent argues that ruling was proper. (RB 79.) Whether trial counsel's refusal to provide that discovery resulted from bad faith or trial counsel's misunderstanding of the scope of discoverable material, the result was the exclusion of expert testimony critical to appellant Vo's defense. (RT 5958.) Given the ruling, trial counsel acted properly in moving to withdraw, and the trial court erred in refusing to grant the motion. It is an abuse of discretion to force a capital defendant to continue with counsel whose misunderstanding and/or actions severely compromise the defense.

In *State v. Dean* (2010) 127 Ohio St.3d 140, 937 N.E.2d 97, the Ohio Supreme Court ordered reversal of a capital conviction and sentence under circumstances remarkably similar to those presented here. There, the defendant requested to represent himself because of the animosity displayed by the trial court against his counsel, including accusations of counsel's misconduct; that request was denied on the ground that the defendant made

it "under duress." The reviewing court found that the trial "judge himself had created that duress," and that problems flowing therefrom "permeated the entire trial." (*Id.*, 137 Ohio St.2d at 140.) Thus, the court held:

> This court has a responsibility to preserve the integrity of the criminal justice system, which includes a duty to ensure that all defendants have received a fair trial from an impartial judge. Where the record demonstrates that that has not occurred, the remedy is a new trial.

(*Id.*, 137 Ohio St.2d at 141.) While the legal focus of that opinion was judicial bias, it is clear that the court was highly concerned with the defendant's right to counsel and with the integrity of the trial itself. In this case, as in *Dean*, the trial court had created duress – a circumstance of unresolvable conflict. As in *Dean*, counsel was not permitted to withdraw after the trial court accused counsel of misconduct; in this case, too, appellant Vo's right to counsel, to defend, to due process of law, a fair trial, and a reliable sentencing process were irreparably harmed.

Aside from asserting that trial counsel remained "loyal" to appellant Vo, respondent ignores the broader legal mandate that defendants are entitled to adequate counsel, and to defend against criminal charges, as well as the Eighth Amendment's requirement of heightened reliability in capital cases.

Assuming *arguendo* that counsel erred in failing to provide adequate

discovery regarding a key defense witness, and/or that counsel so misunderstood the law regarding discovery that he placed his client in the untenable position of losing a key portion of the defense to which he was entitled, the trial court should have granted counsel's motion to withdraw. Either legal error was not the fault of appellant Vo. The right to counsel and the right to defend are absolutely core constitutional rights, essential to ensuring a fair trial and a just result. Reversal is required.

VI. **There was insufficient evidence to support the lying in wait murder charge and lying in wait special circumstance, and that special circumstance is unconstitutionally vague and overbroad.**

The evidence is insufficient to support the lying in wait murder charge and the lying in wait special circumstance, and the special circumstance is unconstitutionally vague and overbroad as to appellant Vo. (Vo AOB, Arg. 10, pp. 307-316; Arg. 8.E, pp. 294-296.) Co-defendant Hajek also contends that the evidence was insufficient to support the lying in wait theory of first degree murder, and the lying in wait special circumstance. (Hajek AOB, Arg. III., pp. 68-78.[47])

Respondent argues that the evidence was sufficient as to each of the defendants, and that the lying in wait special circumstance is constitutional. (RB, Arg. VI, pp. 87-96.) As to appellant Vo, respondent's arguments rely heavily upon the assumption – unsupported by the evidence – that appellant Vo shared co-defendant Hajek's alleged plan to kill. Respondent is not correct.

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[47] Appellant Vo adopts Argument III of Hajek's AOB and ARB, to the extent those arguments are applicable to him, pursuant to California rules of Court, Rule 8.2200(a)(a). (Vo AOB, pp. 309-310.)

A. Insufficiency of the Evidence.

There is insufficient evidence that appellant Vo either intended to or actually killed the victim, much less that he did so while lying in wait.[48] The lying in wait special circumstance requires an intentional killing, with concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Morales* (1989) 48 Cal. 3d 527, 556-557.) Neither concealment of purpose nor taking a victim unawares is sufficient to support the special circumstance allegation. (*Richards v. Superior Court* (1983) 146 Cal.App.3d 306, 314-315.)

A defendant may not be convicted of a crime (or have found true a special circumstance allegation) if the evidence presented at trial is

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[48] The trial court found that appellants killed the victim while lying in wait for her granddaughter, Ellen Wang, who was not present during any of the events. Respondent, however, states "We do not subscribe to this theory," without explaining why. (RB 91, fn. 31.)

This footnote strongly suggests that respondent is aware the lying-in-wait in this case was erroneously permitted to go to the jury. The case cited in that footnote, *People v. Grier* (2007) 41 Cal.3d 555, 602, stands for the idea that a ruling given for the wrong reason should not be disturbed on appeal. Respondent cites no case approving lying-in-wait murder or the lying-in-wait special circumstance under facts similar to those of this case, where the alleged lying-in-wait was for an entirely different person who was not present.

insufficient to persuade a rational factfnder beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 309.) The Eighth and Fourteenth Amendments require heightened reliability at both the guilt and penalty phases. (*Woodson v. North Carolina* (1976) 408 U.S. 280, 305; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Respondent admits that Vo was not a party to the telephone call between co-defendant Hajek and witness Moriarty[49], wherein Hajek talked of a plan to kill as revenge for an earlier incident involving Ellen Wang. (RB p. 89, fn. 30.)[50] Appellant Vo was not a party to the earlier conflict between Ellen Wang and co-defendant Hajek, and did not know Ellen Wang or her family.

Appellant Vo testified that his sole purpose in accompanying Hajek on that day was to assist Hajek in speaking with Ellen Wang and if

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[49] Witness Moriarty stated on cross-examination that co-defendant Hajek never mentioned appellant Vo in the statement; he only indicated what he, Hajek alone, planned to do. (RT 3684.)

[50] Appellant Vo refers to and incorporates herein Argument 4 of his AOB, and argument XI of this brief, addressing the error in admitting the testimony of Moriarty against him; Argument 1 of his AOB and argument II of this brief, regarding the trial court's error in refusing to sever his trial from that of the co-defendant; and Argument 7 of his AOB and Argument XIII of this brief, regarding the multiple errors in admitting words of his co-defendant against him in violation of his right of confrontation and cross-examination.

necessary, to provide interference to defuse the situation in case there was any hostility. (RT 4986-88.) Vo testified that he tagged along with Hajek that day in case "Ellen had her friends there, or her boyfriend or something like that." (RT 4987.) Appellant Vo and co-defendant Hajek first went to Ellen Wang's school, in order to speak with her. (RT 4983.) She was not at school that day, and it was only then they tried to find her at her house. While Vo made a brief threat to kill if family members screamed (13 RT 3162), he immediately returned a knife he had brandished to the kitchen (upon the request of Cary Wang), and did not use it again. (13 RT 3163.) He assured Tony Wang that he did not intend to harm the family. (16 RT 3894.) Vo's assurance, rather than establish a concealment of purpose, establishes his independence from Hajek's "plan." Unlike co-defendant Hajek, appellant Vo had no blood on his person. (15 RT 3590; 7 CT 1762.)

Respondent's argument depends on the unproven **assumption** that the two defendants shared a plan to kill: "*[t]hey* concealed their murderous purpose"; "*they* continued to conceal their purpose"; "*appellants* waited and watched for an opportune time to tact, and thereafter sprung a surprise attack . . . from a position of advantage." (RB 89.) Although respondent admits that Vo was not present when co-defendant Hajek made his statement about a plan to witness Moriarty, it asserts that Vo accompanying

Hajek to the home and acting "in apparent conformity with the plan, *suggest[ed]* that he was knowingly participating in it as well." (RB 89-90, fn. 30[51]; emphasis added.) This reasoning is circular and fails to support respondent's assumption of complicity.

The mere "suggestion" of knowledge of and agreement with a co-defendant's alleged plan falls far short of proof upon which a rational factfinder can find guilt beyond a reasonable doubt. (*Jackson v. Virginia*, *supra.*) Respondent argues that appellant Vo's "actions before, during, and after the crime demonstrate" intent to kill (RB 92), but by way of factual support offers only that appellant Vo allegedly had a "motive" for revenge – motive not being an element of either the crime or the special circumstance – and that he went to the Wang household in Hajek's company. (RB 92, referencing RB 85-86.) Speculation about motives and the mere fact of appellant Vo's presence in the home is not a substitute for proof beyond a reasonable doubt that Vo intended to kill.

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[51] Also in footnote 30, respondent asserts that "Following arrest, [Vo] continued to maintain contact with Hajek." (RB 90.) There is no evidence that is true, and respondent cites none. Hajek wrote to Vo in the jail, and those letters were seized via search warrant, but there is no indication that Vo responded.

As the prosecutor did at trial, respondent continues to improperly attribute Hajek's words and actions to Vo.

As noted, appellant Vo concealed no homicidal purpose because he did not have one; he did not possess an intent to kill. (Vo AOB, 308, citing 7CT 1762.) Appellant Vo took no weapons to the house; the knife he briefly brandished was from the Wangs' kitchen, and it returned it to its place upon request. (13 RT 3163.) Hajek brought an inoperable pellet gun. (16 RT 3796-3798; 14 RT 3508-10.) Neither brought restraints; a rope that was used was found in the house. (14 RT 3286) None of these facts support respondent's premise that Vo possessed an intent to kill.

The trial court found that the homicide of Su Hung occurred "while they were lying in wait for Ellen . . .." (21 RT 5272.) Respondent disavows the finding regarding lying in wait for *a different* alleged intended victim (RB 91, fn. 31), urging this Court instead to find sufficient evidence of lying in wait as to all the family members, including the homicide victim. (RB 89, fn. 29.) Appellant's counsel is not aware of authority – and respondent cites none – for the proposition that a lying in wait special circumstance may be employed when the perpetrator is waiting for someone other than the homicide victim. A special circumstance "must . . . be based on specific factual indicia that relate to a rational distinction characterizing a more serious type of murder." (7 CT 1762, citing *People v. Hendricks* (1987) 43 Cal.3d 584, 595.)

Despite the trial court's finding that there was "absolutely no evidence on the record that there was a surprise attack other than the fact that she may have been tied or bound at the time it did occur" (21 RT 5272), respondent gamely offers the theory that the victim was isolated from others in the family[52], lulled into a "false sense of security" by being untied and left to nap and read the newspaper, and then killed by surprise at an opportune time. (RB 89-91.)[53] Respondent's characterization again requires considerable leaps from the available facts; such a conjured scenario does not equate to substantial evidence meeting the legal standard.

Respondent's theory is directly contrary to this Court's reasoning in *People v. Lewis* (2008) 43 Cal.4th 415, 514-515, which held that:

> "Mere" concealment of purpose is not enough to support the lying-in-wait special circumstance. (*People v. Morales*, *supra*,

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[52] Su Hung became "angry and hostile," and was taken to her bedroom and tied for a time. (20 RT 4991.) Her bonds were then removed. (14 RT 3343-45, 14 RT 3365.) She napped and read the newspaper. (14 RT 3305, 3366, 3367.)

[53] Respondent nowhere explains why it would be more "opportune" to wait until additional family members arrived at the home. It is arguable (indeed, likely) that co-defendant Hajek waited until appellant Vo had gone with Su Hung's daughter Cary Wang to look for Ellen Wang. If so, that turn of events fails to prove that Vo had any knowledge of the plan, and exculpates him from personally committing the homicide.

The facts do not support a hypothesis that there was an advance arrangement to take Cary Wang from the house. She herself suggested going to look for Ellen Wang. (13 RT 3250.)

> 48 Cal.3d at p. 557.) Rather, such concealment must be contemporaneous with a substantial period of watching and waiting for an opportune time to act, and followed by a surprise attack on an unsuspecting victim from a position of advantage. (See *ibid.*) Here, there was no evidence that, while concealing his purpose to kill, defendant watched and waited for an opportune time to kill the victims. Rather, the evidence suggests each was killed when, and only when, his or her ATM withdrawal limit had been reached and the victim had been driven to a suitable location for killing. Moreover, there was no evidence that the victims were surprised. Indeed, the evidence suggests each victim must have been aware of being in grave danger long before getting killed.

(Emphasis added.) The factual circumstances in *Lewis* were analogous to those in this case, and the prosecution's arguments about a continuing course of conduct – quite similar to those advanced by respondent here (see RB 91) – were soundly rejected. There, as here, the alleged concealment of homicidal purpose and watchful waiting must be contemporaneous, and flow immediately to the killing. This Court explained:

> We have never held the lying-in-wait special circumstance to have been established on similar facts. Were we to hold that sufficient evidence supports the lying-in-wait special-circumstance allegations the jury found true here, it would be difficult to say that there is any distinction between a murder committed "by means of" lying in wait and a murder committed "while" lying in wait. Such a construction of the lying-in-wait special circumstance would read the word "while" out of the statute. Although we do not "minimize the heinousness of defendant's deeds" (*People v. Hillhouse, supra*, 27 Cal.4th at p. 499), we are compelled to conclude that on these facts "the circumstances calling for the ultimate penalty [on the basis of lying in wait] do not exist." (*Domino [v. Superior Court], supra*, 129 Cal. App. 3d at p. 1011.)

(*People v. Lewis, supra,* 43 Cal.4th 415, 515.)

Respondent argues that reversal of the conviction is not required, should this Court determine that the murder by lying in wait charge be reversed, because there were a variety of other murder theories available: torture murder, burglary felony-murder, and premeditated murder. (RB 92.) Appellant Vo disagrees, as there was insufficient evidence to support any of these charges as to him.[54]

There is no evidence that appellant Vo intended to kill or did kill. The case against him for homicide was manufactured from the statements and actions of the co-defendant[55], spun into an elaborate uncharged conspiracy[56], and admitted against him the statements of co-defendant

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[54] Appellant Vo refers to and incorporates by reference Argument 8 of his AOB, and Arguments VII and XIX of this brief. Argument 8 of Vo's AOB argues that there was insufficient evidence that appellant Vo committed first degree murder. Respondent's reply brief failed to respond to the arguments concerning intentional murder (subparts A and B); those should be deemed admitted.

[55] Appellant refers to and incorporates his argument that the trial court erroneously refused to sever the trials, Argument 1 of his AOB and argument 2 of this brief.

[56] Appellant Vo refers to and incorporates Argument 6 of his AOB and Argument X of this brief, concerning the uncharged and unproven conspiracy theory.

Hajek, in a joint trial where he was unable to confront the source[57].

Respondent also contends that reversal of the lying in wait special circumstance would not require reversal of the death judgment, since a torture special circumstance was also found.[58] (RB 92-95.) Much of this discussion yet again attributes moves and actions of Hajek to appellant Vo, without supporting evidence for an "evil plan," lack of remorse, and "evil characters" (RB 92-93); this discussion is based on co-defendant Hajek's statements and actions, factors which should have played no part in the individualized sentencing to which appellant Vo was entitled, had he somehow been convicted and a special circumstance found in the absence of all the evidence that should not have been admitted against Vo.

As to Mr. Vo personally, respondent first notes that "the prosecutor emphasized his role as the leader of the operation"[59] (RB 94, citing 25 RT 6397) and other statements of the trial prosecutor during argument. (RB 94,

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[57] Appellant Vo refers to and incorporates Arguments 4, 5, and 7of his AOB, and corresponding Arguments XI, XII, and XIII of this brief, addressing the violations of his confrontation rights in this joint trial.

[58] As set forth more fully in Argument VII of appellant Vo's AOB and Argument VII herein, the torture murder special circumstance and torture murder charge are also both invalid.

[59] Respondent exaggerates even the statement of the trial prosecutor, who argued as to factor J that Vo "was in fact a major participant if not at the scene that time giving many of the orders." (25 RT 6397.)

citing 25 RT 6398, 6390.) A prosecutor's argument is not evidence; it certainly does not show the harmlessness of a conviction and a true finding based on lack of sufficient evidence.[60] Appellant Vo admitted briefly brandishing a knife and making a threat, but then returned the knife to the kitchen upon Cary Wang's request. (20 RT 4988; 20 RT 4988-9.) Vo also admitted going with Cary Wang to look for Ellen; they stopped at the school, and then at her office, with no physical harm done. (20 RT 4989; 20 RT 4989-90.)

The evidence was insufficient to prove either lying in wait murder, or the lying in wait special circumstance, as to appellant Vo. Reversal is required.

B. The lying in wait special circumstance is unconstitutionally vague and overbroad as applied to appellant Vo.

"To avoid th[e] constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the

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[60] The assertion that appellant Vo was "the leader" is ludicrous. Co-defendant Hajek had the fight with Ellen Wang, whom Vo did not know; Hajek told Moriarty of his plan for revenge, in a conversation that did not involve Vo; Hajek woke Vo and took him that morning; Hajek drove to the school and then the Wang house; Hajek alone had blood on his person; and Hajek's statements and writings were at the core of the prosecution theory.

imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 876.) Under California law, the "special circumstances" enumerated in section 190.2 "perform the same constitutionally required 'narrowing function' as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 975.) The lying-in-wait special circumstance (§ 190.2, subd. (a)(15)), as interpreted by this Court, violates the Eighth Amendment by failing to narrow the class of persons eligible for the death penalty, and by failing to provide a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.].)

1. The Lying-In-Wait Special Circumstance Does Not Narrow the Class of Death-Eligible Defendants.

Murder "perpetrated by means of . . . lying in wait" is murder of the first degree. (§ 189.) A defendant convicted of first-degree murder in California is rendered death eligible if a special circumstance is found. (See § 190.2.) At the time of appellant's crime and trial, one such special circumstance was that "[t]he defendant intentionally killed the victim while

lying in wait." (Former§ 190.2, subd. (a)(15).) The Court has described the lying-in-wait special circumstance as only "slightly different" from lying-in-wait first-degree murder *(People v. Hillhouse* (2002) 27 Cal.4th 469, 500; *People v. Carpenter* (1997) 15 Cal.4th 312, 388; *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2), with the special circumstance requiring an intentional murder that occurs during a period "which includes (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage[.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149, quoting *People v. Morales*, *supra*, 48 Cal.3d 527, 557.)

Although the second element of the lying-in-wait special circumstance – a substantial period of watching and waiting – theoretically could differentiate murder under the lying-in-wait special circumstance from simple premeditated murder, the Court's construction of this prong has precluded such a narrowing function. The Court has established that the watching and waiting period need only be "brief" and its duration only "'such as to show a state of mind equivalent to premeditation or deliberation.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1021, quoting CALJIC No. 8.25.) The victim need not be the object of the "watching" in

order for this special circumstance to apply, as a period of "'watchful' waiting" for the arrival of the victim will satisfy this requirement. (*People v. Sims* (1993) 5 Cal.4th 405, 433.) And, this "watchful waiting" may occur in the knowing presence of the victim (see, e.g., *People v. Morales*, *supra*, 48 Cal.3d at p. 558), or where the defendant reveals his presence to the victim. (See, e.g., *People v. Carpenter*, *supra*, 15 Cal.4th 312, 388-389.)

In light of this broad interpretation of the second element of the lying-in-wait special circumstance, only the first and third elements are left to differentiate a first-degree murder under the lying-in-wait special circumstance from other premeditated murders. The Court has, however, also adopted an expansive construction of the first prong of the lying-in-wait special circumstance (concealment of purpose), and its case law has construed the meaning of lying-in-wait to include not only killing in ambush, but also murder in which the killer's purpose was concealed. (*People v. Morales*, *supra*, 48 Cal.3d at p. 555.) By requiring only a concealment of purpose, rather than physical concealment, the first prong clearly fails to narrow the class of death-eligible premeditated murderers in any significant manner. (See, e.g., *Morales*, *supra*, at p. 557 [noting concealment of purpose is characteristic of many "routine" murders].) As

for the final prong (a surprise attack from a position of advantage), it is hard to imagine many premeditated murders preceded by fair warning and carried out from a position disadvantageous to the murderer. As Justice Mosk noted:

> [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J).)

In light of the broad interpretation that the Court has given to the lying-in-wait special circumstance, the class of first-degree murders to whom this special circumstance applies is enormous. (See, e.g., Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev.1283, 1320 [the lying-in-wait special circumstance makes most premeditated murders potential death penalty cases].) This special circumstance thereby creates the very risk of "wanton" and "freakish" death sentencing found unconstitutional in *Furman v. Georgia*, *supra*, 408 U.S. 238. Moreover, while the Court has interpreted the lying-in-wait special circumstance as being "slightly different" from lying-in-wait first-degree murder (*People v. Hillhouse*, *supra*, 27 Cal.4th at

p. 500), this difference is not made clear to California juries. According to the Court, the distinguishing factors are that "'[m]urder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death[,]" while the special circumstance requires "'an intentional murder'" that "'take[s] place during the period of concealment and watchful waiting[.]'" (*People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1148-1149.) California juries are not, however, instructed that "murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death," but instead, are told that the defendant's state of mind must be such that he considered the murder beforehand, or carefully thought and weighed considerations for and against the murder. (CALJIC No. 8.25.) Likewise, California juries instructed on lying-in-wait first degree murder are told the murder must be "immediately preceded by lying in wait" (*ibid.*), thereby indicating, as does the special circumstance, that there can be no "clear interruption separating the period of lying in wait from the period during which the killing takes place[.]" (CALJIC No. 8.81.15.) Thus, while the Court has interpreted the special circumstance differently than lying-in-wait first degree murder, California juries are not provided adequate guidance from which they can distinguish the class of death-eligible defendants. (See *Wade v. Calderon* (9th Cir. 1994) 29 F.3d

1313, 1321-1322 [failure to adequately guide the jury's discretion regarding the circumstances under which it could find a defendant eligible for death violates the Eighth Amendment]; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444 [death penalty statutes are constitutionally defective where "they create the potential for impermissibly disparate and irrational sentencing [by] encompass[ing] a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them."].)

Furthermore, the Court's interpretation of the lying-in-wait theory of murder as requiring only implied malice appears incorrect. Both lying-in-wait murder and the lying-in-wait special circumstance incorporate the identical definition of lying in wait.

> The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation. [¶] The word "premeditation" means considered beforehand. [¶] The word "deliberation" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.

Thus, to establish either lying-in-wait murder or the lying-in-wait special circumstance, the defendant must be proved to have acted with premeditation or deliberation. As stated by the Court, "lying in wait as a theory of murder is the 'functional equivalent of proof of premeditation,

deliberation and intent to kill' [Citations]; hence, 'a showing of lying in wait obviates the necessity of separately proving premeditation and deliberation . . . ' [Citation.]" (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1149, fn. 10.) If, by definition, lying-in-wait as a theory of murder is the equivalent of an intent to kill, and lying-in-wait is defined in the identical manner in the lying-in-wait special circumstance, then both must include the intent to kill, and there is no meaningful distinction between them.

In sum, the lying-in-wait special circumstance is not narrower than lying-in-wait murder, and can apply to virtually any intentional first-degree murder. This special circumstance therefore violates the Eighth Amendment narrowing requirement. Indeed, although the vast majority of states now have capital punishment statutes, only three states other than California use lying in wait as a basis for a capital defendant's death eligibility: Colorado, Indiana and Montana. (See Osterman & Heidenreich, *Lying In Wait: A General Circumstance*, 30 U.S.F. L.Rev. at p. 1276.) Notably, the construction of the Indiana provision is considerably narrower than the construction of the California statute, as it requires watching, waiting and concealment, then ambush upon the arrival of the intended victim. (*Thacker v. State* (Ind. 1990) 556 N.E.2d 1315, 1325.) Colorado similarly limits its "lying-in-wait or ambush" aggravating factor to

situations where a defendant "conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise." (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 751.) While there are few cases interpreting the Montana aggravating factor, its scope is necessarily limited by the state law requirement of proportionality review, which prevents imposition of death sentences on less culpable defendants. (See Mont.Code.Ann. § 46-18-310.)

2. The Lying-In-Wait Special Circumstance Fails to Distinguish Death-Eligible Defendant.

The Eighth Amendment demands more than mere narrowing the class of death-eligible murderers. The death-eligibility criteria must provide a meaningful basis for distinguishing between those who receive death and those who do not. For example, a death penalty statute could satisfy the Eighth Amendment narrowing requirement by restricting death eligibility to only those murderers whose victims were between the ages of 20 and 22. However, such an eligibility requirement would be unconstitutional in that it fails to meaningfully distinguish, on the basis of comparative culpability, between those who can be sentenced to death and those who cannot. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a

principled basis for doing so." (*Arave v. Creech* (1993) 507 U.S. 463, 474; see also *United States v. Cheely*, *supra*, 36 F.3d at p. 1445 ("[n]arrowing is not an end in itself, and not just any narrowing will suffice"].)

The lying-in-wait special circumstance, as interpreted by the Court, fails to provide the requisite meaningful distinction between murderers. There is simply no reason to believe that murders committed by lying in wait are more deserving of the extreme sanction of death than other premeditated killings. Indeed, members of the Court have long recognized this fundamental flaw of the lying-in-wait special circumstance. (See, e.g., *People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J.); *People v. Webster* (1991) 54 Cal.3d 411, 461-462 (conc. and dis. opn. of Mosk, J.); *id.* at p. 466 (conc. and dis. opn. of Broussard, J.); *People v. Ceja*, *supra*, 4 Cal.4th at p. 1147 (conc. opn. of Kennard, J.); *People v. Hillhouse*, *supra*, 27 Cal.4th 469, 512-513 (conc. opn. of Kennard, J.).)

It is particularly revealing that, as stated above, almost no other state has included lying-in-wait murder as the type of heinous killing deserving of eligibility for the ultimate sanction of death, a clear indication of the lack of "societal consensus that a murder while lying in wait is more heinous than an ordinary murder, and thus more deserving of the death penalty." (*People v. Webster*, *supra*, 54 Cal.3d at p. 467 (conc. and dis. opn. of

Broussard, J.).)

C. Respondent's arguments regarding lying-in-wait fail.

Respondent correctly notes that this Court has rejected claims that the lying in wait special circumstance is unconstitutionally vague and overbroad. (RB 95.)[61] For reasons set forth in Vo's AOB, appellant respectfully requests that this Court reconsider those earlier rulings. The special circumstance, as construed by this Court, fails to genuinely narrow the category of persons eligible for capital punishment, and fails to provide a meaningful basis for distinguishing between those who are subjected to the death penalty and those who are not. (Vo AOB, Arg. 10, pp. 310-316.)

Appellant, however, additionally asserts that the lying in wait special circumstance was unconstitutionally vague and overbroad as applied to him. (Vo AOB 313-315.) In the unique circumstances of this case, the alleged lying in wait was – and was found by the trial court to be – waiting for a person other than the homicide victim. (21 RT 5272.) Respondent's footnote stating, "We do not subscribe to this theory," but urging this Court nonetheless to rule that the trial court properly found sufficient evidence to

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[61] Among the cases cited by respondent for this proposition is *People v. Lewis*, *supra*, 43 Cal.4th 415, 515-516. (RB 95.) As discussed above, the *Lewis* case in fact reversed lying in wait special circumstances based on facts analogous to those in this case, where the alleged lying in wait to surprise a victim was not followed immediately by the homicide.

support the special circumstance (RB 91, fn. 31), is an invitation to this Court to abandon any effort at requiring the special circumstance to genuinely narrow the class of persons eligible for capital punishment, and to ignore its own jurisprudence interpreting the lying in wait special circumstance. This, the Court cannot do.

Moreover, the special circumstance was unconstitutional as applied to appellant Vo because the jury instruction invited a true finding on the special circumstance *without regard to personal culpability*, stating it must be proven only that "a" defendant intentionally killed the victim, and that the homicide occurred while "a" defendant was lying in wait. (Vo AOB 313; 8 CT 2031.)

Respondent refers to a similar argument regarding the torture special circumstance, and argues there is no reasonable likelihood the jury applied the instruction in an unconstitutional manner; it further notes that there was an individual verdict form including a finding that appellant Vo intentionally killed while lying in wait. (RB 95-96.) In the referenced argument (RB 163-166), respondent admits the error, and that it was prejudicial under controlling precedent:

> In *People v. Davenport* (1985) 41 Cal.3d 247, 271, this Court held that the torture-murder special circumstance requires proof that the defendant himself intended to kill and to torture the victim. The instruction given here was thus technically

> erroneous. In *People v. Petznick* (2003) 114 Cal.App.4th 663, 686, the Sixth District Court of Appeal found a similar error prejudicial.

Respondent nonetheless argues that other instructions and the verdict form cured the "technical" harm, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72. (RB 164-165.) Respondent is wrong.

Respondent does not discuss appellant Vo's contention that under these circumstances, the lying in wait special circumstance instruction violated both major aspects of the Eight Amendment: the requirement of individualized sentencing, and the requirement that death eligibility be adequately narrowed and channeled to avoid arbitrary and capricious application of capital punishment. (Vo AOB, pp. 314-316.) The instructional error amounted to strict liability for Vo being present in the Wang home with co-defendant Hajek, relieving the prosecution of its obligation to prove the defendant's beyond a reasonable doubt as to each element of a crime – or in this instance, the special circumstance allegation. (*In re Winship* (1970) 397 U.S. 358, 364.) It is error per se, and not subject to harmless error analysis. (*Rose v. Clark* (1986) 487 U.S. 570; *Connecticut v. Johnson* (1983) 460 U.S. 73; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Estelle v. McGuire, *supra*, 502 U.S. 62, 72, is cited by respondent in support of its theory that "there is no reasonable likelihood the jury applied

the challenged instruction in an unconstitutional manner." (RB 95.) *Estelle v. McGuire* dealt with review of ordinary instructional error on federal habeas corpus; it is not applicable where the instructional error relieves the prosecution of its burden of proof. (*In re Winship, supra*, 397 U.S. 358, 364.)

That other instructions were given in which the jury was told to decide as to each defendant separately (see, RB 164-165) does not cure the fundamental error with the lying in wait special circumstance instruction. As the United States Supreme Court decided in *Francis v. Franklin* (1985) 471 U.S. 307, conflicting instructions do not ensure that every juror disregarded the plain meaning of this instruction: that the special circumstance should be found true if "a" defendant intentionally killed while "a" defendant was lying in wait.

As noted throughout this brief, appellant Vo's was a case in which the prosecution did all in its power to persuade jurors to find culpability on the part of appellant Vo based on the words and actions of co-defendant Hajek. Despite a lack of evidence that Vo knew of or joined in any murderous intentions of Hajek, or committed the homicide, the prosecution created an elaborate (but uncharged and thus unproven) conspiracy theory, and ceaselessly stressed joint responsibility – joint intent, joint actions –

going so far as to tell jurors they need not decide who did what. (21 RT 5382.) The trial court erroneously refused a severance, allowed the uncharged conspiracy theory to go before the jury, and admitted statements of co-defendant Hajek, all reinforcing the prosecutor's successful effort to have the jurors treat the co-defendants as if they were one.

Respondent primarily relies on CALJIC 8.80.1 (7 CT 1903-1904) for its argument that other instructions cured the harm. (RB 164-165.) The first paragraph quoted (RB 164) is an eight-line sentence and, quite frankly, not very comprehensible to speakers of ordinary English who are untrained in legal analysis. Reasonable jurors might well be struck by the phrase "if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator" in conjunction with the last phrase suggesting that "aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or "assis[ing] any actor in the commission of murder in the first degree" was sufficient. The critical phrase, that "such defendant with the intent to kill" act in any way is lost in the middle; and of that phrase, the most crucial part is one word, "**such**."

While part of the legal lexicon, this usage of "such" is uncommon among ordinary speakers of English. In ordinary usage, "such" implies similarity rather than particularity. See, e.g., the definition in the *Oxford*

American Dictionary (1979):

> **such** (such) *adj.* 1. Of the same kind or degree, *people such as these*. 2. Of the kind or degree described, *there's no such person*. 3. So great or intense, *it gave her such a fright*. **such** *pronoun* that, the action or thing referred to, *such being the case, we can do nothing*. [definition of **as such** omitted.]

In the midst of this paragraph-long sentence, the word "such" fails to clearly admonish that jurors could not find the special circumstance true unless *this* particular defendant *personally* intended to kill or did kill.

The second paragraph of CALJIC 8.80.1 cited by respondent states that jurors must decide special circumstances "separately as to each of the defendants" (RB 164), and the third requires each special circumstance to be decided as to each of the defendants. (RB 164-165.) Again, in the context of this case where the prosecutor hammered home the (unproven) theory that appellant Vo shared the murderous intentions of co-defendant Hajek (as expressed in his conversation with witness Moriarty, a conversation in which Vo did not participate), these jury instructions failed to provide clarity and ensure the prosecution was held to its burden of proof as to all elements, when the primary instruction on the lying in wait special circumstance required only that the prosecution prove "a" defendant possess the intent to kill while "a" defendant was lying in wait. (*Francis v. Franklin*, *supra,* 471 U.S. 307.) A reasonable juror may well have

concluded that these instructions required them to address separate verdict forms for each defendant.[62]

In any event, reversal is required under *People v. Davenport*, *supra,* 41 Cal.3d 247, 271 [in which this Court held that the torture-murder special circumstance requires proof that the defendant himself intended to kill and to torture the victim], and *People v. Petznick*, *supra,* 114 Cal.App.4th 663, 686 [wherein a similar error was found prejudicial].

D. Conclusion.

The evidence is insufficient to prove that appellant Vo either killed or intended to kill the victim, necessary elements of both murder by lying in wait and the lying in wait special circumstance. It is insufficient to prove *any* lying in wait, as that special circumstance has previously been construed by this Court.

Appellant urges that the lying in wait special circumstance is constitutionally vague and overbroad, and that this Court's previous rejections of that challenge be reconsidered. In any event, its application to him is overbroad, and relieved the prosecution of its burden of proof .

Reversal is required as a matter of law. Even if this Court should

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[62] Respondent argues that the verdict forms required a finding of personal intent to kill or actual killing. (RB 96, 165.) A verdict form is not an instruction on the law, and these did not cure the error.

decide on narrower grounds than all those raised, it cannot – consistent with its own jurisprudence and that of the United States Supreme Court – decide that this constellation of errors was harmless.

V. There was insufficient evidence that appellant Vo committed attempted murder while armed with a knife.

The trial court erroneously denied appellant Vo's motion for a directed judgment of acquittal (Penal Code § 1181.1) and allowed the prosecutor to pursue, and the jury to convict, appellant Vo of four counts of attempted murder while armed with a knife.[63] (Vo AOB, Arg. 11, pp. 316-324.)

The evidence was insufficient[64] to support those charges: there was no evidence that Vo either possessed the requisite specific intent to kill, nor that he committed acts in furtherance of an intent which he did not possess. None of the alleged victims was physically harmed; one, Ellen Wang, was not even present during any of the events occurring before the defendants were arrested that day. Appellant Vo admittedly used a knife briefly at one point, then at the request of Cary Wang, he returned it to its place in the kitchen. (RT 3241-42; RT 4988-9.) There is no evidence that appellant Vo thereafter held a knife.

Co-defendant Hajek also raises a claim that the evidence was

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[63] Appellant Vo also raises objections to the sufficiency of evidence regarding the knife enhancements in Argument 9 of his AOB, and Argument VIII of this brief, incorporated herein.

[64] *Jackson v. Virginia, supra*, 443 U.S. 307, 319-320. This Court must "resolve the issue in light of the whole record . . .." (*People v. Johnson* (1980) 26 Cal.3d 557, 562.)

insufficient to support the attempted murder counts. (Hajek AOB, Arg. VII, pp. 111-119.) Without expressing an opinion about the sufficiency of the evidence as to co-defendant Hajek, appellant Vo notes again that the co-defendants are in significantly different postures.[65]

Respondent argues that the trial court properly denied the motion for a directed judgment of acquittal on the attempted murder charges. (RB Arg. V, pp. 80-86.) Unsurprisingly, respondent relies heavily on co-defendant Hajek's statements to witness Moriarty before the crime that Hajek intended to kill the Wang family. (RB p. 84.) Respondent also argues that the actions of that day were "overt acts" "in furtherance of their design." (RB pp. 82-84.)[66]

As to appellant Vo, respondent's assertions urge this Court to ignore

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[65] See, e.g., appellant Vo's briefing regarding the improper denial of his motion for severance, set forth more fully in his AOB, Arg. 1, and in Arg. II of this brief.

Co-defendant Hajek had a grudge against Ellen Wang, arising from an incident at which Vo was not present. Co-defendant Hajek told a witness the night before that he intended to kill Ellen's family; appellant Vo was not present at either end of that telephone conversation. Co-defendant Hajek awoke appellant Vo that morning and talked him into going to confront Ellen Wang, but there is no evidence he told Vo of his intent to kill anyone. Co-defendant Hajek brought a weapon to the scene. Co-defendant Hajek alone had blood on his clothing after the homicide victim was killed.

[66] Appellant Vo refers to and incorporates herein Argument 6 of his AOB and Argument X herein, addressing numerous errors arising from the prosecution's uncharged conspiracy theory.

the bedrock constitutional principles regarding sufficiency of the evidence[67], and to uphold four convictions of attempted murder – an extremely serious felony – based on no more than innuendo, speculation, and guilt by association. A close look at the "evidence" shows its ephemeral basis; it cannot withstand constitutional scrutiny.

Respondent speaks little of appellant Vo himself in the section of its argument regarding "overt acts;" respondent prefers to address the actions of the co-defendants jointly, in the context of an assumed joint "plan."[68] (RB, pp. 82-84.) The only reference specifically to appellant Vo is this: "[Ellen Wang] was the primary target of their rage, because of her fight with Hajek and Lori Nguyen, both of whom were close friends with Vo." (RB, p. 82.)

As to the intent-to-kill element of attempted murder, respondent asserts that appellant Vo "had a motive to get revenge on Ellen for fighting

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[67] When, as here, respondent declines to address issues raised by appellant, the reasonable and appropriate inference is that "respondent has abandoned any attempt to support the judgment [against this particular attack], and that the ground urged by appellant for reversing the judgment is meritorious." (*Berry v. Ryan* (1950) 97 Cal.App.2d 492, 493, cited with approval in *Smith v. Williams* (1961) 55 Cal.2d 617, 621; but see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

[68] Appellant Vo refers to and incorporates herein Argument 6 of his AOB and Argument X of this brief, addressing the alleged conspiracy theory.

with his best friend and the girl he was in love with, and [for Ellen] making crank calls afterward." (RB pp. 85-86.)[69] Motive is not an element of this crime; an alleged "love" motive falls far short of proof of specific intent to kill.

Respondent then recites acts that appellant Vo either admittedly or allegedly committed, without bothering to cite the trial transcript, as if these were proof of mens rea. (RB p. 86.) They are not.

There is no proof that appellant Vo intended to kill any of the four alleged victims of attempted murder (one of whom was never present), or that he committed overt acts in furtherance of an alleged plan he did not join. Reversal is required.

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[69] Vo was not present during that earlier event involving Hajek, Ellen Wang, and Lori Nguyen. The prosecutor's assertion that Vo was "in love" with Ms. Nguyen was denied by both Nguyen (17 RT 4081) and Vo (21 RT 5203).

VII. **The torture murder special circumstance and torture murder charges must be reversed, for they are both unsupported by the evidence, and the torture murder special circumstance is unconstitutionally vague and overbroad.**

The evidence is insufficient to support the torture murder charge and the lying in special circumstance, and the special circumstance is unconstitutionally vague and overbroad as to appellant Vo. (Vo AOB, Arg. 9, pp. 298-307; Arg. 8.D, pp. 291-294.) Co-defendant Hajek also contends that the evidence was insufficient to support the torture theory of first degree murder, and the torture special circumstance. (Hajek AOB, Arg. IV, pp. 79-91.[70])

Respondent argues that the evidence was sufficient, and that the torture special circumstance is constitutional. (RB, Arg. VII, pp. 96-102.) As to appellant Vo, respondent's arguments rely heavily upon the assumption – unsupported by the evidence – that appellant Vo shared co-defendant Hajek's alleged plan to kill, and extrapolating from that assumption, also shared an alleged intent to torture. Respondent is not correct.

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[70] Appellant Vo adopts Argument IV of Hajek's AOB and ARB to the extent it is applicable to him, pursuant to California rules of Court, Rule 8.2200(a)(a). (Vo AOB, p. 300-301.)

In *People v. Davenport* (1985) 41 Cal.3d 247, this Court recognized that severe pain presumably precedes the death of the victim in the vast majority of murders. (*Id.*, at p. 265.) In order to comply with the constitutional requirement that any capital punishment scheme "must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence'" (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244), this Court construed the special circumstance to include the intent to torture, as defined by established authority. (*Davenport*, *supra*, at p. 271.) That intent must be personal to a particular defendant. (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210.)

Under this Court's construction, the acts alleged to constitute torture must be substantially in excess of those causing death, in order to comport with the constitutional requirement that the special circumstance genuinely narrow the class of persons eligible for capital punishment. For example, in *People v. Chatman* (2006) 38 Cal.4th 344, this Court upheld a conviction for torture murder and a true finding on a torture special circumstance allegation, describing the wounds as follows:

> Here defendant stabbed [the victim] over four dozen times. Six life-threatening wounds to the neck, back, and chest, while quite serious, were not immediately fatal. The location of most of the blood spatters supports a conclusion that the

these charges as to him.[75] There is no evidence that appellant Vo intended to kill or did kill. The case against him for homicide was manufactured from the statements and actions of the co-defendant[76], spun into an elaborate uncharged conspiracy[77], and admitted against him the statements of co-defendant Hajek, in a joint trial where he was unable to confront the source[78].

Respondent also contends that reversal of the torture special circumstance would not require reversal of the death judgment, since a lying in wait special circumstance was also found.[79] (RB 101.) This

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[75] Appellant Vo refers to and incorporates by reference Argument 8 of his AOB, and Arguments VII and XIX of this brief. Argument 8 of Vo's AOB argues that there was insufficient evidence that appellant Vo committed first degree murder. Respondent's reply brief failed to respond to the arguments concerning intentional murder (subparts A and B); those should be deemed admitted.

[76] Appellant refers to and incorporates his argument that the trial court erroneously refused to sever the trials, Argument 1 of his AOB and argument 2 of this brief.

[77] Appellant Vo refers to and incorporates Argument 6 of his AOB and Argument X of this brief, concerning the uncharged and unproven conspiracy theory.

[78] Appellant Vo refers to and incorporates Arguments 4, 5, and 7of his AOB, and corresponding Arguments XI, XII, and XIII of this brief, addressing the violations of his confrontation rights in this joint trial.

[79] As set forth more fully in Arguments 10 and 8.E of appellant Vo's AOB and Argument VI herein, the lying in wait murder charge and lying in (continued...)

discussion involves respondent reciting victim impact, the defendants' alleged lack of remorse, and "evil characters" (RB 101), based primarily on co-defendant Hajek's statements and actions. The co-defendant's statements would not have been admissible in a separate trial; most of the factors recited by respondent should have played no part in the individualized sentencing to which appellant Vo was entitled, had he somehow been convicted and a special circumstance found in the absence of all the evidence that should not have been admitted against Vo.

Reversal is required. Appellant Vo did some shameful things that day, but the evidence does not show he killed or intended to kill, much less that he tortured or intended to torture.

B. The torture murder special circumstance as applied to appellant Vo is unconstitutionally vague and overbroad.

Appellant recognizes that this Court has rejected facial challenges to the torture murder special circumstance in the past, but urges this Court to reconsider those decisions.

In this case, however, the torture murder special circumstance as applied to appellant Vo is unconstitutionally vague and overbroad. There was no proof – only argument – that appellant Vo intended to kill, intended

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[79](...continued)
wait special circumstance are also both invalid.

to torture, or committed any of those acts. The theories upon which the State relies amount to advocating strict liability for Vo's presence in the home with co-defendant Hajek.

Amplifying those problems rather than curing them, the jury instruction permitted the jury to return a true finding if "a" defendant intended to kill and "a" defendant intended to and committed torture, thus removing the requirement that *this* defendant *personally* possess the requisite intent and/or commit the requisite acts. Respondent addresses this instructional issue in Argument XXI; appellant Vo refers to and incorporates his reply in Argument XXI of this brief.

C. Conclusion.

There is insufficient evidence to support the torture murder charge and the torture murder special circumstance, as to appellant Vo. The torture murder special circumstance is additionally vague and overbroad, particularly as applied to appellant Vo. Reversal is required.

VIII. **There was insufficient evidence to support the use of knife enhancements in most counts.**

There was insufficient evidence to support use of knife enhancements as to appellant Vo in counts 3, 4, 6, and 9 of the information, and reversal is required. (Vo AOB, Arg. 14, pp. 337-340.)[80]

Respondent contends the evidence is sufficient as to Cary Wang, then argues – based on its conspiracy theory and the assumption that appellant Vo possessed an intent to kill the entire family – that Vo's brief brandishment of a knife from the Wang kitchen, which he then returned to the kitchen upon request,[81] is sufficient to convict him of attempted murder and to view him as armed throughout the course of events, despite the evidence that he was not so armed. (RB 102-105.)

Respondent cites *People v. Granado* (1996) 49 Cal.App.4th 317, 322

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[80] Appellant refers to and incorporates herein Argument 11 of his AOB and Argument V herein, regarding the insufficiency of evidence supporting the attempted murder charges. There was no evidence that appellant Vo shared any intent to kill any victim (in contrast to co-defendant Hajek, whose statements before the crimes suggested he did). There was no evidence that appellant Vo attempted to murder anyone. One of the alleged victims of attempted murder was not present at any time during the day.

[81] Appellant Vo admittedly used a knife briefly at one point, then at the request of Cary Wang, he returned it to its place in the kitchen. (RT 3241-42; RT 4988-9.) There is no evidence that appellant Vo thereafter held a knife. Thus, Vo's case is distinct from those advanced by respondent, where a defendant instilled fear through use of a weapon. None of these involved an explicit discarding of a weapon upon request.

and *People v. Jones* (2001) 25 Cal.4th 89, 111 for the proposition that the phrase "in the commission of" a crime should be broadly construed. Respondent seeks to stretch the concept of broad construction well past constitutional tolerability.

People v. Granado, *supra*, 49 Cal.App.4th 317, was a robbery case in which the defendant pulled a gun from his waistband and displayed it within a few feet of the victim, while demanding money. The appellate court found that defendant's use of a weapon qualified as use during the commission of the robbery, even though the gun was not pointed at the victim. *People v. Jones*, *supra*, 25 Cal.4th 89, was a sexual assault case in which a weapon was used after completion of several sex crimes, presumably to maintain control over the victim and permit the defendant's escape.[82]

Neither *Granado* nor *Jones* bears any similarity to the facts of this case, where a knife was briefly brandished when Cary Wang arrived home, then put away in the kitchen at Cary Wang's request, and no knife was ever displayed again by appellant Vo. Any use of the knife terminated quickly,

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[82] "A person is 'armed' with a deadly weapon when he simply carries a weapon or has it available for use in either offense or defense. (*People v. Reaves* (1974) 42 Cal.App.3d 852, 856-857 [117 Cal.Rptr. 163].)" (*People v. Stiltner* (1982) 132 Cal.App.3d 216, 230.) That is not the circumstance here, where the weapon was put away upon request.

when the knife was put away – in the kitchen, not on his person. The cases cited by respondent do not address the termination of a weapons enhancement at all.

Nor do they deal with the constitutional problem here: the sufficiency of the evidence to support a weapons enhancement when the weapon was put away and never seen again, except in the kitchen knife block. These facts do not support any of the knife enhancements under the standard of *Jackson v. Virginia* (1979) 443 U.S. 307.) Reversal is required.

X. The Prosecution's Uncharged Conspiracy Theory Deprived Appellant Vo of His Constitutional Rights, and Permitted Jurors to Infer Guilt of Charged Offenses on a Quantum of Evidence Less than the Standard of Proof.

Appellant Vo's trial was rendered fundamentally unfair because the prosecutor was permitted to pursue an uncharged and amorphous "conspiracy" theory – the existence and scope of which was not found by the trial court before trial, or even before the admission of allegedly relevant evidence – resulting in the admission of a broad range of evidence, most of which was properly admissible, if at all, only against co-defendant Hajek. There was no evidence that appellant Vo knew of or joined in Hajek's alleged murderous plot. (Vo AOB arg. 6, pp. 107-111.) Appellant Vo also has argued that there was not constitutionally sufficient evidence to support the conspiracy theory. (Vo AOB, arg. 8.C, pp. 290-291, 287.)

Co-defendant Hajek also raised an argument concerning the conspiracy theory. (Hajek AOB, arg. V, pp. 92-100.)[83]

Respondent maintains that the trial court properly relied upon an uncharged conspiracy as a theory of liability (RB 107-108), and that there was sufficient evidence of a conspiracy in this case. (RB 109-111.) As

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[83] Appellant Vo adopts Argument V of Hajek's AOB and ARB to the extent it is applicable to him, pursuant to California rules of Court, Rule 8.2200(a)(a).

demonstrated below, respondent fails to address many of the contentions raised in appellant Vo's opening brief, and respondent's assertions posit a view stripping appellant Vo of his constitutional rights and a fair trial.

A. The Prosecutor's Amorphous Conspiracy Theory was Extraordinarily Broad.

As set forth more fully in Mr. Vo's AOB, pp. 249-253, trial counsel objected to use of the uncharged conspiracy theory. No written notice concerning the nature and scope of the alleged conspiracy was provided pretrial. (6 CT 1442-1453; 13 RT 2986 et seq.)[84]

As to letters written by co-defendant Hajek and testimony of witness Leung, urged as supportive of an alleged conspiracy, trial counsel argued that the prosecution appeared to be trying to establish "a broad conspiracy which does not apply to the [Penal Code §] 187 [homicide charge]" (16 RT 3900); that the evidence did not show a conspiracy between the co-defendants (16 RT 3900-3901); that as to appellant Vo, co-defendant

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[84] Respondent simply asserts, without discussion, that defendants were not deprived of adequate notice of the charges, citing *People v. Gallego* (1990) 52 Cal.3d 115, 188. (RB 108.) This is non-responsive to the contention that the uncharged conspiracy theory was used as a substitute for evidence that appellant Vo was guilty of the charged offenses, and the state failed to provide constitutional pretrial notice of the breadth and object(s) of the alleged conspiracy.

Hajek's letters are hearsay, are not shown to be adoptive admissions, are irrelevant and objectionable under Evidence Code §352 (16 RT 3903); and that the admission of this evidence would invite jurors to speculate since it is unclear who was part of the alleged conspiracy, and what the object of the alleged conspiracy was. (16 RT 3903.)

Furthermore, trial counsel argued that under Penal Code § 1223 and related cases, an alleged conspiracy must be established as a foundational fact before statements are admissible, and that the prosecution was unable to establish that foundation. (16 RT 3905-3906.)[85]

Objections were reiterated before the case went to the jury. (21 RT 5261.) In addition, counsel objected to the conspiracy instructions proffered by the prosecution, arguing in particular that the felony-murder theory was grounded in an alleged conspiracy which was insufficiently proven to take it to the jury. (21 RT 5285-5286.) Moreover, appellant Vo's

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[85] The trial court admitted evidence allegedly related to the conspiracy theory without first determining whether there was foundational evidence of the alleged uncharged conspiracy, or what it might encompass, stating that it would rule on admissibility of some items after seeing how the evidence fit into the conspiracy theory (15 RT 3542), that it would admit co-defendant Hajek's statements subject to a motion to strike (16 RT 3936), and that it would not hold a hearing on admissibility of a witness' testimony outside the presence of the jury because "I really don't like to try a case twice." (16 RT 3907, 3010.)

counsel objected that the instructions as a whole were irreparably confusing due to the multiple theories offered by the prosecution, including conspiracy, aiding and abetting, felony murder. (21 RT 5286-5287.)

Although at one point the prosecutor asserted that his theory was a conspiracy to commit murder (16 RT 3905), he presented it to the jury as a conspiracy to commit burglary, arguing that all it took to find appellant Vo guilty of first degree murder was a finding that he "went into that house with a felonious intent." (21 RT 5370.)[86]

The prosecutor used his vast all-purpose conspiracy theory to present a broad array of evidence (Vo AOB pp. 253-260), which he then used to tar appellant Vo with the bad acts and statements of his co-defendant, urging those as a substitute for evidence that appellant Vo himself premeditated, deliberated, possessed the requisite intent for special circumstance allegations, intended to kill, or did kill.[87] Yet none of that evidence served

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[86] As respondent notes, jury instructions prepared at the close of the guilt phase "specified burglary and murder as the target offenses." (RB 110, citing 7 CT 1858.) The fact that the court settled on target offenses at the end of guilt phase offers little comfort to a defendant wishing to hone the theory of defense and prepare to meet the evidence *before* trial. (See, *Lankford v. Idaho* (1991) 500 U.S. 110.)

[87] Appellant refers to and incorporates herein Arguments 8, 9, 11, and 14 of his AOB, regarding insufficiency of evidence (Arguments V, VI, VII, VIII, and XIX of this brief); Argument 1 of his AOB regarding error in denying severance (Argument II of this brief); Argument 5 of the AOB

(continued...)

to establish the basic foundational facts of [1] agreement, or [2] acts in accordance. It failed to demonstrate even a prima facie case that a conspiracy connected to this crime actually existed.

Without repeating all of the examples in Vo's AOB (pp. 253-260), the alleged conspiracy evidence included prior criminal acts involving Hajek only[88]; statements made by Hajek only, both before[89] and after the crime; and Hajek's threat against a witness. That appellant Vo kept letters which Hajek sent him[90], the prosecution contended, meant that Vo

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[87](...continued)
regarding improper admission of a taped conversation between the co-defendants in which only co-defendant Hajek's voice was audible (Argument XII of this brief); and Argument 7 of the AOB regarding the error in admitting statements of the co-defendant against appellant Vo (Argument XIII of this brief).

[88] During the pendency of the capital case in the trial court, Vo was tried for and acquitted of a robbery, for which Hajek was convicted. (1/17/95 RT 48-50.) Vo's diary entry about Hajek's arrest, which was exculpatory as to Vo, was admitted over Vo's objection to "corroborate" Vo's involvement in the alleged conspiracy. (17 RT 4179.)

[89] A cornerstone of the prosecution's theory that the homicide was pre-planned was co-defendant Hajek's statements to witness Tevya Moriarty the night before. (15 RT 3644.) Ms. Moriarty testified, *inter alia*, that co-defendant Hajek spoke of his plan in the singular. (15 RT 3656.) No evidence was introduced that appellant Vo knew of or joined in Hajek's plan.

[90] Vo testified that he kept the letters from Hajek so he could give them to his lawyer. (20 RT 5049.) Obviously, the right to counsel contemplates a defendant sharing important information with his counsel, as
(continued...)

somehow agreed[91] with Hajek's often bizarre[92] statements.[93] The alleged conspiracy included allegations of torture, revenge, and sadism, all based on Hajek's statements and writings.

An adjunct to the conspiracy theory was the prosecutor's inventive "love triangle" motive, based on the fact that Lori Nguyen had been with co-defendant Hajek when a dispute erupted with Ellen Wang, the victim's granddaughter, and the prosecutor's assertion – denied by both Nguyen (17 RT 4081) and Vo (21 RT 5203) – that Vo was "in love" with Ms. Nguyen.[94]

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[90](...continued)
well as counsel advising the client. An adverse co-defendant's unsolicited statements bearing on the crime and the trial are plainly of interest in preparing the defense.

[91] The prosecution asserted that the fact Vo kept a letter meant that co-defendant Hajek's assertions in the letter were true. (21 RT 5372.) In the context of a case where the co-defendants had adverse defenses, this assertion makes no sense absent some affirmative additional evidence that Vo agreed with these statements of Hajek. There is no such evidence.

[92] For example, Exhibit 76 described Hajek's plan to "get rid of" witness Moriarty (17 RT 4175); Exhibit 78, in which Hajek said "we did this for her," was proffered as evidence of a motive and admitted over objection. (17 RT 4177.) Co-defendant Hajek's counsel presented extensive evidence of his serious mental illness at trial.

[93] As set forth more fully in Argument XII of this brief, and Argument 5 of Vo's AOB, respondent's arguments concerning Hajek's writings are wrong.

[94] Exhibits 94, 95, and 96, letters apparently written by Vo, were admitted in support of the "love" branch of the prosecution conspiracy
(continued...)

B. The prosecution failed to give constitutionally sufficient notice of the nature and scope of the alleged conspiracy, failed to offer sufficient evidence of its existence, and was improperly allowed to place evidence bearing on the alleged conspiracy before the jury without findings that statements were made in furtherance of the alleged objective or that the alleged conspiracy existed.

As set forth more fully in Mr. Vo's AOB at pp. 260-276, the uncharged conspiracy in this case implicates not only state law, but federal constitutional law.

One of the objectives of the criminal justice system is to prevent convictions (much less death sentences) based on mere speculation; that speculation was employed here violates appellant Vo's rights under the Sixth, Eighth, and Fourteenth Amendments. The prosecution bears the burden of proof, and the standard of proof is beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.)[95] Charges must be supported by

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[94](...continued)
theory. (See, e.g., 15 RT 3548-9, 3552-3, 3554.) These letters demonstrate neither the existence of a conspiracy nor appellant Vo's participation in a conspiracy. As to the alleged "love" motive, the prosecutor's speculation as a basis for a capital conviction would violate Eighth Amendment reliability concerns. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

[95] Respondent asserts that an uncharged conspiracy may be used as a "theory of liability" (RB107-108), but fails to address the specific problem here: that this "theory of liability" was not required to be proven to any standard. The broad conspiracy theory was instead used as a substitute for proof of the substantive charges. Jurors were encouraged to infer guilt based on the alleged and unproven conspiracy.

constitutionally sufficient evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307.)[96] Verdicts must be unanimous. (See, *People v. Wheeler* (1978) 22 Cal.3d 258, 265, interpreting Art. 1, § 16 of the California Constitution.) The prosecution here failed to give notice of the charges, failed to clarify the scope and objectives of the alleged conspiracy, and furthermore failed to prove the existence of a conspiracy.

> Conspiracy is a specific intent crime, with the intent divided into two elements: "(a) the intent to agree or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of the offense." (*People v. Horn* (1974) 12 Cal.3d 290, 296 [115 Cal.Rptr. 516, 524 P.2d 1300].)

(*People v. Bachus* (1979) 23 Cal.2d 360, 390.)

> "'Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' [Citations.]"

(*Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153, 158; accord, *People v. Manson* (1976) 61 Cal.App.3d 102, 126 ["[a]ssociation, by itself, does not prove criminal conspiracy"].)[97]

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[96] Respondent argues that there was sufficient evidence of a conspiracy. (RB 109-111.) This argument will be addressed below.

[97] Guilt by association was the only plausible reason the prosecution (continued...)

As trial counsel noted (16 RT 3905-3906), pursuant to Penal Code § 1223, statements in the course of a conspiracy are not inadmissible under the hearsay rule, but only if evidence sufficient to sustain a finding that the statement was made while participating in a conspiracy, and in furtherance of the objective of the conspiracy. Evidence was admitted in this case without the trial court having made such a finding.[98]

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[97](...continued)
pursued the alleged but uncharged conspiracy. As noted above, the overwhelming bulk of the evidence proffered in support of the alleged conspiracy consisted of the words and actions of co-defendant Hajek. The jury was urged to treat Vo's friendship with Hajek and witness Lori Nguyen as proof he was involved in a conspiracy. The fact that Vo kept letters that co-defendant Hajek wrote meant, the prosecutor asserted, that co-defendant Hajek's assertions were true. (21 RT 5372.)

[98] Respondent states that the trial court made an express finding on the existence of the conspiracy. (RB 110, fn. 36, citing 17 RT 4143, 4165; 21 RT 5263.) The timing of any asserted finding underscores appellant Vo's argument that vagueness as to this theory violated his right to due process.

On April 19, 1995 – the day before the prosecution rested at the guilt phase – the parties were discussing admission of marked exhibits, about which testimony had already been given. The trial court stated first that he thought a prima facie case for conspiracy had been shown, but that it was a question of when the conspiracy ended. (17 RT 4143; emphasis added.) In the court's next statement, it said "I guess maybe I kind of jumped ahead by saying we had a conspiracy theory" (17 RT 4143-4144), and again questioned whether the alleged conspiracy lasted after incarceration, when Mr. Hajek wrote various letters. Later, the trial court stated, "Well, I think a conspiracy has been shown." (17 RT 4165.) Not only was this too late for pretrial notice or to serve as a finding about the existence of the alleged conspiracy before evidence was admitted on that theory, but it was too little

(continued...)

Moreover, due process of law requires that a person be given "reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . to examine the witnesses against him, to offer testimony, and to be represented by counsel." (*In re Oliver* (1948) 333 U.S. 257, 273, quoted in *Lankford v. Idaho* (1991) 500 U.S. 110, 126; see also, *Gardner v. Florida* (1977) 430 U.S. 349, 360, n. 23.) No such notice was given in this case.[99]

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[98](...continued)
to place any limits on the scope of the alleged conspiracy.

On May 3, 1995, as the guilt phase drew to a close, the judge stated, ". . . and I think the court has made a finding of conspiracy, but I think somewhere I have read that it is a jury question, whether it was a conspiracy or not. And they may have to decide and how to treat that certain evidence if they find it true or find it not true, even though it's not charged." (21 RT 5263.)

These findings were made *after* the state had introduced a wide array of evidence bearing on the alleged conspiracy.

[99] Respondent argues that using the uncharged conspiracy theory to prove criminal liability does not violate the right to notice, citing *People v. Gallego* (1990) 52 Cal.3d 115, 188. (RB 108.)

Gallego, however, recognizes that in some instances notice may be constitutionally inadequate. (*Gallego*, *supra*, 52 Cal.3d 115, 189, citing *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234.) Vo's trial presented such a situation. Even the general nature of the alleged conspiracy was not clarified until jury instructions were being prepared. The vast array of evidence allegedly supporting an alleged conspiracy was such that no reasonable counsel or defendant could anticipate and prepare without notice in advance of trial.

In this capital case, the Eighth Amendment guarantee of heightened reliability was eviscerated by the use of such vague, post-hoc allegations of conspiracy. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) Respondent does not address the constitutional need for heightened reliability in a capital case.

The beauty of this trial prosecutor's boundless conspiracy theory was – from the point of view of winning at all costs[100] – is that the prosecutor could invent a "conspiracy" out of any unrelated facts that smelled bad, and call it "proof" of capital charges against both defendants. Conveniently, because the conspiracy was not charged, the prosecution was improperly relieved of all the troublesome work of giving notice of its scope, its objective, which acts were alleged to be in furtherance of the alleged conspiracy (as opposed to the independent and the unrelated acts performed

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[100] "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. **It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.**" (*Berger v. United States* (1935) 295 U.S. 78, 88; emphasis added.)

solely by co-defendant Hajek), and also relieved the prosecution of the need to prove those allegations beyond a reasonable doubt, or to a unanimous jury.[101]

1. Respondent's contentions about reliance on an uncharged conspiracy.

Respondent first argues that it was proper for the state to rely on an uncharged conspiracy as a theory of liability. (RB 107-108.)[102] Respondent cites *People v. Belmontes* (1988) 45 Cal.3d 744, 788-789, and *People v. Salcedo* (1994) 30 Cal.App.4th 209, 215-216.[103] *Belmontes* holds that once the existence of a conspiracy in furtherance of the charged crimes is proven, there is no error in instructing the jury on the law of conspiracy.

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[101] Had a conspiracy been charged, the prosecutor would have needed to plead in advance of trial and prove beyond a reasonable doubt that there was an agreement to conspire; the object of the conspiracy; and the acts alleged to be in furtherance of that conspiracy.

[102] Respondent asserts that neither defendant objected to conspiracy instructions on that ground, and thus any objection to the use of an uncharged conspiracy as a theory of liability is waived. (RB 107.) This is a classic straw man argument. Appellants objected repeatedly to the introduction of evidence concerning the alleged uncharged conspiracy theory. See subpart A of this argument, above.

Appellant also refers to and incorporates Argument XXIII of this brief, concerning conspiracy instructions.

[103] *Salcedo* is a non-homicide drug case, in which the conspiracy urged was under a drug statute meant to "extend sentence enhancements to large narcotic traffickers who do not personally handle the narcotics but who are often prosecuted for conspiracy" (*Salcedo*, *supra*, at 217), and thus is not obviously applicable to this capital case.

(*Belmontes*, *supra,* at 790.) In *Belmontes*, this Court explained:

> The evidence here showed that defendant, Vasquez and Bolanos met, specifically intended to agree or conspire, specifically intended to commit the planned burglary, and carried out overt acts in furtherance of the conspiracy -- completing the intended crime. There being evidence supportive of all the elements of a conspiracy, the People were entitled to proceed on that alternative theory of liability. (*People v. Horn* (1974) 12 Cal.3d 290, 296 [115 Cal.Rptr. 516, 524 P.2d 1300].)

(*People v. Belmontes*, *supra*, 45 Cal.3d 744, 789.) There was *no* independent evidence in this case of a specific agreement to commit a planned crime, no of overt acts in furtherance of such an agreement.

Respondent wishes for the holding in *Belmontes* to be the prosecutorial equivalent of a "get out of jail free" card[104]: if the prosecutor's theory is that there is a conspiracy, the prosecution may offer any evidence at all as "proof" of the substantive charges; no notice of a novel theory must be given; the usual burden of proof beyond a reasonable doubt does not apply; and the prosecution need not worry about the 8th Amendment

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[104] "Monopoly" is a popular board game, in which players might end up in jail by chance. A "get out of jail free" card is part of the game, enabling players to escape jail, again by chance (or sometimes by barter, depending on house rules). This analogy is obviously imperfect, but the point is that respondent seeks to have a prosecutor's self-created "conspiracy theory" serve as an escape-hatch from the usual rules about prosecutors needing to prove substantive criminal charges beyond a reasonable doubt.

requirement of particular reliability or heightened due process standards in capital cases.

The prima facie showing of the existence of a conspiracy is, however, not so minimal as respondent suggests. The proponent's burden under Penal Code §1223 is to show that it is more likely than not that the foundational facts exist, i.e., by a preponderance of the evidence. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 62.) This is the burden of proof that governs resolution of civil disputes. That burden was met in the cases cited by respondent, but was not met in this case.

Appellant Vo respectfully urges that this Court should clarify *Belmontes* in the context of the situation presented here – an intolerably vague uncharged conspiracy resting mainly on the co-defendant's words and actions over a broad span in time, with no independent proof that appellant Vo ever agreed to those words or entered a conspiracy, no pretrial notice of the objects or scope of the alleged conspiracy, used as "proof" of substantive charges in lieu of actual proof of those charges – and emphasize to prosecutors and trial courts that it is constitutionally unacceptable to cast aside the most basic legal protections of defendants where the charges are merely labeled differently. This Court must not permit what the law of conspiracy has long forbidden: guilt by suspicion or by association. (*People*

v. Bachus, *supra*, 23 Cal.2d 360, 390; *Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153, 158; *People v. Manson* (1976) 61 Cal.App.3d 102, 126.)

2. Respondent's contentions about sufficiency of evidence.

Respondent's second contention is that there was sufficient evidence of a conspiracy in this case. (RB 109-111.) Respondent points to *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134, for the proposition that the jury may be instructed upon a prima facie showing of a conspiracy by independent evidence, and *People v. Pitts* (1990) 223 Cal.App.3d 606, 891, for the proposition that it is unnecessary to prove that the parties previously met and agreed to perform the unlawful act, or that they had a detailed plan for its execution.

People v. Rodrigues, *supra*, was a case in which an accomplice and another provided the critical testimony that a conspiracy existed. This Court stated:

> We find that accomplice Ontiveros's testimony at trial, standing alone, provided prima facie evidence of a conspiracy. In addition, we find that the existence of a conspiracy was sufficiently established through Zavala's testimony of the events taking place at the apartment.

(*People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1135.) That case involved a plan to rob drug dealers, a plan shown by the testimony of an accomplice as

well as that of a witness at the scene. An obvious difference is that in *this* case, the statements and actions of co-defendant Hajek, which weighed so heavily in the prosecution's conspiracy theory, were never allowed to be tested by confrontation and cross-examination, because co-defendant Hajek never testified.[105]

People v. Pitts, *supra*, was a multi-defendant case involving a child molestation ring, with numerous alleged offenses by the defendants occurring over a period of time with several victims. The major holdings of the case involved rampant prosecutorial misconduct, for which the convictions were reversed. As to the use of a conspiracy theory in that case, the appellate court said:

> Taken in the light most favorable to the judgment below, the evidence shows that all defendants met numerous times for the purpose of molesting children and filming these acts. Johnny, for one, identified all defendants, including Grace, Dill, and Gina, as being present a lot of the times the "nasty things" occurred. **Their agreement can be reasonably inferred from the number of times this went on and the nature of the acts that occurred**, as can their dual purpose and intent.

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[105] Appellant Vo refers to and incorporates Argument 1 of his AOB regarding error in denying severance (Argument II of this brief); Argument 5 of the AOB regarding improper admission of a taped conversation between the co-defendants in which only co-defendant Hajek's voice was audible (Argument XII of this brief); and Argument 7 of the AOB regarding the error in admitting statements of the co-defendant against appellant Vo (Argument XIII of this brief).

(*People v. Pitts*, *supra*, 223 Cal.App.3d 606, 891-892; emphasis added.) No such course of substantial criminal conduct occurred in this case, nor was there evidence of a common homicidal purpose.

Turning to the facts of this case, respondent simply recites, with no record citations, a summary of the prosecution's theory of the case. (RB 109-110.) Respondent then cites *People v. Jurado* (2006) 38 Cal.4th 71, 121, for the proposition that shared motive, presence at the scene, and evidence of post-crime conduct demonstrates sufficient evidence of a conspiracy; and respondent again turns to *People v. Rodrigues, supra,* 8 Cal. 4th 1060, 1135, addressed above. (RB 110.)

Respondent's reliance on *Jurado* is misplaced, as *Jurado* involved a charged conspiracy – unlike the uncharged conspiracy in this case – and this Court stated:

> "Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, **as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy**." (*People v. Russo* [(2001) 25 Cal.4th 1124] at p. 1135.)

(*People v. Jurado*, *supra*, 38 Cal.4th 71, 120-121, emphasis added.) Appellant Vo's jury was not required to find either the existence of a conspiracy or any overt act, much less unanimously or beyond a reasonable

doubt.

Essentially conceding that evidence bearing on the alleged but uncharged conspiracy was admitted in advance of a ruling as required by Penal Code §1223, respondent asserts that appellant Vo could not have been prejudiced "since the trial court correctly found sufficient evidence of the conspiracy" (RB 110-111), referring to respondent's own summary of the prosecution theory (RB 109), which contains no citations to the record. Respondent's argument, which appeals to post-hoc and circular reasoning, contains little specificity since the record is bereft of evidence supporting a conspiracy. This Court should make clear that a prosecutor cannot constitutionally be allowed to introduce a vague, uncharged, unproven "conspiracy" theory as a substitute for evidence that each defendant is guilty of the substantive charges.

C. The Jury Was Given Erroneous Instructions Regarding the Alleged Uncharged Conspiracy.

Appellant Vo adopts Argument XVI of co-defendant Hajek's opening brief concerning erroneous instructions regarding the alleged conspiracy, and incorporates Argument 18 of his own opening brief concerning erroneous instructions on aider and abettor liability. (See, Vo AOB 272-276.)

The instructions regarding the alleged conspiracy failed to specify

the quantum of proof necessary to establish that a conspiracy existed. (8 CT 1981-1990; 16 RT 3906.)[106] Furthermore, the instructions do not address the scope of the alleged conspiracy, or what evidence was admitted in support of it. Conflicting instructions were given: jurors were told that the existence of a conspiracy may be inferred from circumstances showing common intent (8 CT 1984), but that the "independent" act or declaration of an alleged conspirator is not binding on a co-conspirator. (8 CT 1986.)

The information was read immediately after the instructions regarding the alleged conspiracy; but because the conspiracy was not charged, that allegation was not in the information. (8 CT 1991 et seq.) Jurors were not instructed what evidence was offered in support of the alleged conspiracy, nor what evidence was admitted only against one defendant. Jurors were not required to make findings regarding the existence or scope of the alleged conspiracy, unlike the decisions required

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[106] On May 3, 1995, as the guilt phase drew to a close, the judge stated, ". . . and I think the court has made a finding of conspiracy, but I think somewhere I have read that it is a jury question, whether it was a conspiracy or not. And they may have to decide and how to treat that certain evidence if they find it true or find it not true, even though it's not charged." (21 RT 5263.)

The trial court thus contemplated the need for jurors to make findings regarding the alleged conspiracy, but then failed to provide instructions for them to do so.

for the charged crimes.

The failure to instruct jurors that proof beyond a reasonable doubt was required, as was a unanimous verdict, impermissibly lightened the burden of proof on the prosecution, allowing jurors to use the conspiracy evidence in lieu of proof of substantive charges without requiring the prosecution to meet any standard of proof, or the jury to find the existence and scope of the alleged conspiracy unanimously. (See, *Francis v. Franklin* (1985) 471 U.S. 307, 317-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524.) Respondent does not address the impermissible lightening of the prosecution's burden.

Respondent contends that due process was not offended by the failure to require the prosecutor to prove beyond a reasonable doubt, or the jury to find, the existence and scope of the alleged conspiracy, citing *People v. Belmontes* (1988) 45 Cal.3d 744, 789-790, and *People v. Jourdain* (1980) 111 Cal.App.3d 396, 403-404. (RB 108.) Appellant acknowledges this contrary authority, but maintains that *Belmontes* must be distinguished. The evidence in Belmontes demonstrated a specific agreement to commit a planned burglary and overt acts in furtherance, satisfying the requirements of a conspiracy. (*People v. Belmontes*, *supra*, 45 Cal.3d 744, 789.) There was *no* such evidence in this case, neither of a specific agreement to commit

a planned crime, nor overt acts in furtherance of such an agreement.

Co-defendant Hajek expressed an intent to kill to a third party before the offense, but there is no evidence that appellant Vo knew of, much less agreed to, such an idea. Co-defendant Hajek made inculpatory statements before and after the offense, but there is no evidence that appellant Vo embraced those statements. Co-defendant Hajek said and did other things with which Vo was not involved[107], but those too were introduced as part of the grand, non-existent conspiracy theory. Appellant Vo sought and was denied severance[108]; he objected to the use of his co-defendant's statements against him[109], but achieved no protection from the trial court.

The evidence here is that on the morning of the offense, co-defendant Hajek arrived at Vo's apartment and awoke him. Vo testified

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[107] See, Vo AOB, Argument 12 and Argument XV of this brief, regarding the improper admission of irrelevant and prejudicial evidence of co-defendant Hajek's interest in Ozzie Osbourne's music, alleged satanic matters, and other bad acts, incorporated herein.

[108] See, Vo AOB, Argument 1, and Argument II of this brief, regarding severance, incorporated herein.

[109] See, Vo AOB, Argument 4 [admission of evidence of a conversation Hajek had with a witness before the crime], Argument 5 [admission of a taped conversation between the co-defendants, in which only Hajek was audible], and Argument 7 [denial of the right to confront and cross-examine his co-defendant violated by introduction of Hajek's statements], and corresponding Arguments XI, XII, and XIII of this brief, incorporated herein.

that he agreed to accompany Hajek to talk to Ellen Wang and dissuade her from making more crank calls to Hajek; he had a concern that Ellen's friends might confront Hajek. They proceeded to Ellen's school, but she was not there because she was playing hooky with friends. Hajek next drove to Ellen's house, where she was also not present. Hajek and Vo were admitted to the house, with no use of force, to wait for Ellen. Things went bad after that, unquestionably.

But there is still no evidence that Vo conspired with Hajek either to commit a burglary or to commit homicide. The events before and during the co-defendants entry into the home were contrary to the prosecution theory of a conspiracy; an intended talk on school grounds does not in the least reflect a plot to kill anyone. Critically absent is any evidence that appellant Vo ever agreed to an alleged murder and/or burglary conspiracy.

Respondent argues that the trial court's failure to advise the jury what evidence was admitted for what charges or allegations (Vo AOB 259) was waived for lack of objection at trial. (RB 111.) Respondent is wrong. Trial counsel objected broadly to the "instructions as a whole," noting the great potential for confusion given the multiple theories proffered by the prosecution, including conspiracy, aider and abettor, and felony murder theories, which he urged would "cause irreparable confusion on the part of

a jury. . . ." Counsel therefore objected to all instructions on conspiracy, as the ones proposed "are not accurate statements of law and they are not adequately supported in the trial record." (21 RT 5286-5287.) Moreover, counsel urged that the felony-murder theory grounded in an alleged conspiracy was not sufficiently proven to take it to a jury. (21 RT 5285-5286.) If there is any technical imperfection in counsel's objections, this Court should nonetheless address the confusion complained of – that the jury was given no guidance about which evidence was admitted as allegedly supportive of a conspiracy, or how properly to use that evidence – because so adversely affected appellant Vo's right to a fair trial. (See, *People v. Hill* (1998) 17 Cal.4th 800, 843, fn 8; *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection is sufficient if the record shows the trial judge understood the issue presented].)

The prosecutor exploited the lack of legal and factual boundaries to its conspiracy theory, conflating it with the requirements for finding first degree murder. (Vo AOB 259-260.) He urged as proof of the alleged conspiracy – and thus proof of first degree murder – matters such as Hajek's participation in another crime (21 RT 5370-5371) and a letter Hajek wrote after arrest; the prosecutor went so far as to argue that because Vo had the letter in his possession, it was not only proof of a conspiracy,

but proof that co-defendant Hajek's assertions in that letter were true. (21 RT 5372.)[110] This is not independent proof of conspiracy.

Respondent claims that any objection to prosecution misconduct in argument was waived by failure to object. (RB 111.)[111] Respondent is

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[110] If the requirements of proof beyond a reasonable doubt (*In re Winship*, *supra,* 397 U.S. 358) and that there must be substantial evidence (*Jackson v. Virginia*, *supra*, 443 U.S. 307) mean anything, the prosecutor's argument was unacceptably out of bounds. Then again, so was the evidence admitted. Guilt by association is legally and constitutionally unacceptable.

[111] Respondent cites *People v. Gionis* (1995) 9 Cal.4th 1196, 1215, in support of its contention that appellant Vo waived an objection to prosecution misconduct. This Court stated:

> A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' (*People v. Harris* (1989) 47 Cal.3d 1047, 1084 [255 Cal.Rptr. 352, 767 P.2d 619], citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [40 L.Ed.2d 431, 436-437, 94 S.Ct. 1868].)

Appellant is not complaining of "rude" conduct, but that the trial court permitted the alleged uncharged conspiracy – ill-defined, of extreme breadth, and without constitutional protections – to be before the jury, with no constraints on the use of that theory or the information admitted.

The trial prosecutor did what one would expect of a prosecutor bent on winning at all costs: used everything in the arsenal to wrongly attribute to appellant Vo the intent and actions of co-defendant Hajek; Hajek's prior statements and actions; Hajek's subsequent statements and actions; and even matters so obscure as Hajek's taste in music, alleged to reflect satanic beliefs. That was indeed an "egregious" course of conduct, infecting the trial with such unfairness as to deny due process.

(continued...)

incorrect. Appellants had strenuously objected to the admission of evidence in support of the alleged conspiracy; they had stressed that no such evidence could be admitted without the court first finding the existence of a conspiracy; they had objected to the conspiracy instructions. Plainly, any further objection would have been futile.[112] This trial court had already failed to put any significant boundaries on the claimed conspiracy theory. Thus, the trial court, which had the responsibility for ensuring appellant Vo's basic trial rights, and yet refused to do so.

D. It Is Constitutionally Intolerable That Capital Murder Charges and a Death Sentence Rested on an Uncharged, Unnoticed, Unproven, Unsupported, and Endlessly Broad Prosecution *Theory*.

For all the reasons above, appellant Vo is entitled to relief because the trial court permitted the jury to hear and consider unproven allegations of and a broad array of evidence supposedly supporting a conspiracy theory – despite the lack of proof that any conspiracy ever existed – and the trial court then declined to give sufficient guidance to jurors, permitting and

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[111](...continued)
The prosecutor's conspiracy theory and conduct flowing therefrom received the full support of the trial court. It was rather like using a blank check, or playing extra lottery games "won" in earlier rounds.

[112] A claim of error is automatically preserved if an admonition by the trial court would not have cured the prejudice or if an objection would have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.)

encouraging jurors to use that information and those allegations in lieu of proof that appellant Vo intended to kill or did kill, or that he was liable for other charges. Those same errors failed to ensure that the jury adequately considered whether appellant Vo should appropriately be sentenced to death. Reversal is required.

XI. **Admission of evidence regarding a conversation that the co-defendant Hajek had with a witness before the offense was erroneous as to appellant Vo, and inflammatory.**

Appellant Vo moved for severance of his trial from that of co-defendant Hajek[113]. One such motion argued that Hajek's alleged statements to witness Tevya Moriarty about Hajek's plans to take revenge and kill violated the principles of *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123. (Vol. 6, CT 1536.) An additional motion was filed to restrict the testimony of this witness and/or preclude the statements made by co-defendant Hajek on the basis that Moriarty's statements were hearsay as to appellant Vo. (Vol. 6, CT 1580-1582; Vol. 1, RT 229.) The motions were denied. Vo's objection was renewed immediately prior to Moriarty's testimony. (Vol. 15, RT 3636.)

In Argument 4 of his AOB, appellant Vo argued that it was error to permit his jury to consider these extrajudicial statements of his co-defendant, that witness Moriarty's testimony was used to improperly paint appellant Vo as a sadistic killer, and that reversal is required because appellant Vo was deprived of his constitutional right to confront adverse

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[113] Argument 1 of Vo's Appellant's Opening Brief and Argument II of this brief address the error in denying severance, and are incorporated herein by reference.

witnesses. (Vo AOB, pp. 232-237, incorporated herein.)

Respondent offers three main arguments: that Moriarty's statements were not testimonial because they concerned a conversation that happened before the crime occurred; that the statements do not facially implicate Vo and as such the inference is too weak to be considered a violation; and that other evidence of Vo's guilt is overwhelming enough to render any error harmless. (RB, pp. 112-114.) Respondent is incorrect.

The admission of a co-defendant's statements is controlled by *People v. Aranda*, *supra*, 63 Cal.2d 518 and *Bruton v. United States*, *supra*, 391 U.S. 123. Respondent mentions *Bruton* in passing (RB at 112), but does not discuss its applicability. *Aranda* is not mentioned at all.

Bruton v. United States, *supra*, 391 U.S. 123 held that admission of one co-defendant's extrajudicial statement against another violated the second defendant's Sixth Amendment right to cross-examine the witnesses against him, even where the jury received a limiting instruction. The risk is too great that the jury will be unable to disregard the evidence in deciding guilt, despite instructions to do so.

In *People v. Aranda*, *supra*, this Court held that the statement of one co-defendant implicating another cannot be admitted in a joint trial. The trial court has three alternatives: [1] effectively delete any statements that

could be used against the second co-defendant; [2] sever the trials of the defendants; or [3] exclude the statement entirely. (*Id.*, 63 Cal.2d at 530-531.) This Court further held that all direct and indirect identifications in a co-defendant's statement must be removed before it may be admitted into evidence. "By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established." (*Aranda*, at 530.) According to Moriarty's testimony, co-defendant Hajek gave the impression that others would be involved. (Vol. 15, RT 3665-66.) The prosecutor's opening statement stressed that the two defendants planned sadistic torture and to carry out the plan of which co-defendant Hajek spoke. (Vol. 13, RT 3013-3015.) The prosecutor's closing argument stressed that Hajek's plan was a "conspiracy" (Vol. 21, RT 5373), that Hajek's desire for revenge demonstrated "torture" (Vol. 21, RT 5375), and that Hajek's statements to Moriarty demonstrated planning by "two cold-blooded murderers." (Vol. 22, RT 5555.)

Moriarty's testimony about co-defendant Hajek's statement was the only even arguable evidence suggesting that anyone besides Hajek may have had a plan or intended to harm anyone. In no way were the inferences against appellant Vo too vague or weak to matter constitutionally: he was at

the house with co-defendant Hajek, and more importantly, the key inference that appellant Vo conspired to commit murder was the very heart of the prosecution's theory.

Harmless error analysis cannot save this fundamental constitutional error, which stripped appellant Vo of a fair trial. The prosecution cannot now prove beyond a reasonable doubt that the evidence of Hajek's statements to Ms. Moriarty did not contribute to appellant Vo's conviction and the death verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Arizona v. Fulminante* (1991) 499 U.S. 279, 296.) The conviction and death judgment must be reversed.

XII. **The trial court erred in admitting a taped conversation between co-defendant Hajek and appellant Vo, in which appellant's utterances were inaudible and for which no reliable transcript existed.**

The trial court erred in admitting a taped conversation between the co-defendant and appellant Vo after they were arrested, in which appellant Vo's utterances were inaudible and for which no reliable transcript existed; admission of this evidence permitted jurors to draw unreliable conclusions, which are unsupported by evidence, about appellant Vo's culpability. (Vo AOB, Arg. 5, pp. 238-249.)[114] As also addressed in Argument 7 of Vo's AOB and Argument XIII. of this brief, incorporated herein, the tape recording of Vo and Hajek at the police station following their arrest (Exhibit 53) was erroneously admitted as to appellant Vo.[115]

Co-defendant Hajek also raised issues about the admission of this

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[114] Appellant Vo also refers to and incorporates herein other related issues, including but not limited to: Argument 1 of his AOB and Argument II herein (denial of severance); Argument 6 of his AOB and Argument X herein (uncharged conspiracy theory); and Argument 7 of his AOB and Argument XIII herein (*Bruton* violations arising from the statements and writings of his co-defendant).

[115] The tape was played for the jury over appellant's objection; by stipulation, this recording was not transcribed by the court reporter. (12 CT 1722) Detective Walter Robinson testified at trial that the sound quality of the tape is poor (RT 3815), but that portions are identifiable as being spoken by co-defendant Hajek; only Hajek is audible on the tape. (16 RT 3818, 3844.)

tape. (Hajek AOB, Arg. VII, pp. 120-132.)[116]

Respondent addresses the issues surrounding the admission of this audiotape in Argument XII of its brief. (RB 114-125.) Respondent asserts that the trial court did not abuse its discretion in admitting this tape despite its poor quality (RB117-118), that the trial court did not abuse its discretion in denying the motions for new trial (RB 118-122), that the tape was properly admitted as to appellant Vo (RB 122-123), and that the trial court was not required to have the audiotape transcribed (123-124).

A. The Poor Quality of the Tape.

Respondent admits that much of the tape is inaudible; the examples respondent gives of audible portions were all statements of co-defendant Hajek. (RB 117-118.) Respondent chooses not to address the inaudibility of any of appellant Vo's statements, which – contrary to respondent's assertion (RB 118) – did in fact invite speculation and unfairness as to appellant Vo.

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[116] Appellant Vo adopts Argument VIII of Hajek's AOB and ARB to the extent it is applicable to him, pursuant to California rules of Court, Rule 8.2200(a)(a).

B. Error in Admitting the Tape Against Appellant Vo.

Respondent argues that appellant Vo's confrontation clause claim is forfeited for failure to object, inapplicable because his statements to Hajek were not testimonial, insufficiently clear as to which statements on the tape Vo is challenging, and meritless because adoptive admissions do not implicate the confrontation clause. (RB 122-123.)[117]

Respondent's waiver argument fails. Appellant Vo's trial counsel objected, stating "it may well be hearsay to my client and very prejudicial in its effect, particularly if there's going to be an effort by the co-defendant to put in statements that are exculpatory as to him or inculpatory as to my client . . ." (16 RT 3820.) Since that objection had been raised and rejected, further objections would have been futile. Trial counsel had previously made numerous objections to the joint trial, and had specifically argued that severance was required because of *Bruton* and *Aranda* problems[118]: he repeatedly argued that the statements of co-defendant Hajek

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[117] Appellant Vo refers to and incorporates herein other related issues, including but not limited to: Argument 1 of his AOB and Argument II herein (denial of severance); Argument 6 of his AOB and Argument X herein (uncharged conspiracy theory); and Argument 7 of his AOB and Argument XIII herein (*Bruton* violations arising from the statements and writings of his co-defendant).

[118] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

would be used against appellant Vo. (See, e.g., Vol. 6, CT 1536.) [119] Trial counsel explicitly expressed his concerns about the evidence to the trial court, but the judge explicitly noted Vo's counsel's objection and overruled it (1 RT 232). (See, *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection is sufficient if the record shows the trial judge understood the issue presented].) There was no waiver.[120]

The only statements audible on the tape were those of co-defendant

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[119] Numerous cases speak to the futility of additional objections when previous objections on that ground have been denied. (See., e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1189, fn 27 [lack of objection is not a waiver where objection would have been futile]; *People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19 [objecting party does not need to request an admonition when objection was overruled]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692 [lack of objection does not waive error if objection and admonition would not have cured the harm].)

[120] Should there be any question in this Court's minds regarding waiver, appellant's constitutionally protected rights in a death penalty case require a heightened level of scrutiny and care. (See, e.g., *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173 [constitutional claims may be considered when presented for the first time on appeal under certain circumstances, e.g., when enforcement of a penal statute is involved, the asserted error fundamentally affected the validity of the judgment, or important issues of public policy are at stake]; *People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8 [reviewing court may consider claim despite lack of objection when error may have adversely affected defendant's right to a fair trial]. Capital cases require courts to construe any ambiguity in favor of the defendant, because they require a greater attention to reliability and due process. (See, *Kyles v. Whitley* (1995) 514 US 419, 422 [the Supreme Court's duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case].)

Hajek. Appellant Vo's counsel objected to them all; respondent's complaint that it is unclear *which* statements were offensive is a straw man. (RB 122, 125.)

Respondent also argues that appellant Vo's "silence" in response to co-defendant Hajek's statements on this poor-quality, surreptitiously-recorded tape are "adoptive admissions." (RB 122-123, 125.) This is another "heads, I win; tails, you lose" argument.[121]

First, for a statement of another to be considered an adoptive admission, the State must demonstrate not only that the defendant heard the statement, but that under all the circumstances, he naturally would have denied the statement if untrue, and that the defendant could have denied the statement but did not. [122]

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[121] Appellant's counsel are at a loss to think of another instance when so much has been confabulated from inaudible material in a legal exhibit. Respondent urges that this Court find an adoptive admission. The jury went farther, and imagined it heard appellant Vo make admissions that no one else heard – not the investigating officers, not trial counsel, not even the District Attorney. (Vo AOB, Args. 5.C and 30.C.6.) Appellant had no notice and opportunity to be heard about either theory at trial.

[122] See, CALCRIM 357, **Adoptive Admissions**:
If you conclude that someone made a statement outside of court that (accused the defendant of the crime/ [or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true:

1. The statement was made to the defendant or made in (his/ her)
(continued...)

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) The statute contemplates either explicit acceptance of another's statement or acquiescence in its truth by silence or equivocal or evasive conduct. "There are only two requirements for the introduction of adoptive admissions: '(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement.' [Citation.]" (*People v. Silva*, *supra*, 45 Cal.3d at p. 623.) Admissibility of an adoptive admission is appropriate when " 'a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was

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[122](...continued)
presence;
2. The defendant heard and understood the statement;
3. The defendant would, under all the circumstances, naturally have denied the statement if (he/she) thought it was not true;
AND
4. The defendant could have denied it but did not.

If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

[You must not consider this evidence in determining the guilt of (the/any) other defendant[s].]

> relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution ... .' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1189 [96 Cal. Rptr. 2d 1, 998 P.2d 969].)

(*People v. Combs* (2004) 34 Cal.4th 821, 842-843.) Respondent has made no such showing, nor can it. Detective Walter Robinson testified at trial that only co-defendant Hajek is audible on the tape. (Vol. 16, RT 3818, 3844.) There is no evidence whatsoever to indicate that appellant Vo agreed with anything that co-defendant Hajek said, which likely accounts for why respondent cites none.

Furthermore, appellant Vo was in custody and entitled to exercise his right to silence under the Fifth Amendment of the United States Constitution and the corollary provision of our state constitution; the State is not entitled to use any silence against him. (See, e.g., *Griffin v. California* (1965) 380 U.S. 609; *People v. Cockrell* (1965) 63 Cal.2d 659.)

C. Error in Denying Appellant Vo's Motion for New Trial.

Appellant Vo refers to and incorporates herein Argument 30 of his AOB (pp. 444-464), and Argument XL herein, regarding denial of his new trial motion.

Appellant raised numerous grounds why a new trial should be granted. One was the unique situation presented here, where the jury "found" information in evidence that had never been noticed or presented.

Respondent argues that the trial court did not abuse its discretion in denying the new trial motions (RB 118-122), addressing almost exclusively contentions of co-defendant Hajek. As to appellant Vo's contention that the jury hearing something on the tape that nobody else did was tantamount to (comparable to) jury misconduct – in its devastating effect on appellant Vo's ability to defend – respondent argues it was not jury misconduct. (RB 121-122.)

Appellant Vo's claim here is not that the jury committed misconduct in the ways that such misconduct is usually understood; rather, appellant Vo claims that the jury was tainted by alleged information that was not part of the trial. Jury deliberations were affected by something that was absolutely not raised or known during the trial, and therefore was not addressed at all during the trial; the evidence was therefore extraneous and unreliable.

Respondent argues that the jury's belief it heard statements on the audiotape that no one else heard was a factual finding that the jury was entitled to make. (RB 119.) No authority is cited to support the proposition that jurors may find facts that were not introduced at trial and which do not exist.

Respondent then argues that all presumptions must be drawn in favor of the court's ruling and therefore it must be "presumed that the jury could

conclude the challenged statements were in fact made" (RB 120); respondent further argues that appellants have "failed to demonstrate that the remarks heard by the jury were *not* in fact on the tape" (RB 121) citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564. (Emphasis respondent's.)[123] No evidence was presented at trial that appellant Vo made any admissions on the tape; the only evidence was that any statements he made were inaudible. Appellant Vo did all he could – and all he reasonably could be expected to do at the trial level – to demonstrate the absence of evidence that he made those alleged remarks.

Respondent's position seeks to insulate the egregious unreliability of appellant Vo's death sentence by ignoring that Vo had no notice or opportunity to defend against any alleged admissions on the audiotape; respondent also ignores the particular reliability that is constitutionally required in capital cases. In respondent's view, it does not matter if "the reported statements had not in fact been recorded on the tape, because some portions of the tape were "clearly audible and relevant." (RB 120.) No law is cited in support of that proposition, which also ignores appellant Vo's complaint that Hajek's statements, the only audible portions, should not

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[123] *Denham* is a case in which a defendant sought a writ of mandate to compel dismissal of charges for failure to prosecute.

have been admitted against him at either phase of this capital trial.[124]

Addressing the trial court's role in ruling on the motion for new trial, respondent asserts that the court's duty was to "weigh the evidence independently, not to determine whether the jury weighed it correctly, citing *People v. Robarge* (1953) 41 Cal.2d 628, 633. First, respondent endeavors to conflate the duties of the trial court on a motion for new trial based on insufficiency of the evidence as a whole, and the court's responsibility when a circumstance arises that taints the jury's consideration.

Counsel for both defendants urged the trial court to listen to the tape on the recorder used by the jurors, and make a finding as to the existence of the alleged statements that jurors claimed to have heard. (See, Vo AOB, pp. 243-244, citing *People v. Hedgecock* (1990) 51 Cal.3d 395, 414.) It appears from the record that the trial court did not do so, but instead denied the motion for new trial without specifying the reasons, and without

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[124] During guilt phase deliberations, the jury requested a transcript of the tape recording. (7 CT 1823.) The trial court responded that a transcript was not available. (7CT 1824.) The content of the tape was therefore clearly an issue during guilt phase deliberations.

Jurors might reasonably have concluded during guilt phase deliberations that they need not resolve all questions about the contents of the tape, because under the prosecution's expansive yet uncharged conspiracy theory, it did not matter who did or said what. Appellant Vo refers to and incorporates herein Argument 6 of his AOB and Argument X herein, regarding the uncharged conspiracy theory.

listening to the tape using the same equipment or making a finding. (10/21/95 RT 30.) Thus, contrary to respondent's suggestion, the trial court did not perform its independent duty to ensure a fair trial, on reliable evidence.

The presumption urged by respondent – that the trial court understood and fulfilled its duties (RB 121, citing *People v. Diaz* (1992) 3 Cal.4th 495, 567, Evid. Code § 664, and *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564) – has been rebutted by the record in this case. The burden is on the state to demonstrate harmlessness beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18), and it cannot meet that burden.

Finally, respondent argues that appellant Vo raises juror misconduct "for the first time on appeal," and therefore "forfeits" his claim on appeal. (RB 121.) Appellant Vo points to the facts set forth at pp. 238-244 of his AOB. Appellant's counsel argued at the hearing on the new trial motion, *inter alia*, that the verdict based on alleged statements that do not exist violated appellant Vo's "right to reliable, competent, trustworthy evidentiary basis for both the guilt and penalty phases. (10/12/95 RT 10-11, cited at Vo AOB pp. 241-242.) Co-defendant Hajek's counsel attacked the reliability of the evidence, emphasizing the particular need for reliability in

capital cases under the 8th Amendment, and urged a violation of due process of law; counsel also clarified that they were not accusing jurors of misconduct, but observing that there is a problem with the reliability of the evidence. (10/12/95 RT 14-15.) The basis for appellant Vo's contentions on appeal were adequately preserved at trial.

D. Error in Not Requiring Transcription of the Audiotape for the Appellate Record.

The trial court had a responsibility to ensure a full and accurate transcript of proceedings for this appeal. (Vo AOB, Arg. 5.B., pp. 246-248.)[125] It failed to do so, by allowing this audiotape to be played for the jury without requiring the court reporter to transcribe it.

Respondent contends that the burden is on appellant Vo to demonstrate that proceedings are rendered unreliable for appellate review; respondent argues that the outcome would not have been different in the absence of counsel's stipulation that the tape need not be transcribed, and that "the jurors would not be bound by the transcript but by what they heard." (RB 123-124.) Respondent does not address any of the

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[125] Appellant refers to and incorporates herein Argument 21 of his AOB, and Argument XXXIV herein, regarding the trial court's failure to ensure a full reporting and a complete record on appeal.

constitutional arguments raised in the AOB.[126]

The core problem is that jurors thought they "heard" something that nobody else ever heard, according to the trial record – including the police officers who testified, and defense counsel. Appellant Vo had no notice, and obviously could not defend against the startling post-trial discovery that the jurors thought they had heard explosive admissions from his own mouth. A transcript would simply have corroborated that these supposed statements of appellant Vo were not audible – that the jury "hearing" them was on the order of jurors doing their own investigation or research, because they relied on "evidence" never introduced during the trial.

Respondent cites *People v. Harris* (2008) 43 Cal.4th 1269, 1283, for the proposition that it is "Vo's burden to establish that the complained-of omissions resulted in a record so deficient as to make the appellate process unreliable," contending Vo cannot meet this standard because the actual

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[126] On many issues there is a conspicuous absence of discussion in Respondent's Brief of Mr. Vo's federal constitutional claims. In these instances, the reasonable and appropriate inference is that "respondent has abandoned any attempt to support the judgment [against this particular attack], and that the ground urged by appellant for reversing the judgment is meritorious." (*Berry v. Ryan* (1950) 97 Cal.App.2d 492, 493, cited with approval in *Smith v. Williams* (1961) 55 Cal.2d 617, 621; but cf., *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

tape is available. (RB 123.)[127] First, *Harris* confirmed the importance of a complete record for appellate review. Second, the situation in *Harris* was vastly different: this Court found it speculative that the loss of some post-trial letters to jurors had an impact on the appeal. Third, it is abundantly clear from the record in this case that jurors thought they heard something of overwhelming importance; *Harris* confirms that the significance of missing material must be analyzed with respect to information in the record otherwise.

Respondent does not address appellant's constitutional authority concerning the importance of a complete record to meaningful appellate review.

Finally, respondent argues that there is no reasonable probability that the outcome would have been different if the disputed tape had been transcribed, as jurors were bound by the tape itself and not any transcript.

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[127] By inference, respondent expects this Court to do what the trial court would not do: listen to the tape to determine the existence of statements that no one besides jurors heard.

Alternatively and perhaps more likely, respondent expects this Court to find a way to ignore the fact that jurors spent a significant amount of their deliberations considering alleged information of which no one else was aware, despite the obvious gravity of their decisions on guilt, special circumstances, and penalty, and despite the constitutional constraints on unreliable judgments.

(RB 123-124, citing *People v. Cook* (2006) 39 Cal.4th 566, 577, fn. 2; *People v. Sims* (1993) 5 Cal.4th 405, 448; *People v. Polk* (1996) 47 Cal.App.4th 944, 952.)

While *Polk* supports the contention that a tape, not its transcript[128], is the evidence upon which jurors must rely, it also held that admission of a partially unintelligible tape is acceptable so long as it does not invite speculation:

> "To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness." (*People v. Demery* (1980) 104 Cal.App.3d 548, 559 . . ..

The recording in this case may not have been misleading or invited speculation as to the statements of co-defendant Hajek which were intelligible, but there is no question that the unintelligibility of any statements of appellant Vo – which was established by testimony – caused

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[128] *Cook* and *Sims* similarly confirm that jurors should rely on audiotapes rather than transcripts supplied by a party. None of these cases addresses the issue raised here, that the trial court was required to have full transcripts prepared for appellate review. A transcript prepared by the prosecution in this case was excluded because it was ruled misleading and inaccurate. (7 CT 1688.)

They also do not address a situation where jurors request for transcripts to be read back, to aid them in their deliberations. During guilt phase deliberations, the jury requested a transcript of the tape recording. (7 CT 1823.) The trial court responded that a transcript was not available. (7CT 1824.)

these jurors to speculate in a way that no party could foresee.

This Court is not present during the trial itself. That is the reason for the rule (and related constitutional rulings) that all proceedings and testimony must be transcribed. Under the bizarre circumstances of this case, and their obvious impact on appellant Vo – both at guilt phase, when the jury heard his co-defendant's admissions and asked for a transcript to aid their deliberations, and at penalty phase, when the jury thought it "heard" appellant Vo himself confessing – the importance of the state and constitutional law requiring all proceedings to be transcribed is starkly evident. It was the trial court's responsibility to ensure a verdict on reliable evidence as well as transcription of the entire trial, and the trial court failed to do so.

E. Reversal is Required.

There was no evidence at the trial that appellant Vo said anything audible on this audiotape – inculpatory, exculpatory, or otherwise. His co-defendant Hajek, on the other hand, made statements that should never have been admitted against appellant Vo without permitting confrontation and cross-examination of their source. Shockingly, jurors thought during penalty deliberations that they heard admissions from appellant Vo – who, according to all the evidence, made no audible statements at all.

Particularly in a capital case where heightened reliability standards apply, such a tainted proceeding violates fundamental fairness. Reversal is required.

XIII. **Appellant Vo's right to confront and cross-examine was abridged by the introduction of co-defendant Hajek's statements and writings.**

As a consequence of the trial court's refusal to sever appellant Vo's trial from that of his co-defendant Hajek, and of the trial court's erroneous rulings on the admission of evidence, Vo's jury heard and considered statements and writings of the co-defendant, and Vo was deprived of the opportunity to confront and cross-examine the co-defendant about them. (Vo AOB, Arg. 7, pp. 276-285.) [129]

Respondent argues that appellant Vo's rights were not violated. (RB, Arg. XIII, pp. 124-129.)

Respondent first complains that particular items also addressed in stand-alone arguments on appeal are "redundant." (RB at 124, referring to Hajek's telephone call to Tevya Moriarty; RB at 124-125, referring to the recording of co-defendant Hajek and appellant Vo [wherein no statements of Mr. Vo were audible]; RB at 125, referring to Hajek's denial of the homicide to his testifying expert at penalty phase.)

While these instances are striking examples of how co-defendant Hajek's words were used against appellant Vo without providing Vo the

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[129] As in his AOB, appellant Vo refers to and incorporates by reference the related arguments in his Opening Brief (Vo AOB, Args. 1, 4, 6) and this Brief (Vo ARB, Args. II, XI, and X).

opportunity to confront and cross-examine him – each example entitling Vo to relief – they did not occur individually and in isolation, nor were they the only examples of Hajek's words being used against appellant Vo. This was a joint trial riddled with Hajek's statements and writings, and those matters all would have been inadmissible in a separate trial of appellant Vo.

Moriarty: As explained more fully in Argment 4 of Vo's AOB and Argument XI of this brief, incorporated herein, co-defendant Hajek's statements to witness Moriarty – from which she inferred the involvement of other people – were the lynchpin of the prosecutor's theory that appellant Vo was part of a pre-planned conspiracy to torture and kill. Given the prosecution's use of that evidence, respondent's argument that the admission was "harmless" is contradicted by the record. (RB 124.)

Jailhouse tape: As also addressed in Argument 5 of Vo's AOB and Argument XII.D. of this brief, incorporated herein, the tape recording of Vo and Hajek at the police station following their arrest (Exhibit 53) was erroneously admitted as to appellant Vo.[130] Respondent argues that

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[130] The tape was played for the jury over appellant's objection; by stipulation, this recording was not transcribed by the court reporter. (12 CT 1722) Detective Walter Robinson testified at trial that the sound quality of the tape is poor (RT 3815), but that portions are identifiable as being spoken by co-defendant Hajek; only Hajek is audible on the tape. (16 RT 3818, 3844.)

appellant Vo's confrontation clause claim is forfeited for failure to object, inapplicable because his statements to Hajek were not testimonial, insufficiently clear as to which statements on the tape Vo is challenging, and meritless because adoptive admissions do not implicate the confrontation clause. (RB 124-125.)

Respondent's waiver argument fails. Appellant Vo's trial counsel objected, stating "it may well be hearsay to my client and very prejudicial in its effect, particularly if there's going to be an effort by the co-defendant to put in statements that are exculpatory as to him or inculpatory as to my client..." (16 RT 3820.) Since that objection had been raised and rejected, further objections would have been futile. Trial counsel had previously made numerous objections to the joint trial, and had specifically argued that severance was required because of *Bruton* and *Aranda* problems[131]: he repeatedly argued that the statements of co-defendant Hajek would be used against appellant Vo. (See, e.g., Vol. 6, CT 1536.) [132] Trial counsel

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[131] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

[132] Numerous cases speak to the futility of additional objections when previous objections on that ground have been denied. (See., e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1189, fn 27 [lack of objection is not a waiver where objection would have been futile]; *People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19 [objecting party does not need to request an admonition when objection was overruled]; *People v. Pitts* (1990) 223

(continued...)

explicitly expressed his concerns with the evidence to the trial court, and the judge explicitly noted Vo's counsel's objection and overruled it (1 RT 232). (See, *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection is sufficient if the record shows the trial judge understood the issue presented].) There was no waiver.[133]

The only statements audible on the tape were those of co-defendant Hajek. Appellant Vo's counsel objected to them all; respondent's complaint that it is unclear *which* statements were offensive is a straw man. (RB 122, 125.)

Respondent also argues that appellant Vo's "silence" in response to

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[132](...continued)
Cal.App.3d 606, 692 [lack of objection does not waive error if objection and admonition would not have cured the harm].)

[133] Should there be any question in this Court's minds regarding waiver, appellant's constitutionally protected rights in a death penalty case require a heightened level of scrutiny and care. (See, e.g., *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173 [constitutional claims may be considered when presented for the first time on appeal under certain circumstances, e.g., when enforcement of a penal statute is involved, the asserted error fundamentally affected the validity of the judgment, or important issues of public policy are at stake]; *People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8 [reviewing court may consider claim despite lack of objection when error may have adversely affected defendant's right to a fair trial]. Capital cases require courts to construe any ambiguity in favor of the defendant, because they require a greater attention to reliability and due process. (See, *Kyles v. Whitley* (1995) 514 US 419, 422 [the Supreme Court's duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case].)

co-defendant Hajek's statements on this poor-quality, surreptitiously-recorded tape are "adoptive admissions." (RB 122-123, 125.) This is another "heads, I win; tails, you lose" argument.[134]

First, for a statement of another to be considered an adoptive admission, the State must demonstrate not only that the defendant heard the statement, but that under all the circumstances, he naturally would have denied the statement if untrue, and that the defendant could have denied the statement but did not. [135]

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[134] Appellant's counsel are at a loss to think of another instance when so much has been confabulated from inaudible material in a legal exhibit. Respondent urges that this Court find an adoptive admission. The jury went farther, and imagined it heard appellant Vo make admissions that no one else heard – not the investigating officers, not trial counsel, not even the District Attorney. (Vo AOB, Args. 5.C and 30.C.6.) Appellant had no notice and opportunity to be heard about either theory at trial.

[135] See, CALCRIM 357, **Adoptive Admissions**:
If you conclude that someone made a statement outside of court that (accused the defendant of the crime/ [or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true:

1. The statement was made to the defendant or made in (his/ her) presence;
2. The defendant heard and understood the statement;
3. The defendant would, under all the circumstances, naturally have denied the statement if (he/she) thought it was not true;
AND
4. The defendant could have denied it but did not.

If you decide that all of these requirements have been met, you may
(continued...)

> "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) The statute contemplates either explicit acceptance of another's statement or acquiescence in its truth by silence or equivocal or evasive conduct. "There are only two requirements for the introduction of adoptive admissions: '(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement.' [Citation.]" (*People v. Silva*, *supra*, 45 Cal.3d at p. 623.) Admissibility of an adoptive admission is appropriate when " 'a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution ... .' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1189 [96 Cal. Rptr. 2d 1, 998 P.2d 969].)

(*People v. Combs* (2004) 34 Cal.4th 821, 842-843.) Respondent has made no such showing, nor can it. Detective Walter Robinson testified at trial that only co-defendant Hajek is audible on the tape. (Vol. 16, RT 3818, 3844.) There is no evidence whatsoever to indicate that appellant Vo

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[135](...continued)
conclude that the defendant admitted the statement was true.

If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

[You must not consider this evidence in determining the guilt of (the/any) other defendant[s].]

agreed with anything that co-defendant Hajek said, which likely accounts for why respondent cites none.

Furthermore, appellant Vo was in custody and entitled to exercise his right to silence under the Fifth Amendment of the United States Constitution and the corollary provision of our state constitution; the State is not entitled to use any silence against him. (See, e.g., *Griffin v. California* (1965) 380 U.S. 609; *People v. Cockrell* (1965) 63 Cal.2d 659.)

Testimony of co-defendant Hajek's expert that Hajek denied the killing: Hajek's mental health expert, Dr. Minagawa, testified at the penalty phase that Hajek had admitted going to the Wang house to get back at Ellen Wang, but he denied killing Su Hung. (23 RT 5892.) This testimony was tantamount to Hajek accusing Vo of being the killer – no other possibility was left, under these facts – violating Vo's right to confrontation in the most prejudicial manner imaginable, just as his jury was to decide his fate. (AOB 279-281, 157-159.) This hearsay evidence could *never* have been admitted in the separate trial to which appellant Vo was entitled.

Respondent argues that Hajek's statement to Dr. Minagawa was not testimonial, not admitted for the truth of the matter, and did not facially incriminate Vo; respondent further argues that the issue is waived. (RB 125.)

Respondent's waiver argument is easily refuted.[136] It argues the issue was forfeited because appellant Vo did not move to strike the testimony when it was given. (RB 125.) Appellant's counsel moved for severance pretrial and later, arguing that the co-defendants' defenses were irreconcilably adverse; those motions were denied. (See, Vo AOB, Arg. 1, pp. 123-159, and Arg. II of this brief.) When Dr. Minagawa testified to co-defendant Hajek's denial of the killing (23 RT 5892), appellant's trial counsel immediately objected and asked to be heard outside the jury's presence; the trial court declined, and instructed the jury that the evidence was only received as to Hajek. (23 RT 5893.) Outside the presence of the jury, trial counsel then moved for a mistrial (23 RT 5909); expressed that the admonition of the trial court would be insufficient to protect Mr. Vo from the prejudicial effect of this testimony (23 RT 5908, 5909-10); reiterated his arguments about extrajudicial statements of co-defendant

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[136] Numerous cases speak to the futility of additional objections when previous objections on that ground have been denied. (See., e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1189, fn 27 [lack of objection is not a waiver where objection would have been futile]; *People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19 [objecting party does not need to request an admonition when objection was overruled]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692 [lack of objection does not waive error if objection and admonition would not have cured the harm].)

Hajek based on the *Aranda* and *Bruton* cases[137] (23 RT 5909-5910); and argued that under those cases, the admonition was insufficient. (*Ibid.*; see also 23 RT 5908-5913.)[138]

Bruton v. United States, *supra*, 391 U.S. 123 is dispositive authority, and not mentioned by respondent in this argument.

> We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

(*Id.*, at 391 U. S. 126; emphasis added.)

Respondent claims that the statement was not hearsay because it was not admitted for the truth of the matter. (RB 125.) In its Argument II, respondent elaborates: that the statement was admitted "to show the basis for the psychiatrist's opinion. (See CALJIC No. 2.10; 8 CT 2060.)" (RB

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[137] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

[138] Respondent's footnote 43 contends, "This after-the-fact motion [for mistrial] was no substitute for a timely objection." (RB 125.) One must wonder how much respondent believes trial counsel must do to preserve an issue, if similar matters been raised before repeatedly, and the trial court declines to interrupt witness testimony to hear the matter at that time.

If disruption of the trial and risking contempt of court are required, as the Attorney General seems to suggest, this Court should state that clearly, since current authority does not support that view.

51.) This rationale is certainly true as to co-defendant Hajek, who was entitled to present the strongest case in mitigation that he could at the penalty phase.[139] However, it was not only irrelevant and inadmissible, but extraordinarily prejudicial as to appellant Vo, who was entitled to have his jury decide the appropriate sentence for him individually. (See, e.g., *Woodson v. North Carolina* (1975) 428 U.S. 280, 304[140]; *Zant v. Stephens* (1983) 462 U.S. 862, 879[141]; *Johnson v. Mississippi* (1988) 486 U.S. 578,

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[139] "It is beyond dispute that, in a capital case

> "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'"

Eddings v. Oklahoma, 455 U. S. 104, 455 U. S. 110 (1982), quoting *Lockett v. Ohio*, 438 U. S. 586, 438 U. S. 604 (1978) (plurality opinion) (emphasis in original). See *Skipper v. South Carolina*, 476 U. S. 1, 476 U. S. 4 (1986)." (*Mills v. Maryland* (1988) 486 U.S. 367, 374.)

[140] "[W]e believe that, in capital cases, the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. at 356 U. S. 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304.)

[141] "What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. See *Eddings v. Oklahoma*, 455 U. S. 104, 455 U. S. 110-112 (1982); *Lockett v. Ohio*, 438 U. S. 586, 438 U. S. 601-605 (1978) (plurality opinion); *Roberts (Harry) v. Louisiana*, 431 U. S. 633, 431

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584-85[142].) This was improper aggravating evidence[143], not admissible

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[141](...continued)
U. S. 636-637 (1977); *Gregg*, 428 U.S. at 428 U.S. 197 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Proffitt v. Florida*, 428 U.S. at 428 U. S. 251-252 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Woodson v. North Carolina,* 428 U. S. 280, 428 U. S. 303-304 (1976) (plurality opinion)." (*Zant v. Stephens*, *supra*, 462 U.S. 862, 879.)

[142] "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment'" in any capital case. See *Gardner v. Florida*, 430 U. S. 349, 430 U. S. 363-364 (1977) (quoting *Woodson v. North Carolina*, 428 U. S. 280, 428 U. S. 305 (1976)) (WHITE, J., concurring in judgment). Although we have acknowledged that there can be `no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U. S. 862, 462 U. S. 884-885, 462 U. S. 887, n. 24 (1983). The question in this case is whether allowing petitioner's death sentence to stand, although based in part on a reversed conviction, violates this principle." (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584-85.)

The unsworn disavowal of the homicide by co-defendant Hajek, under circumstances where he could not be cross-examined, was every bit as arbitrary and constitutionally unreliable an aggravating sentencing consideration as the invalid prior conviction addressed in *Johnson v. Mississippi.*

[143] This accusation would have been considered by jurors to be "circumstances of the crime," Factor A of the factors to be considered in determination of sentence under California Penal Code § 190.3. A capital defendant is required to be given notice of the aggravating circumstances under the statute. Due process requires discovery of materials to be used by the prosecution against a defendant. (*Brady v. Maryland (*1963) 373 U.S. 83; *Kyles v. Whitley*, *supra*, 514 US 419, 432 [*Brady* is applicable to the penalty phase as well as guilt].)

against appellant Vo[144], of the most devastating sort – an accusation he was the killer, from the only other person who would know.

As to appellant Vo, the statement was hearsay: an out of court statement offered for the truth. (Evidence Code § 1200.) Co-defendant Hajek's defense counsel stated that the purpose of Dr. Minagawa's testimony in this regard was to implicate appellant Vo, in order to mitigate the culpability of her client.

> "I'm putting everyone on notice I'm planning to get into that and clear implications of that is Mr. Vo did that. And I should be entitled to because otherwise – Because the issue of lingering doubt on who the actual killer is, is going to be very pertinent to the penalty phase in this case, mitigator."

(23 RT 5912.) Respondent also argues that co-defendant Hajek's statement to Dr. Minagawa was not "facially incriminatory." (RB 125, 51.) That contention lacks luster under the facts of this case, including the fact that co-defendant Hajek's counsel explicitly said she meant to accuse appellant Vo of the killing.

Pressing forward, respondent cites *Richardson v. Marsh* (1987) 481 U.S. 200, for the proposition that there is no violation of *Bruton* when the confession is redacted to eliminate a co-defendant's name. *Richardson* is

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[144] If respondent has any theory under which this evidence could be admitted in a separate trial of appellant Vo, it has not seen fit to explain that theory.

inapposite for several reasons. Most glaringly, it was not a capital case and did not deal with the problem of appellant Vo's rights at the penalty phase of trial, when a co-defendant introduces extra-judicial evidence to mitigate his own sentence.[145]

This was not a police interrogation; it was not noticed by the prosecution as evidence in aggravation; there is no indication in the record that the full contents of the interview were disclosed in discovery. The *Richardson* court's discussion of redaction of names being a sufficient guard against an unfair trial of guilt quite frankly has nothing to do with these circumstances, where guilt has been found and the jury is to deliberate the appropriate penalty for two distinct defendants. Unlike statements redacted and introduced at the guilt phase of a trial, appellant Vo's counsel had no discovery, and no reasonable notice or opportunity to litigate the contents of this interview – one piece of which was offered by the co-defendant to aid his own case only – much less to confront and cross-examine the source of the information.

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[145] Respondent offers no analysis of appellant Vo's particular rights at the penalty phase vis-a-vis those of the co-defendant, but simply asserts a one-purpose-fits-all excuse for allowing Dr. Minagawa's testimony about Hajek's denial of committing homicide. Indeed, respondent does not address any Eighth Amendment concerns at all in this argument. Appellant's contention that his right to be free from cruel and unusual punishment was violated should be deemed conceded.

In *Lankford v. Idaho* (1991) 500 U.S. 110, the United States Supreme Court addressed the critical role of due process – specifically, fair notice and the opportunity to be heard – in capital sentencing proceedings. Justice Stevens, quoting Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U. S. 123, wrote:

> "Man, being what he is, cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." *Id.* at 341 U. S. 171-172 (footnote omitted).

(*Lankford v. Idaho*, *supra*, 500 U.S. 110, 121-122.) Turning to the proper functioning of the adversarial system, Justice Stevens explained:

> Without such notice, the Court is denied the benefit of the adversary process. As we wrote in *Strickland v. Washington*, 466 U. S. 668 (1984):
>
> "A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision."

> *Id.* at 466 U. S. 686-687. Earlier, in *Gardner [v. Florida]*, we had described the critical role that the adversary process plays in our system of justice:
>
> "Our belief that debate between adversaries is often essential to the truthseeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."
>
> 430 U.S. at 430 U. S. 360. [Fn. omitted.] If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error, see, e.g., *United States v. Cardenas*, 917 F.2d 683, 688-689 (CA2 1990), and with that, the possibility of an incorrect result. See, e.g., *Herring v. New York*, 422 U. S. 853, 422 U. S. 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free"). Petitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned in this case.

(*Lankford v. Idaho*, *supra*, 500 U.S. 110, 127.)[146] Furthermore, here as in *Lankford*, the Eighth Amendment's concern that "death is different" and requires heightened reliability (See, *Gardner v. Florida* (1977) 430 U.S.

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[146] Appellant Vo was on notice that the prosecution sought death in this case; however, he was not on full and fair notice (with discovery) that the co-defendant would accuse him of committing the homicide. Moreover, appellant Vo had no means to contest that accusation in a joint trial. He had already moved repeatedly for severance because of just such a danger. His proper motion for mistrial following the admission of this evidence was denied.

349) compels this Court to abhor a procedure that so egregiously sacrificed appellant Vo's right to a reliable and individualized determination of his guilt and appropriate sentence.

Co-defendant Hajek's trial counsel had no obligation to provide discovery of its mitigation case to appellant Vo, nor did it have the obligation to provide any evidence it developed which was exculpatory as to Vo.[147] The settled law about the prosecution's obligation to disclose does not exist to provide a windfall to the prosecution in the event that a non-severed co-defendant seeks to advance his case at the penalty phase of a capital trial; it instead *exists to protect individual defendants*.

Letters of co-defendant Hajek

Respondent concedes that Exhibits 65, 72, 73, and 78, letters written by co-defendant Hajek, were admitted against appellant Vo despite his objections that they violated *Bruton* and *Aranda*. (RB 126.) Respondent, however, argues that the confrontation clause applies only to testimonial evidence, that "the challenged letters to not facially and powerfully incriminate Vo" (RB 127), that the letters are "cumulative" to the extent

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[147] *Brady v. Maryland*, *supra*, 373 U.S. 83, 87 and state law (Cal. Penal Code §1054.1) require prosecutors to disclose relevant evidence, including evidence favorable to the accused. These provisions apply to the penalty phase of a capital trial. (See, *Kyles v. Whitley*, *supra*, 514 US 419, 432.)

they admit the existence of a plan[148] (RB 128), and that any error was harmless.

These letters were written by co-defendant Hajek and reflect his personal views of matters. Appellant Vo had no opportunity to confront and cross-examine him. The letters were devastating pieces of evidence in light of the prosecution theory that there was a conspiracy to commit murder – a conspiracy which appellant Vo denies. The prosecution's conspiracy theory relies on the words of co-defendant Hajek, including those in these letters.

> Exhibit 65 suggests an agreement was reached before entering the Wang household.
>
> The prosecutor argued that Exhibit 72 corroborated Hajek's statement to Tevya Moriarty about a plan to kill. (17 RT 4168.)
>
> Exhibit 73 suggests Vo's complicity in attempted murder, and the opinion that "we are doomed" at the trial. (See, RB 128.)
>
> Exhibit 78 suggests that Vo attempted to enlist the help of a third party, before the offenses.

As set forth more fully in Argument 6 of appellant Vo's AOB and

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[148] The only other evidence of a "plan" consisted of co-defendant Hajek's statements to witness Moriarty the night before the offenses. There is no evidence at all that appellant Vo knew of those statements or that plan. The fact that there were multiple errors in the admission of co-defendant Hajek's words against appellant Vo does not somehow cure the individual errors.

Argument X of this brief, the prosecution's broad conspiracy theory not only permitted but encouraged the jury to find guilt (and impose a sentence of death) as to appellant Vo, based on evidence properly admissible only against co-defendant Hajek. Respondent's contention that these letters "do not facially and powerfully incriminate Vo" (RB 127-128) ignores the context of the prosecutor's case against appellant Vo, and the extent to which the case relied on tying him to co-defendant Hajek's words and actions.

Although briefly mentioning *Bruton v. United States*, *supra,* 391 U.S. 123,[149] respondent does not discuss that controlling case, but instead argues that co-defendant Hajek's statements were not "testimonial," and therefore "Vo had no federal constitutional right to confront or cross-examine Hajek regarding the statements. [fn. omitted.]" (RB 127.)[150] Respondent's misreading of *Crawford v. Washington* (2004) 541 U.S.36

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[149] Respondent summarizes the holding of *Bruton* as follows: " defendant's confrontation rights are violated when the facially and powerfully incriminating confession or admission of a non-testifying co-defendant is introduced at their joint trial." (RB 127.) The language "facially and powerfully incriminating" does not appear in the *Bruton* opinion, but is instead the interpretation preferred by respondent.

[150] Respondent's assertion that Hajek's statements in the letters were not "testimonial" is certainly subject to dispute. Hajek apparently wrote those letters as he prepared for trial, and he discussed factual matters related to the case.

and its progeny is preposterous, and would thoroughly eviscerate the *Bruton* rule. Respondent points to no authority overruling *Bruton*.

While these letters may have been properly admitted against co-defendant Hajek as admissions of a party (Evidence Code § 1220), respondent ignores the fact that there was no exception to the hearsay rule (Evidence Code § 1200) making co-defendant Hajek's letters admissible against appellant Vo. They cannot be considered adoptive admissions under Evidence Code, § 1221; there is no evidence that appellant Vo agreed with or adopted these statements. [151] There is certainly no indicia of reliability so as to qualify for any other exception, and indeed, respondent offers not so much as a theory.

In summary, *Bruton v. United States*, *supra*, 391 U.S. 123 is dispositive authority, holding that even with limiting instructions – which were not given as to these letters, since they were admitted against both defendants – the Confrontation Clause is violated by the introduction in a joint trial of a co-defendant's admissions or confession. (*Id.*, at 391 U. S. 126.)

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[151] See also, *People v. Silva*, *supra*, 45 Cal.3d at p. 623; *People v. Riel* (2000) 22 Cal.4th 1153, 1189; *People v. Combs* (2004) 34 Cal.4th 821, 842-843.

Conclusion

In this joint trial, appellant Vo's right to confront and cross-examine was violated on multiple occasions by the admission of statements of his co-defendant Hajek. These included the co-defendant's statements to witness Moriarty indicating a plan to kill, the co-defendant's statements in a jailhouse recording made shortly after arrest, the co-defendant's denial of the killing to an expert who testified at the joint penalty phase, and letters written by the co-defendant about the crime and trial.

None of these materials would have been admissible in a separate trial of appellant Vo. None was admissible in his joint trial with co-defendant Hajek, under *Bruton*. The impact of these statements of the co-defendant can hardly be overstated, in this case where the prosecutor urged an expansive "conspiracy" theory, and consistently tarred appellant Vo with the words and actions of his co-defendant. Reversal is required.

XV. **The trial court erred in permitting irrelevant and prejudicial evidence of co-defendant Hajek's interest in Ozzie Osbourne's music, alleged satanic matters, and other alleged bad acts.**

The prosecution committed misconduct in introducing irrelevant evidence of co-defendant Hajek's alleged bad acts and bad character at the guilt phase of trial, including but not limited to Hajek's interest in Ozzie [sic] Osbourne's music (RT 3680, 4091, 4121)[152], alleged satanic matters (RT 4091), and alleged other bad acts (e.g., fear he would sacrifice the family dog, RT 3666; and auto theft, RT 3659, 3647). The trial court erred in allowing the introduction of this evidence and the prosecutor's related arguments, and further erred in failing to provide limiting instructions prohibiting the jury from using this inflammatory and irrelevant evidence against appellant Vo. (Vo AOB, Arg. 12, pp. 324-330.)[153]

Respondent offers no theory on which any of this evidence could

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[152] Evidence of co-defendant Hajek's interest in Ozzy Osbourne's music was elicited by the prosecutor from witness Lori Nguyen, during his effort to develop evidence of Hajek's alleged Satanism. (17 RT 4090-4091; RB 135-137.) Mr. Osbourne is a well-known musician in the heavy metal genre. Certainly, many who do not subscribe to Satanic worship are familiar with his music.

[153] Appellant Vo's argument also referred to and incorporated Arguments 1 [refusal to sever Vo's trial from that of the co-defendant] and 6 [error in permitting admission of evidence allegedly supporting an uncharged conspiracy] of his AOB, and he correspondingly refers to and incorporates Arguments II and X of this brief.

have been admitted against appellant Vo in a separate trial.

Co-defendant Hajek also argued that the trial court erred in admitting evidence of Hajek's alleged interest in Satan worship. (Hajek AOB, Arg. IX.) Respondent primarily addresses co-defendant Hajek's claim in its reply brief. (RB, Arg. XV, pp. 135-142.)

As to appellant Vo, respondent addresses only the contention it was error to admit evidence of co-defendant Hajek's interest in Satan worship, and the failure of the trial court to provide a limiting instruction. (RB 142-143.) Therefore, appellant Vo's remaining contentions should be deemed admitted by respondent: that the joint trial, the broad alleged and uncharged conspiracy, and the trial court's evidentiary rulings erroneously and prejudicially permitted appellant Vo's jury to consider against him the inflammatory evidence of co-defendant Hajek's family's fear that Hajek would sacrifice the family dog[154], and auto theft; and that the errors not only tainted the jury's consideration of Vo's guilt, but deprived him of the individualized sentencing to which he was entitled at the penalty phase.

Respondent does not address Eighth Amendment issues in this argument. Appellant Vo was entitled heightened reliability throughout his

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[154] Appellant Vo notes that allegations of cruelty against animals are particularly likely to inflame citizens and jurors.

trial, and to have his jury decide the appropriate sentence for him individually. (See, e.g., *Woodson v. North Carolina* (1975) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879, 884-885; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.) The Eighth Amendment absolutely requires that "any decision to impose the death sentence [must] be, and appear to be, based on reason, rather than caprice and emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

Respondent likewise does not respond to appellant Vo's contention that the prosecutor committed misconduct by offering this evidence regarding co-defendant Hajek, and using it against appellant Vo. (Vo AOB pp. 327-329.) The prosecution's job, after all, is to seek justice rather than winning at all cost. (See, e.g., *Berger v. United States* (1935) 295 U.S. 78, 88.)

Respondent contends that there is no basis for appellant Vo's claim of error as to the admission of Hajek's alleged Satan worship, because there was no objection to the admission of Exhibit 64 (a letter written by Hajek, stating that "The Devil made me do it!" and that he wished to obtain a Satanic bible), and therefore any error was invited; and because an objection to witness Lori Nguyen's testimony was overruled with a caveat that Hajek's statement "does not flop over to Mr. Vo." (17 RT 4090; RB

142.) Respondent asserts that appellant Vo has forfeited his objection on appeal because he did not request amplification of the trial court's ruling. (RB 142-43.) Respondent is wrong.

Respondent ignores both appellant Vo's extensive and unsuccessful efforts to sever his trial from that of co-defendant Hajek[155] because of the danger that Hajek's words and actions would be used against Vo, and the context in which evidence of co-defendant Hajek's alleged devil-worship and bad acts[156] were elicited and used by the prosecution. The prosecutor created and invoked an alleged far-reaching (yet uncharged and unproven) conspiracy theory[157] to attribute Hajek's words[158] and actions to appellant

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[155] Appellant Vo refers to and incorporates Argument 1 of his AOB, and Argument II of this brief, regarding the erroneous denial of severance; and Argument 25 of his AOB and XXXVII of this brief, regarding the trial court's refusal to provide a separate jury for the penalty phase.

[156] As set forth more fully at pp. 325 et seq. of Vo's AOB, the bad character and bad act evidence at issue here was relevant, if at all, only to co-defendant Hajek.

[157] Appellant Vo refers to and incorporates Argument 6 of his AOB, and Argument X of this brief, regarding the uncharged and unproven conspiracy theory. The conspiracy theory rests on the inference that appellant Vo knew of and supported co-defendant Hajek's homicidal plans. No evidence supports that inference.

[158] Appellant Vo refers to and incorporates Arguments 4, 5, and 7 of his AOB, and Arguments XI, XII, and XIII of this brief, regarding the admission of co-defendant Hajek's words against Vo, in violation of his right to confront and cross-examine the source of those words.

Vo.

The trial prosecutor consistently sought to link the two defendants, arguing, for example, that they have "that kind of criminal mind . . . shared by both defendants . . .." (22 RT 5556); that Vo has no mental impairment, but he and the co-defendant were "equally premeditating" and that "[w]hat they share is a sadism, is a cold-blooded killing." (22 RT 5573); and proffering argument as to Satanism (22 RT 5576; objection sustained only after the words were spoken). The admission of evidence regarding co-defendant Hajek's alleged Satanic worship and bad acts was prejudicial as to appellant Vo because the prosecution worked so hard to use the evidence produced against Hajek to tar appellant Vo, throughout the trial.

Respondent urges that this Court employ the doctrine of "invited error" to reject appellant Vo's complaint that Exhibit 64 was used to support the prosecutor's arguments about Satanism. (RB 142, citing *People v. Lucero* (2000) 23 Cal.4th 692, 723.) At the time that trial counsel expressed no opposition to Exhibit 64 (17 RT 4162), trial counsel was not on notice that the trial prosecutor intended to use that letter, written by co-defendant Hajek, to argue that *both* defendants were Satanic. A joint adherence to Satanism is certainly <u>not</u> a reasonable inference from the

letter.[159] Respondent does not discuss why "invited error" should apply when a piece of evidence irrelevant as to this defendant is unexpectedly used against him in an unforeseeable way.[160]

Counsel did object when the prosecutor unexpectedly argued Satanism, and the objection was sustained. (22 RT 5576.) However, the bell had been rung; requesting an admonition would only have drawn more attention to the specter of Satanism, and would not have cured the harm. (*People v. Green* (1980) 27 Cal.3d 1; *People v. Pitts* (1990) 223 Cal.App 3d 606.)

Respondent next urges that this Court disregard appellant Vo's

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[159] As set forth more fully in Vo's AOB at pp. 325-327, bad character, bad act, and propensity evidence is generally prohibited, and well-recognized as being prejudicial and violative of due process. To introduce such evidence against someone *other than* the subject of those allegations is highly irregular, and far less potentially justifiable.

Alleged Satanism is a rather unusual example of this type of prohibited evidence. However, there is no question that it was intended to inflame and prejudice jurors with its implications of evil. The most ecumenical members of mainstream religions presumably do not embrace devil-worship, even if they do embrace religious freedom generally.

The allegation of Satanism is generally akin to irrelevant allegations of gang membership; the introduction of such irrelevant evidence violates the First and Fourteenth Amendments (see, *Dawson v. Delaware* (1992) 503 U.S. 159), as well as the Eighth Amendment in capital cases.

[160] Certainly the passage cited in *Lucero* cited by respondent (RB 142), dealing with deliberate tactical choices as to jury instructions, does not extend the doctrine of "invited error" to this turn of events.

objection to Lori Nguyen's testimony regarding Satanism, claiming that the jury was instructed to disregard the evidence as to appellant Vo, that trial counsel did not request "clarification or amplification, and it was therefore forfeited. (RB 142-143.)

This objection was properly made and preserved. The trial court overruled the objection. (17 RT 4090.) The trial court's statement at that time that "it is a statement by Mr. Hajek and it does not flop over[161] to Mr. Vo" (*Ibid.*) was insufficient to prevent its use against Vo during jury deliberations. The judge's words were colloquial and ambiguous enough to provide little guidance to jurors. Further objection would have been futile (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1189, fn 27), and further admonition would not have cured the harm. (*People v. Green* (1980) 27 Cal.3d 1.)

In more mundane circumstances, allegations that one is **evil** because one's *acquaintance* has allegedly done things or said things – even allegations of devil worship, threatening the family dog, listening to heavy metal music, and prior crimes – might be ignored and/or have no lingering

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[161] "Does not flop over" is not a legal term of art. It is not very clear in colloquial American English, either. A reasonable juror would have interpreted the trial court's statement – given that the trial court had just denied appellant Vo's objection – as merely confirming that Hajek alone made the statement, but it was admissible against both Hajek and Vo.

consequences. In everyday life, we can drift away from acquaintances who prove to have habits or beliefs to which we do not subscribe; we can drift away from those who accuse us by association.

This capital trial was not an ordinary circumstance, however, and distance was not an option. The trial court refused to sever Mr. Vo from his co-defendant. The prosecutor continually told the jury that the sins of Hajek were those of Vo as well. And then there were the jurors – who most certainly did not, *could* not regard all this as mundane, since it was part of the gravest duty a citizen can perform.

Reversal is required. Vo's jurors, exposed to the wealth of adverse evidence concerning co-defendant Hajek, and exposed to one-sided communications urged as implicating Vo could not avoid – and were not properly cautioned to avoid – a verdict through improper notions of guilt by association. Such a verdict flies in the face of numerous constitutional mandates (the 6th, 8th, and 14th Amendments to the United States Constitution), and cannot be regarded as proven harmless under the standard of (*Chapman v. California* (1967) 386 U.S. 18, 24.)

XIX. **There is insufficient evidence that appellant Vo committed first degree murder.**

Appellant Vo raised a multi-part argument that there was insufficient evidence that he committed first degree murder. (Vo AOB, Arg. 8, pp. 286-307.) This argument included the following sub-parts: [A] there is no evidence that appellant Vo committed the murder; [B] there is no evidence that appellant Vo intended to kill, or that he harbored a reckless disregard for human life; [C] the alleged uncharged conspiracy theory failed to establish that appellant Vo had any knowledge co-defendant Hajek intended to kill, much less that appellant Vo agreed and assisted in that plot[162]; [D] there is insufficient evidence of torture murder[163]; [E] there is insufficient evidence of murder by lying in wait[164]; and [F] there is insufficient evidence of felony murder.

In Argument XIX, respondent addresses insufficiency of evidence for felony murder. (RB, pp. 158-161, addressing arguments of both

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[162] Appellant Vo refers to and incorporates herein arguments 6 and 8.C. of his AOB, and corresponding arguments X and XXIII of this brief, concerning the uncharged conspiracy theory.

[163] Appellant Vo refers to and incorporates herein arguments 9 of his AOB, and VII of this brief, regarding torture murder and the torture special circumstance.

[164] Appellant Vo refers to and incorporates arguments 10 of his AOB, and VI of this brief, regarding lying-in-wait murder and the lying-in-wait special circumstance.

defendants.) Respondent elsewhere addresses Vo's arguments 8D, regarding torture murder (RB Arg. VII, pp. 96 et seq.), and 8E, regarding lying in wait (RB Arg. VI, pp. 87 et seq.) Respondent also addresses the conspiracy theory. (RB Arg. X, pp. 107 et seq.)

There appears to be no response to appellant Vo's arguments about the insufficiency of evidence that he either committed the murder, or held the requisite mental states to be convicted under any theory. (Vo AOB, Arg. 8, subparts A and B.) These elements are dispositive under any theory.

Nor does respondent address in any meaningful way the constitutional arguments about sufficiency of the evidence as to appellant Vo, in any parts of its brief. *(Jackson v. Virginia* (1979) 443 U.S. 307, 319.) The state's failure to ensure the minimal standard of providing evidence sufficient to persuade a rational factfinder beyond a reasonable doubt also offends the Eighth and Fourteenth Amendment requirements of particular reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

As to felony murder, one of the theories posited at trial, the prosecutor argued that appellant Vo was guilty if he "went into that house with a felonious intent, it doesn't matter whether he intended or whether the killing was even accidental." (21 RT 5370.) Under California law, the

felony supporting a felony-murder, however, must be a specified felony (Penal Code § 190.3), and it cannot be a felony merely incidental to the homicide. (*People v. Green* (1980) 27 Cal.3d 1, 59.)[165]

Respondent's Argument XIX reframes the problem as one of jury instructions regarding burglary.[166] (RB 158-161.) Respondent suggests first that "appellants entered the Wang residence with more than one intent" (RB 159), then suggests the appellants received some kind of "windfall" because the judge instructed on burglary-murder as a theory of first degree murder, even though the judge believed the entry was "with the intent to commit murder." (RB 160, citing 10/12/95 RT 47.) Respondent's brief is both non-responsive to appellant Vo's argument about insufficiency of the evidence, and wrong.

Respondent admits that this Court's recent decision in *People v. Farley* (2009) 46 Cal.4th 1053, 1117-1121 (permitting the felony-murder

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[165] The prosecutor argued a number of factual theories, including that the felonious intent was homicide (See, e.g. 21 RT 5380), which theory would place the homicide squarely outside the realm of felony-murder under *Green*, *supra*. Robbery- murder and burglary-murder special circumstances were stricken before the case went to the jury. (7 CT 1815.)

[166] A significant part of the respondent's briefing on this issue addresses the argument of Hajek's trial counsel, that felony murder could not be found because the evidence showed her client entered the house with the intent to murder. (RB 158-161.) There is no evidence that appellant Vo shared that intent, or any intent sufficient for a conviction of first degree murder.

rule to apply when assault is intended) is prospective only and does not apply to this case (*Id.*, at p. 1122, cited at RB 158), but still respondent forges ahead. The "substantial evidence" urged by respondent – without citations to the record – boils down to Hajek's statements to Moriarty, Hajek's possession of a bank card after the incident, the state of disarray in the residence, and Vo's lack of a job and need for money. (RB 159.)

This is not substantial evidence of appellant Vo's guilt that "reasonably inspires confidence and is of solid value." As this Court has explained:

> In resolving a contention based upon insufficiency of the evidence, the reviewing court's task is to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738, 16 A.L.R.4th 1255].) The judgment must be supported by "substantial evidence," which has been defined as evidence that "reasonably inspires confidence and is of 'solid value.'" (*People v. Bassett* (1968) 69 Cal.2d 122, 139 [70 Cal.Rptr. 193, 443 P.2d 777]; see *People v. Javier A.* (1985) 38 Cal.3d 811, 819 [215 Cal.Rptr. 242, 700 P.2d 1244].) The rules governing sufficiency of the evidence are as applicable to challenges aimed at special circumstance findings as they are to claims of alleged deficiencies in proof of any other element of the prosecution's case. (*People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25 [165 Cal.Rptr. 289, 611 P.2d 883].)
>
> In order to find the robbery-murder special circumstance to have been true, the jury here was required to find that the murder was committed "during the commission or attempted commission of" a robbery. (Former § 190.2, subd. (c)(3).)

> Moreover . . . a valid special circumstance finding requires that the underlying felony be "proved." (Former § 190.4.) CA(13)(13) Hence, there were two necessary prerequisites to the jury's special circumstance finding: 1) substantial evidence of the robbery, and 2) substantial evidence that the murder was committed during the commission or attempted commission of the robbery. (*People v. Green*, *supra*, 27 Cal.3d at pp. 52, 59.) As will appear, neither of these conditions was satisfied in this case.

(*People v. Morris* (1988) 46 Cal. 3d 1, 19.) While robbery was not before the jury in this case, the theory of burglary felony murder was. There was no evidence showing a preexisting intent to steal when appellant entered the house; the respondent's theory of "more than one intent" and appellant Vo's alleged need for money are not sufficient to support a finding of intent to steal beyond a reasonable doubt. This "evidence," then, does not establish to a "near certainty" an intent to steal when appellant entered the house (*People v. Bassett*, *supra*, 69 Cal. 2d at 139; *People v. Hall* (1964) 62 Cal.2d 104, 112), as required by due process and article I, § 15 of the California Constitution. (See also, *People v. Wilson* (1992) 3 Cal. 4th 926, 939; *People v. Hogan* (1982) 31 Cal.3d 815, 854.)[167]

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[167] This Court stated in *People v. Hogan*, *supra*, 31 Cal.3d 815, 854, that:

> The rule governing evidence of poverty as motive for crime was stated long ago in *People v. Kelly* (1901) 132 Cal. 430, 431-432 [64 P. 563]: "Generally, evidence of the wealth or poverty of a defendant is not admissible; but the sudden possession of money,

(continued...)

Reversal is required. Respondent has declined to address appellant Vo's arguments about the insufficiency of evidence that he either committed the murder, or held the requisite mental states to be convicted under any theory. As to the felony murder theory, respondent can only say that appellant Vo lacked money. There is no substantial evidence supporting the felony-murder theory, or any other theory of appellant Vo's culpability for first degree murder.

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[167](...continued)
immediately after the commission of a larceny, by one who before that had been impecunious, is clearly admissible as a circumstance in the case. [Citation.]" Wigmore states a general policy of exclusion of this type of evidence as motive for crime because "the practical result of [admission] would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence." (2 Wigmore, Evidence (3d ed. 1940) § 392, p. 341; *People v. Gorgol* (1953) 122 Cal. App. 2d 281, 303 [265 P.2d 69].)

XXI. The torture murder special circumstance instruction was unconstitutional.

Appellant Vo contends that the torture murder special circumstance was unconstitutional as applied (Vo AOB, Arg. 9.C, pp. 302-306)[168], and that the instruction improperly invited the jury to find the torture special circumstance true without requiring that it find appellant Vo was personally culpable. (Vo AOB, pp. 304-306.) Respondent Hajek also urges the impropriety of the torture special circumstance instruction. (Hajek AOB, Arg. XIV.)[169]

Respondent contends that the instruction was proper. (RB Arg. XXI, pp. 163-166.) Respondent is incorrect, and reversal is required.

The gist of the problem is that the instruction pursuant to CALJIC 8.81.18 required only that the jury find that "a" defendant intended to kill, the defendant intended to inflict extreme cruel physical pain and suffering, the acts were committed while the victim was alive, and "a" defendant did in fact inflict extreme cruel physical pain and suffering. (7 CT 1908; 21 RT

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[168] Appellant Vo refers to and incorporates Argument VII of this brief, addressing insufficiency of the evidence of torture as well as the unconstitutionality of the torture murder special circumstance as applied to him.

[169] Appellant Vo adopts Argument XIV of Hajek's AOB and ARB to the extent it is applicable to him, pursuant to California rules of Court, Rule 8.2200(a)(a).

5319-5320.) This instruction did not require the jury to find personal culpability; if either defendant intended to kill and intentionally inflicted torture, the special circumstance could be found as to both, even if the other did not have any such intention or participate.

Respondent admits that this instruction was erroneous, and that it was prejudicial under controlling precedent:

> In *People v. Davenport* (1985) 41 Cal.3d 247, 271, this Court held that the torture-murder special circumstance requires proof that the defendant himself intended to kill and to torture the victim. The instruction given here was thus technically erroneous. In *People v. Petznick* (2003) 114 Cal.App.4th 663, 686, the Sixth District Court of Appeal found a similar error prejudicial.

(RB 163-164.) Respondent nonetheless argues that other instructions and the verdict form cured the harm, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72. (RB 164-165.)

The instructional error amounted to strict liability for Vo being present in the Wang home with co-defendant Hajek, relieving the prosecution of its obligation to prove beyond a reasonable doubt each element of a crime – or in this instance, the special circumstance allegation. (*In re Winship* (1970) 397 U.S. 358, 364.) It is error per se, and not subject to harmless error analysis. (*Rose v. Clark* (1986) 487 U.S. 570; *Connecticut v. Johnson* (1983) 460 U.S. 73; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Estelle v. McGuire, *supra*, 502 U.S. 62, 72, is cited by respondent in support of its theory that "there is no reasonable likelihood the jury applied the challenged instruction in an unconstitutional manner." (RB 95.) *Estelle v. McGuire* dealt with review of ordinary instructional error on federal habeas corpus; it is not applicable where the instructional error relieves the prosecution of its burden of proof.

That other instructions were given in which the jury was told to decide as to each defendant separately (see, RB 164-165) does not cure the fundamental error with the torture murder special circumstance instruction. As the United States Supreme Court decided in *Francis v. Franklin* (1985) 471 U.S. 307, conflicting instructions do not ensure that every juror disregarded the plain meaning of this instruction: that the special circumstance should be found true if "a" defendant intended to kill and "a" defendant inflicted torture.[170]

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[170] As set forth fully in Arg. XXIV of this brief, regarding aiding and abetting instructions, the jury in fact demonstrated the confusion feared by trial counsel, sending a note to the trial court asking about the relationship between an aider/abettor or co-conspirator and the requirement for the special circumstances that a defendant "intentionally" killed the victim. The note reads:

> (p. 57) ¶ 3 under Special Circumstances: If a 'defendant' is determined to be an 'aider and abettor' or a 'co-conspirator' does he then become: '(The) (A) defendant on page 59, item #
>
> (continued...)

As noted throughout this brief, this was a case in which the prosecution did all in its power to persuade jurors to find culpability on the part of appellant Vo based on the words and actions of co-defendant Hajek. Despite no evidence that Vo knew of or joined in any murderous intentions of Hajek, intended to or did torture, or committed the homicide, the prosecution created an elaborate (but uncharged and thus unproven) conspiracy theory, and ceaselessly stressed joint responsibility – joint intent, joint actions – going so far as to tell jurors they need not decide who did what. (21 RT 5382.) The trial court erroneously refused a severance, allowed the uncharged conspiracy theory to go before the jury, and admitted statements of co-defendant Hajek, all reinforcing the prosecutor's successful effort to have the jurors treat the co-defendants as one.

Respondent primarily relies on CALJIC 8.80.1 (7 CT 1903-1904) for its argument that other instructions cured the harm. (RB 164-165.) The first paragraph quoted (RB 164) is an eight-line sentence and, quite frankly,

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[170](...continued)

1 which reads: **#1. (The) (A) defendant intentionally killed the victim.**

(CT 1825; emphasis supplied in original by enclosing language bolded here in a box.) The jurors' note apparently refers also to Instruction 59 (CT 2036), regarding the special circumstance of lying in wait; it expresses confusion about the interplay of conspiracy and aiding and abetting instructions and the special circumstances.

not very comprehensible to speakers of ordinary English who are untrained in legal analysis. This paragraph contains two lengthy conditional clauses and multiple negatives, followed by a third conditional phrase.[171] Reasonable jurors might well be struck by the phrase "if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator" in conjunction with the last phrase suggesting that "aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or "assis[ing] any actor in the commission of murder in the first degree" was sufficient. The critical phrase, that "such defendant with the intent to kill" act in any way is lost in the middle; and of that phrase, the most crucial part is one word, "**such**." By the time jurors get to this word, they would be hopelessly tangled in the rest of the convoluted instruction, particularly in circumstances where the prosecutor urged a "one for all" decision process.

While part of the legal lexicon, this usage of "such" is uncommon among ordinary speakers of English. In ordinary usage, "such" implies similarity rather than particularity. See, e.g., the definition in the *Oxford American Dictionary* (1979):

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[171] See P. Tiersma, "Communicating with Juries: How to Draft More Understandable Jury Instructions" (National Center for State Courts, 2006, p. 18.) which notes that jury instructions are often "stilted and turgid" in style, making them hard to understand.

> **such** (such) *adj.* 1. Of the same kind or degree, *people such as these*. 2. Of the kind or degree described, *there's no such person*. 3. So great or intense, *it gave her such a fright*. **such** *pronoun* that, the action or thing referred to, *such being the case, we can do nothing*. [definition of **as such** omitted.]

In the midst of this exceedingly complex paragraph-long sentence, the word "such" fails to clearly admonish that jurors could not find the special circumstance true unless *this* particular defendant *personally* intended to kill or did kill.

The second paragraph of CALJIC 8.80.1 cited by respondent states that jurors must decide special circumstances "separately as to each of the defendants" (RB 164), and the third requires each special circumstance to be decided as to each of the defendants. (RB 164-165.) Again, in the context of this case where the prosecutor hammered home the (unproven) theory that appellant Vo shared the murderous intentions of co-defendant Hajek (as expressed in his conversation with witness Moriarty, a conversation in which Vo did not participate), these instructions failed to provide clarity and ensure that the prosecution was held to its burden of proof as to each defendant on all elements, when the primary instruction on the lying in wait special circumstance required only that the prosecution prove "a" defendant possess the intent to kill while "a" defendant was lying

in wait. (*Francis v. Franklin, supra,* 471 U.S. 307.)[172] In the midst of very lengthy and confusing instructions, a reasonable juror may well have concluded that these instructions in CALJIC 8.80.1 required them to find guilt on separate verdict forms for each defendant, having found that one of them satisfied the criteria for the torture special circumstance.[173]

Reversal is required under *People v. Davenport, supra,* 41 Cal.3d 247, 271 [in which this Court held that the torture-murder special circumstance requires proof that the defendant himself intended to kill and to torture the victim, and clarified that torture must include intentionally painful acts above and beyond those accomplishing the murder, so as to distinguish a case from the many other homicides],similar instructional error was found prejudicial], *In re Winship*, *supra,* 397 U.S. 358, 364 [the prosecution's obligation to prove each element beyond a reasonable doubt], *Jackson v. Virginia*, *supra*, 443 U.S. 307 [the requirement of substantial evidence to support the charges]. The instructional error is error *per se*, and

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[172] Here, respondent seeks to equate the two articles ("a" and "the"), an approach that surely must fail. A person looking for keys to "the car" will not be satisfied with the keys to "a car."

[173] Respondent argues that the verdict forms required a finding of personal intent to kill or actual killing. (RB 96, 165.) A verdict form is not an instruction on the law, and these did not cure the error.

not subject to harmless error analysis. (*Rose v. Clark* (1986) 487 U.S. 570; *Connecticut v. Johnson* (1983) 460 U.S. 73.)

XXIII. The jury was given erroneous instructions regarding the uncharged conspiracy.

Appellant Vo asserts that the defendants were given erroneous instructions concerning the alleged uncharged conspiracy. (Vo AOB Arg. 6.F., pp. 272-276; see also Arg. X of this brief, concerning the conspiracy, incorporated herein.) Appellant Vo also adopts by reference the argument of co-defendant Hajek concerning erroneous instructions on conspiracy (Hajek AOB Arg. XVI, pp. 188-203)[174], and incorporates by reference his own arguments concerning errors in instructing the jury regarding aider and abettor liability. (Vo AOB, Arg. 18, pp. 349-355, and Arg. XXIV of this brief.)

Hajek, joined by Vo, asserts error in [1] the failure to identify the alleged overt acts (Hajek AOB, pp. 189-193), [2] the failure to properly allege the object of the conspiracy (Hajek AOB, pp. 193-196), and [3] the failure to instruct on findings of the objects of the conspiracy. (Hajek AOB, pp. 196-201.) Appellant Vo further complains that [4] the jurors were not instructed about which evidence was admitted for what charges or allegations, or against whom the evidence could be used; [5] jurors were not

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[174] Appellant Vo adopts Argument XVI of Hajek's AOB and ARB to the extent it is applicable to him, pursuant to California rules of Court, Rule 8.2200(a)(a).

required to find the existence of a conspiracy by any quantum of proof; [6] conflicting instructions were given about whether jurors should use the acts and statements of one against the other; and finally, [7] that the requirement of proof beyond a reasonable doubt was undermined by these instructions. (Vo AOB, pp. 272-276.)

Respondent argues that the conspiracy instructions were proper. (RB pp. 167-179.) Respondent is incorrect.

A. Overt Acts.

Respondent first contends that appellant's argument that the trial court was required to identify specific overt acts in furtherance of the alleged conspiracy was forfeited for failure to object. (RB 168.) Respondent also argues that appellant's argument regarding the failure to instruct on CALJIC No. 6.21 was waived for failure to object. (RB 169-170.)

Trial counsel objected broadly to the "instructions as a whole," noting the great potential for confusion given the multiple theories proffered by the prosecution, including conspiracy, aider and abettor, and felony murder theories, which he urged would "cause irreparable confusion on the part of a jury. . . . " Counsel therefore objected to all instructions on conspiracy, as the ones proposed "are not accurate statements of law and

they are not adequately supported in the trial record." (21 RT 5286-5287.) Moreover, counsel urged that a felony-murder theory grounded in an alleged conspiracy was not sufficiently proven to take it to a jury. (21 RT 5285-5286.) If there is any technical imperfection in counsel's objections, this Court should nonetheless address the confusion complained of – that the jury was given no guidance about which evidence was admitted as allegedly supportive of a conspiracy, or how properly to use that evidence – because it so adversely affected appellant Vo's right to a fair trial. (See, *People v. Hill* (1998) 17 Cal.4th 800, 843, fn 8; *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection is sufficient if the record shows the trial judge understood the issue presented].) [175]

Next, respondent argues that there is no requirement to instruct the jury on alleged overt acts in an uncharged conspiracy, distinguishing *People v. Russo* (2001) 25 Cal.4th 1124 and *People v. Morante* (1999) 20 Cal.4th 403[176] on the ground that both cases involved charged conspiracies. (RB

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[175] See also, *United States v. McCullah* (10th Circuit, 1996) 87 F.3d 1136, 1139, holding: "[U]nless we are prepared to elevate 'form over substance,' the defense adequately alerted the trial court to the problem based upon its allegation of "outrageous," i.e. improper, governmental conduct. This is a capital case--failure to say the 'magic words' should not result in the affirmance of a death sentence which might not otherwise have been imposed."

[176] "A conviction of conspiracy requires proof that the defendant and (continued...)

168-169.) Overt acts are, however, an element of the crime of conspiracy, and thus also of the theory of liability. As this Court has noted,

> One purpose of the overt act requirement is to provide a locus penitentiae – an opportunity to repent – so that any of the conspirators may reconsider and abandon the agreement before taking steps to further it, and thereby avoid punishment for the conspiracy. (*People v. Morante*, *supra*, 20 Cal. 4th at p. 416, fn. 4; *People v. Zamora* (1976) 18 Cal. 3d 538, 549, fn. 8 [134 Cal. Rptr. 784, 557 P.2d 75].) Another purpose is "to show that an indictable conspiracy exists" because "evil thoughts alone cannot constitute a criminal offense." (*People v. Olson* (1965) 232 Cal. App. 2d 480, 489 [42 Cal. Rptr. 760]; see also *People v. Jones* (1986) 180 Cal. App. 3d 509, 516 [225 Cal. Rptr. 697].)

(*People v. Russo* (2001) 25 Cal.4th 1124, 1131.) The failure to put the defendants – and jurors – on notice of acts alleged to be in furtherance of the alleged conspiracy deprived appellants of due process of law, and impermissibly lightened the prosecutions's burden of proof. (*Carella v. California* (1989) 491 U.S. 263, 265; *In re Winship* (1970) 397 U.S. 358, 364.)

Respondent argues that it was proper for the state to rely on an uncharged conspiracy as a theory of liability. (RB 169.) Respondent cites

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[176](...continued)
another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante*, *supra*, 20 Cal. 4th 403, 416.)

People v. Belmontes (1988) 45 Cal.3d 744, 788-789, and *People v. Salcedo* (1994) 30 Cal.App.4th 209, 215-216.[177] *Belmontes* holds that once the existence of a conspiracy in furtherance of the charged crimes is proven, there is no error in instructing the jury on the law of conspiracy. (*Belmontes, supra,* at 790.) In *Belmontes*, this Court explained:

> The evidence here showed that defendant, Vasquez and Bolanos met, specifically intended to agree or conspire, specifically intended to commit the planned burglary, and carried out overt acts in furtherance of the conspiracy -- completing the intended crime. There being evidence supportive of all the elements of a conspiracy, the People were entitled to proceed on that alternative theory of liability. (*People v. Horn* (1974) 12 Cal.3d 290, 296 [115 Cal. Rptr. 516, 524 P.2d 1300].)

(*People v. Belmontes*, *supra*, 45 Cal.3d 744, 789.) In contrast, there was *no* such evidence in this case, neither any specific agreement to commit a planned crime, nor overt acts in furtherance of such an agreement.

Respondent was permitted to introduce a wide array of information under its uncharged conspiracy theory, information which was questionably related to events for which the defendants were on trial: e.g., co-defendant Hajek's bad acts and alleged "satanic" beliefs long before the crime to co-

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[177] *Salcedo* is a non-homicide drug case, in which the conspiracy urged was under a drug statute meant to "extend sentence enhancements to large narcotic traffickers who do not personally handle the narcotics but who are often prosecuted for conspiracy" (*Salcedo*, *supra*, at 217), and thus is not obviously applicable to this capital case.

defendant Hajek's post-crime statements. It is reasonably probable that jurors, lacking proper instruction on which matters were alleged to be overt acts, would have relied upon matters which could not possibly have been overt acts in furtherance of the alleged conspiracy.

B. Object of the Conspiracy.

Respondent asserts that appellants forfeited any claim that CALJIC 6.10.5 was improper because it was phrased as requiring an agreement with "specific intent to agree to commit a public offense *such as burglary and murder*. . . ." (RB 170-171, citing 7 CT 1858.)[178] As noted above, appellants objected to the irreparably confusing conspiracy instructions as a whole, and in any event, the trial court had a sua sponte duty to properly instruct on the law essential to the determination of the case. (21 RT 5285-5287; see, *People v. Sedeno* (1974) 10 Cal.3d 703, 715, quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

Respondent then notes that the standard for review is whether there is a reasonable likelihood that the jury applied the challenged instructions in an unconstitutional way, and argues that there was no such reasonable

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[178] See also RB 173, regarding CALJIC 8.26, which only identified burglary as the object of the conspiracy; and RB 174-175, regarding conflicts between CALJIC 6.10.5 and CALJIC 6.11. Appellant Vo does not waive these aspects of the claim, but feels they are covered adequately in existing briefing.

likelihood because the prosecutor only focused on burglary and murder. (RB 171-172, citing argument at 21 RT 5369-5370, 5373.) Respondent conveniently overlooks the enormous breadth of the prosecutor's alleged conspiracy theory.

The prosecutor used his all-purpose conspiracy theory to present a broad array of evidence (Vo AOB pp. 253-260), to tar appellant Vo with the bad acts and statements of his co-defendant, urging that evidence as a substitute for proof that appellant Vo himself premeditated, deliberated, possessed the requisite intent for special circumstance allegations, intended to kill, or did kill.[179] The alleged evidence of a conspiracy is stunning both in its erratic scope, and in its failure to demonstrate that a conspiracy connected to this crime actually existed. The notion of conspiracy lacked the most fundamental requirement – an agreement.

Without repeating all of the examples in Vo's AOB (pp. 253-260), the alleged conspiracy evidence included prior criminal acts involving

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[179] Appellant refers to and incorporates herein Arguments 8, 9, 11, and 14 of his AOB, regarding insufficiency of evidence (Arguments V, VI, VII, VIII, and XIX of this brief); Argument 1 of his AOB regarding error in denying severance (Argument II of this brief); Argument 5 of the AOB regarding improper admission of a taped conversation between the co-defendants in which only co-defendant Hajek's voice was audible (Argument XII of this brief); and Argument 7 of the AOB regarding the error in admitting statements of the co-defendant against appellant Vo (Argument XIII of this brief).

Hajek only[180]; statements made by Hajek only, before[181] and after the crime; Hajek's threat against a witness. That appellant Vo kept letters which Hajek sent him[182], the prosecution contended, meant that Vo somehow

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[180] During the pendency of the capital case in the trial court, Vo was tried for and acquitted of a robbery, for which Hajek was convicted. (1/17/95 RT 48-50.) Vo's diary entry about Hajek's arrest, which was exculpatory as to Vo, was admitted over Vo's objection to "corroborate" Vo's involvement in the alleged conspiracy. (17 RT 4179.)

[181] A cornerstone of the prosecution's theory that the homicide was pre-planned consisted of co-defendant Hajek's statements to witness Tevya Moriraty the night before the events. (15 RT 3644.) Ms. Moriarty testified, *inter alia*, that co-defendant Hajek spoke of his plan in the singular. (15 RT 3656.) No evidence was introduced that appellant Vo knew of or joined in Hajek's plan.

[182] Vo testified that he kept the letters from Hajek so he could give them to his lawyer. (20 RT 5049.) Obviously, the right to counsel contemplates a defendant sharing important information with his counsel, as well as counsel advising the client. An adverse co-defendant's unsolicited statements bearing on the crime and the trial are plainly of interest in preparing the defense.

agreed[183] with Hajek's often bizarre[184] statements.[185] The alleged conspiracy included allegations of torture, revenge, and sadism, based on Hajek's statements and writings.

Under the extraordinary circumstances of this case, with a boundless alleged uncharged conspiracy, there is indeed a reasonable likelihood that jurors were confused by the instructions. Appellant Vo asserts that was the very reason for pursuing an uncharged conspiracy theory: to permit jurors to use the mass of evidence concerning co-defendant Hajek as a substitute for proof of appellant Vo's guilt, and then to use that same information at the penalty phase to deny appellant Vo his right to a reliable and individualized sentencing procedure.

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[183] The prosecution claimed that the fact Vo kept a letter meant that co-defendant Hajek's assertions were true. (21 RT 5372.) In the context of a case where the co-defendants had adverse defenses, this assertion makes no sense absent some affirmative additional evidence that Vo agreed with these statements of Hajek. There is no such evidence.

[184] For example, Exhibit 76 described Hajek's plan to "get rid of" witness Moriarty (17 RT 4175); Exhibit 78, in which Hajek said "we did this for her," was proffered as evidence of a motive and admitted over objection. (17 RT 4177.) Co-defendant Hajek's counsel presented extensive evidence of his serious mental illness at trial.

[185] As set forth more fully in Argument XII of this brief, and Argument 5 of Vo's AOB, respondent's arguments concerning Hajek's writings are wrong.

C. Reversal is required.

The confusing instructions regarding conspiracy – rendered more confusing in the context of a case where multiple theories were offered, particularly given the theory of aiding and abetting – provided constitutionally inadequate guidance to the jury, and permitted jurors to find appellant Vo guilty without proof beyond a reasonable doubt of his personal culpability. Reversal is required.

XXIV. The instructions regarding aiding and abetting were confusing, and failed to apprise the jury properly of the prosecution's burden of proving each element of each crime as to each defendant separately.

Appellant Vo contends that the instructions regarding aiding and betting were confusing, and unconstitutionally permitted a capital conviction without requiring the jury to find that he personally possessed the requisite intent for the charged offenses.[186] (Vo AOB, Arg. 18, pp. 349-355.)[187]

In this case, the prosecutor proceeded on multiple alternate theories of first degree murder, including premeditated and deliberate murder and felony murder.[188] The prosecution also employed a broad uncharged conspiracy theory, with the objective of having the jury find both defendants guilty of charges regardless of proof of their individual

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[186] Vo refers to and incorporates Arguments 6 (regarding the uncharged conspiracy theory) and 1 (regarding the error in refusing to sever the co-defendants for trial) of his AOB, and corresponding Arguments X and II of this brief.

[187] Co-defendant Hajek adopted this argument (Hajek 2d Supp. AOB, p. 4), and also raised an argument that the aiding and abetting instructions were insufficient to instruct the jury regarding the effect of mental illness on the necessary mental state for conviction. (Hajek AOB, Arg. XVII, pp. 204-210.)

[188] Appellant Vo refers to and incorporates Argument XXII of co-defendant Hajek's AOB, adopted in Vo's AOB, Argument 16, regarding the multiple alternate theories of murder.

culpability. In arguing the law of aiding and abetting to the jurors, the prosecution argued that if both "participated in this crime . . they're liable under the law," regarded as principals, and an aider and abettor need do "nothing more than encourage or give[] advice." (21 RT 5282-5283.)[189]

Among other instructions, described at pp. 349-351 of Vo's AOB, the jury was instructed with CALJIC 3.00 and 3.01, addressing liability of aiders and abettors. (8 CT 2004, 2005.) In the context of the uncharged conspiracy theory, which was not required to be proven, these instructions permitted the jury to find appellant Vo guilty of substantive charges without requiring that they find he personally possessed the requisite specific intent.

The jury in fact demonstrated the confusion feared by trial counsel, sending a note to the trial court asking about the relationship between an aider/abettor or co-conspirator and the requirement for the special circumstances that a defendant "intentionally" killed the victim. The note reads:

> (p. 57) ¶ 3 under Special Circumstances: If a 'defendant' is

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[189] Compare this Court's recent decision in *People v. Mil* (January 23, 2012), 2012 WL 171471 (Cal.), 12 Cal. Daily Op. Serv. 912, which clarified that felony-murder special circumstances require instruction that a non-killer may only be found liable for the felony-murder special circumstance if the prosecution has proven beyond a reasonable doubt that the non-killer either possessed an intent to kill, or acted with reckless indifference to human life.

> determined to be an 'aider and abettor' or a 'co-conspirator' does he then become: '(The) (A) defendant on page 59, item # 1 which reads: **#1. (The) (A) defendant intentionally killed the victim.**

(CT 1825; emphasis supplied in original by enclosing language bolded here in a box.) The jurors' note apparently refers also to Instruction 59 (CT 2036), regarding the special circumstance of lying in wait. A reasonable interpretation of the note is that once labeled as a "conspirator" or "accomplice," jurors then wondered if any defendant then took on the required mental state for the various offenses.

In response, the trial court again instructed the jurors with Instruction 59, regarding the lying in wait special circumstance. (CT 1829.) This mere repetition of one of the instructions did not assist jurors in their task; nor did it alleviate the problem of jurors needing to understand that they must decide the requisite mental state as to each defendant separately for each charged offense. The prosecution is required to prove each element of each allegation presented to the jury for decision, beyond a reasonable doubt, and individually as to each defendant. (*In re Winship* (1970) 397 U.S. 358, 361-364; *Jackson v. Virginia*, *supra*, 443 U.S. 307, 318-319; *Ring v. Arizona* (2002) 536 U.S. 584.)

The trial court's instructions failed to make clear that the prosecution's conspiracy theory was an insufficient substitute for proving

each element of each charge in its case against appellant Vo; they thus impermissibly lightened the prosecution's burden of proof. (See, *Francis v. Franklin* (1985) 471 U.S. 307, 317-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524.) An aiding and abetting conviction requires proof not merely of "knowing aid" but also that the defendant had the specific intent to encourage or facilitate the offense with which the principal was charged. (*People v. Beeman* (1984) 35 Cal.3d.547, 561.)

Respondent argues that the instructions were proper, and the trial court's answer to the jury's note was proper. (RB 179-185.) As to the instructional error, respondent asserts that the jury was told that an aider and abettor must act "with the intent or purpose of committing, encouraging, or facilitating the commission of the crime." (RB 180, citing 7 CT 1882.) Respondent also asserts that the jury was specifically instructed, following the jury note, that it must find an intent to kill in order to find true a special circumstance on an aiding and abetting theory. (RB 181-185.)

However, respondent's observation provides no assurance that the instruction was understood, especially in light of the jury's note, which shows apparent and unalleviated confusion; the trial court's generic statement, like its repetition of the instruction, was insufficient guidance.

At RB 181-185, the respondent lays out the discussion with jurors

after this note. At one point, the court said, "you can't be an aider, abettor unless you have the intent." (RB 183.) The trial court did not explain what it meant by "intent" – what kind of intent, when it was possessed. Moreover, the trial court did not specify this decision needs to be made as to each defendant, and in the context of this conspiracy theory, a juror may have misunderstood the court to mean an intent by either one of them was sufficient.

The informal nature of the statement noted by respondent did not aid in clarity, either. "You" is an indefinite pronoun; it can be used in the singular or the plural; and it is also commonly used informally in a hypothetic sense. This judge was not accusing the juror raising the question of being an aider and abettor, for example. There is a danger the second "you" might have been interpreted as "you jurors find that somebody has the intent."

For all these reasons, reversal is required.

XXXIV. **The trial court erred in declining to ensure that all proceedings were properly reported to permit full appellate review of a complete record.**

As set forth more fully in appellant Vo's AOB, Arg. 21, pp. 362-374, the trial court failed to ensure the complete record for post-conviction review that is required by state law and under the federal constitution. Co-defendant Hajek raises the issue at Argument XXIV of his AOB, pp. 296-275.

Respondent contends there was no prejudice arising from the implicitly admitted incompleteness of the trial record. (RB, Arg. XXXIV, pp. 205-207.)

Appellant Vo adopts Argument XXIV of Hajek's ARB, pp. 87-95, pursuant to California rules of Court, Rule 8.2200(a)(a).

XXXIX. **The trial court erroneously refused to preclude improper argument by the prosecutor.**

Appellant Vo contends that the prosecutor committed misconduct in argument in the following ways: [a] improperly arguing non-statutory factors in aggravation; [b] improperly urging that the defendants' exercise of constitutional rights militated in favor of capital punishment; [c] by urging lack of remorse as an aggravating factor; [d] by arguing that appellant's youthful age rendered him dangerous in prison; [e] undermining the right to individualized sentencing by urging that the jury consider the defendants together, and consider factors applicable to the co-defendant only in sentencing Mr. Vo. (Vo AOB, Arg. 29, pp. 424-435.)

Co-defendant Hajek also raised issues about the prosecutor's misconduct. (Hajek 2nd Supp. AOB, Arg. XXXIII.B.2-3, pp. 6, 12-17.)[190]

Respondent contends that all claims of prosecution misconduct are waived, and none are meritorious. (RB Arg. XXXIX, pp. 222-243.) Appellant addresses only those contentions requiring a response, and does not waive other portions of his argument.

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[190] Appellant Vo adopts Argument XXXIII of Hajek's AOB and ARB to the extent it is applicable to him, pursuant to California rules of Court, Rule 8.2200(a)(a).

A. The claims of misconduct are not waived.

Respondent asserts that claims of prosecution misconduct are waived. (RB 223.) Respondent is incorrect.

There is no requirement of an objection or request for admonition if the objection would be futile, or of an admonition would not cure the harm created by the misconduct. (See, *People v. Valdez* (2004) 32 Cal.4th 73, 122; *People v. Hill* (1998) 17 Cal.4th 800, 822; *People v. Bolton* (1979) 23 Cal.3d 208, 215-216, fn. 5.) See also, *United States v. McCullah* (10th Circuit, 1996) 87 F.3d 1136, 1139, holding:

> "[U]nless we are prepared to elevate 'form over substance,' the defense adequately alerted the trial court to the problem based upon its allegation of "outrageous," i.e. improper, governmental conduct. This is a capital case--failure to say the 'magic words' should not result in the affirmance of a death sentence which might not otherwise have been imposed."

B. Nonstaturory factors in aggravation are impermissible.

The prosecutor argued several non-statutory factors in aggravation, including: lack of remorse (RT 6391, 6396)[191]; failure to show mercy to the

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[191] Appellant Vo refers to and incorporates herein Argument 5 of his AOB, pp. 238-249, and Argument XII of this brief, regarding erroneous admission of the jailhouse tape recording.

As respondent notes in its brief, the prosecutor argued to jurors that appellant Vo made statements on that tape demonstrating lack of remorse.

(continued...)

victim; future dangerousness in prison (RT 6398, 6420); the co-defendant's alleged sadistic tendencies (RT 6292, 6394, 6395, 6415, 6416) and sexual interest in Ellen Wang (RT 6395, 6416); the co-defendant's alleged fabrication of a mental health defense (RT 6393, 6405, 6407, 6411-6412); appellant Vo's family's caring for him (RT 6394, 6399); the "bad crowd" that appellant Vo allegedly frequented after high school (RT 6399, 6400); and Vo's alleged "secret life" (RT 6401, 6403). In addition, the prosecutor urged that the "innocence" of the victims was a reason to sentence the defendants to death. (RT 6387, 6397.)

In *People v. Boyd* (1985) 38 Cal. 3d 762, 775-776, this Court established that evidence of non-statutory aggravating factors is not admissible during the penalty phase of a capital trial, and the prosecutor may not argue that any non-statutory factors should be considered in aggravation.

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[191](...continued)
(RB 237-238, citing 25 RT 6390-6391.) The tape was played for the jury over appellant's objection; by stipulation, this recording was not transcribed by the court reporter. (12 CT 1722) Detective Walter Robinson testified at trial that the sound quality of the tape is poor (RT 3815), but that portions are identifiable as being spoken by co-defendant Hajek; only Hajek is audible on the tape. (16 RT 3818, 3844.) It was misconduct for the prosecutor to argue that statements existed, where the only evidence introduced during the trial was that no statements of appellant Vo were audible. The prosecutor was in effect "testifying" to matters not introduced in evidence.

Respondent implicitly admits that the prosecutor argued non-statutory factors in aggravation, stating "Many of these [non-statutory factors] were actually addressed by the prosecutor as factors that should not be given weight as mitigating." (RB 224, emphasis added.) This is a distinction without a difference; the prosecutor's argument was tantamount to urging these factors be used in aggravation, to support a death verdict.

As an example, respondent cites the prosecutor's argument that Vo should not be given mercy for his rough childhood when his parents taught him values and raised "other law abiding citizens." (25 RT 6399-6400.)" (*Ibid.*) The prosecutor actually argued that Vo's family showed him love and "**did not teach him sadism**" (25 RT 6399), so "he does not fall into this **exception** or concern." (25 RT 6400.)

The prosecutor's reference to "sadism" is hardly a neutral statement[192] that appellant Vo's mitigating background evidence is entitled to no weight; it was instead an appeal to vote for death based upon an underlying and implicit premise,

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[192] It is improper for the prosecutor to present prejudicial information to the jury in the form of argument. (*People v. Perez* (1962) 58 Cal.2d 229, 244), disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1.) When a prosecutor improperly imparts information to the jury in this manner, he circumvents and undermines the constitutional protections of confrontation and counsel. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473.)

namely the prosecutor's personal assessment that appellant Vo was "sadistic."[193] As noted in co-defendant Hajek's ARB, Arg. XXXIII, pp. 96-100, the theme of co-defendant Hajek's alleged "sexual sadism" was developed out of whole cloth by the prosecutor in his cross-examination of Hajek's expert witness[194], and multiple objections by Hajek's counsel proved futile in restraining the prosecutor. It is reasonably likely, under the facts of this case, that jurors understood this argument to mean that they should attribute the alleged "sadism" of co-defendant Hajek to appellant Vo as well. Such an attribution fits squarely within the prosecution's uncharged conspiracy theory.

The prosecutor's argument suggesting that mitigating evidence is to be treated as some kind of "exception" to a death judgment is contrary to controlling precedent, and a misstatement of law. It suggests, contrary to California law[195] and federal constitutional law[196], that a death sentence is

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[193] It is improper for a prosecutor to promote reliance on his opinion based on his official position and superior knowledge of the facts. (See, *People v. Thompson* (1998) 45 Cal.3d 86,112; *People v. Bain* (1971) 5 Cal.3d 839, 848.)

[194] Asking questions for the purpose of putting the facts and insinuations of the question before the jury similarly constitutes misconduct. (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

[195] In *People v. Boyde* (1988) 46 Cal. 3d 212, 253-254, for example, this Court clarified that the jury's duty is to weigh the appropriate

(continued...)

the default sentence, repudiating the constitutionally mandated function of mitigating evidence in capital cases. In *Lockett v. Ohio* (1978) 438 U.S. 586, the United States Supreme Court explained that a state may not prevent the sentencer

> "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation [because that] creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

(*Id.*, at p. 605.) See also, *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8; *In re Gay* (1998) 19 Cal.4th 771, 814.)

C. It was prejudicial misconduct to argue Vo's alleged future dangerousness.

Appellant Vo asserts prejudicial misconduct in the prosecutor's arguments that he would pose a danger in prison. (Vo AOB 432-433.) While some of co-defendant Hajek's behavior raised a concern about

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[195](...continued)
punishment, deciding whether death or life without parole is more appropriate. There is no presumption that death should be the sentence.

[196] The Unites States Supreme Court has made clear that mandatory sentencing schemes are unconstitutional (*Woodson v. North Carolina* (1976) 428 U.S. 280), and that juries must be permitted to give weight to mitigating evidence.

possible assaultive conduct in prison, appellant Vo presented considerable evidence of his exemplary conduct in jail. In support of his future dangerousness theory, the prosecutor argued Hajek's misconduct, and the youth of both defendants. (See, e.g., 25 RT 6420.)

Respondent addresses the improper argument that Vo would be dangerous in the future due to his youth in two places, asserting that it was proper to argue future dangerousness (RB 224-225), and that it was proper to argue that the defendants' youth should not be used as a mitigating factor. (RB 240-241.) Respondent failed to address the prosecution's systematic linking of co-defendant Hajek's misconduct to the prosecutor's argument that appellant Vo would be dangerous in prison; this therefore would appear to be uncontested.

The "evidence" that Vo might be dangerous was essentially the unsworn "testimony" of the prosecutor; he first elicited from appellant's expert that youth is a risk factor, then argued to the jury – despite the expert's actual testimony that appellant Vo's jail records "show that he's been a very good prisoner" (24 RT 6160-6171) – that the expert said that youthful "age makes them worse prisoners, more dangerous, less controllable in the prison situation." (25 RT 6397.) Plainly, the prosecutor was arguing that a death sentence was deserved because of appellant's age;

he used this as a factor in aggravation. The prosecutor invited jurors to focus only on witness Park's general statement regarding age, and to ignore its non-applicability to appellant Vo personally.

According to respondent, the prosecutor merely urged jurors to accord age no weight in mitigation, because [1] the defendants were adults, [2] the crime was heinous, and [3] Vo's expert said future dangerousness was more of a risk with younger prisoners. (RB 240-241.)

In the first place, no one below age 18 is eligible for capital punishment[197]; urging appellant's youth (age 19 at the time of the offense) to be disregarded as mitigation on the ground he was a legal adult renders the statutory sentencing factor meaningless, since the death penalty only applies to legal adults in any event. Secondly, "heinousness" is unconstitutionally vague[198]; by definition, every case that reaches the penalty phase does so because there has been a murder conviction plus a special circumstance finding; again, this asserted justification could be applied to every capital case.

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[197] *Roper v. Simmons* (2005) 543 U.S. 551; California Penal Code § 190.5.

[198] See, *Maynard v. Cartwright* (1988) 486 U.S. 356 [holding that Oklahoma's "heinous, atrocious, and cruel" aggravating circumstance was unconstitutionally vague]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980); *Furman v. Georgia* (1972) 408 U.S. 238.

Switching gears, respondent posits that it is perfectly acceptable for a prosecutor to argue age in aggravation. (RB 241, citing *People v. Lucky* (1988) 45 Cal.3d 259, 302.) Appellant recognizes that this Court has previously held that age may be argued as either mitigation or aggravation, but respectfully suggests that the use of appellant Vo's youth to argue future dangerousness – in the face of evidence he had no prior record of violence, as well as evidence that Vo had demonstrated no problems in custody – was factually misleading, failed to provide constitutionally adequate guidance to jurors, and undermines the requirement that jurors fully consider and weigh all evidence proffered in mitigation of sentence, so they can reach a reliable determination. *(Woodson v. North Carolina, supra,* 428 U.S. 280; *Lockett v. Ohio, supra,* 438 U.S. 586.)

D. The prosecutor improperly urged the jury to consider the defendants jointly in determining sentence.

The United States Supreme Court has held that the Eighth Amendment requires "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304; emphasis added.)

Respondent contends that Vo asserts the prosecutor urged the jury to

consider the co-defendants jointly throughout his argument, but only points to one instance. (RB 242.) The prosecutor's penalty argument (25 RT 6384-6419) is literally filled with references to the defendants jointly. See, e.g., 25 RT 6384 ("they have committed the worst of crimes;" "the defense" [referring to both defenses]); 25 RT 6385 ("these two murderers, attempted mass murderers"); 25 RT 6387 ("the defendants;" "they tortured her;" "these defendants knew what they were doing"); 25 RT 6391 ("the defense" [again referring to both defenses]); 25 RT 6394-6395 (comparing Vo to Hajek, and concluding Vo was worse because he did not have mental illness; objection sustained); 25 RT 6396 ("these two men killed;" as to Vo, "this is all about him just backing up, just helping out a friend"); 25 RT 6397 ("they're both adults;" "these are monsterous defendants and age has nothing to do with it"); 25 RT 6416 ("these defendants"); 25 RT 6418 ("the defendants are liable;" the death penalty is justified "by the character of the criminals and the character of the crime, and the defendants in this case have satisfied that"); 25 RT 6419 ("these defendants and these defense counsel;" "both of these defendants deserve the death penalty for the monsterous crimes").

E. Conclusion.

The prosecutor's misconduct in argument continued the course set in its determination to try these defendants jointly, weilding an unfounded and boundless conspiracy theory, and employing all means to secure a death judgment against appellant Vo – despite the lack of evidence that Vo killed or intended to kill, despite Vo's lack of any prior record of violence, despite Vo's excellent behavior and hard work in jail, and despite significant factors militating against a death judgment. Reversal is required.

XL. The trial court improperly denied appellant Vo's motion for new trial.

Appellant Vo's trial counsel raised numerous grounds for a new trial, and so does appellant on direct appeal. (Vo AOB, Arg. 30, pp. 435-469.)[199] The grounds are:

(1) Insufficient evidence to support the torture special circumstance.[200]

(2) Insufficient evidence to support the lying in wait special circumstance.[201]

(3) Admission of letters written by co-defendant Hajek, over objection of appellant Vo.[202]

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[199] Co-defendant Hajek also filed a Motion for New Trial (CT 2752-2755), supported by the Declaration of Brenda Wilson, a paralegal who attended an interview with three jurors on August 10, 1995. (CT 2756-2757.) Also pending before the trial court was appellant Vo's Motion to Reduce Death Verdict to the Penalty of Life Imprisonment Without the Possibility of Parole [Penal Code §190.4(e); §1181(7)], filed on August 16, 1995. (CT 2730-2740.) That motion was supported by the Declaration of Jeanne DeKelver, appellant's second counsel, relating conversations with several jurors after the penalty phase (the first also attended by the prosecutor and an investigator for the Public Defender, and the second also attended by counsel for co-defendant Hajek). (CT 2741-2744.)

[200] Appellant refers to and incorporates Arguments 9, pp. 298-307, and 8.D of his AOB, pp. 291-294, and Argument VII of this brief, regarding torture murder and the torture murder special circumstance.

[201] Appellant refers to and incorporates Arg. 10, pp. 307-316, and Arg. 8.E, pp. 294-296, of his AOB, and Argument VI of this brief, regarding lying in wait.

[202] Appellant refers to and incorporates AOB, Arg. 7, pp. 276-285 regarding *Bruton* violations in this case (in turn incorporating Args. 1, 4, 6 of the AOB), and corresponding Arguments XIII, II, XI, and X of this brief.

(4) Denial of the severance motion despite inconsistent defenses, and the admission of evidence applicable only to one defendant.[203]

(5) Admission of co-defendant Hajek's statement to witness Moriarty

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[203] Appellant Vo refers to and incorporates Argument 1 of his AOB, pp. 123-159 (Arg. II of this brief), regarding the improper denial of severance, which in turn incorporates the other errors flowing from that denial, including but not limited to the following arguments in his AOB: Arg. 2 (denial of necessary continuances); Arg. 4 (admission of evidence concerning co-defendant Hajek's conversation with a witness before the offense, stating Hajek's violent intent); Arg. 5 (admission of taped conversation between appellant Vo and co-defendant Hajek, in which Hajek made inculpatory statements and Vo's responses are inaudible); Arg. 6 (the prosecution's uncharged conspiracy theory); Arg. 7 (admission of co-defendant Hajek's extrajudicial statements, resulting in the denial of the right to confront and cross-examine); Arg. 8 (insufficient evidence that Vo killed, intended to kill, or harbored reckless disregard for human life, or participated in the uncharged alleged conspiracy, or otherwise was criminally culpable for the homicide); Arg. 12 (admission of evidence of co-defendant Hajek's musical interests, alleged Satanism, and other alleged bad acts); Arg. 17 (improper instructions undermined the constitutional requirement of proof beyond a reasonable doubt as to appellant Vo); Arg. 18 (instructions on aiding and abetting improperly relieved the prosecution of its duty to prove each element as to each defendant separately); Arg. 19 (appellant Vo's jury was burdened by instructions regarding Hajek's conduct and mental defenses, and no limiting language was given); Arg. 20 (instructions improperly permitted the jury to infer guilt from alleged evidence of motive); Arg. 25 (the trial court improperly refused to permit a separate jury to decide appellant Vo's penalty); Arg. 28 (penalty instructions failed to provide adequate guidance, and required jurors to consider factors and evidence that was wholly irrelevant to appellant Vo); Arg. 29 (the trial court refused to preclude improper argument by the prosecutor, including his urging that the defendants be considered jointly and that the jury consider factors applicable only to one defendant); Arg. 30 (denial of the motion for new trial); and Arguments 22 and 33 (cumulative error).

the night before the homicide, over objection of appellant Vo.[204]

(6) Admission of a tape recording of a conversation between the defendants (Exhibit 53), despite such poor quality that substantial portions were inaudible, permitting the jury to speculate and base its verdict on unreliable evidence.[205]

(7) Excusal over objection of prospective juror E, and the refusal to excuse juror W for employment hardship.[206]

(8) Denial of continuance requests, requiring counsel to defend when he was not prepared to go forward.[207]

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[204] In Argument 4 of his AOB, appellant Vo argued that it was error to permit his jury to consider these extrajudicial statements of the co-defendant, that witness Moriarty's testimony was used to improperly paint appellant Vo as a sadistic killer, and that reversal is required because appellant Vo was deprived of his right of confrontation. Appellant Vo incorporates herein Argument 4 of his AOB, pp. 232-237, and Argument XI of this brief.

[205] Appellant Vo refers to and incorporates herein Argument 5 of his AOB, pp. 238-249, and Argument XII of this brief. The improper admission of the jailhouse audiotape, in which only co-defendant Hajek's voice was audible, was an egregious error.

Appellant Vo also refers to and incorporates herein other related issues, including but not limited to: Argument 1 of his AOB and Argument II herein (denial of severance); Argument 6 of his AOB and Argument X herein (uncharged conspiracy theory); and Argument 7 of his AOB and Argument XIII herein (*Bruton* violations arising from the statements and writings of his co-defendant).

[206] Appellant Vo refers to and incorporates Argument 23 of his AOB, pp. 378-386.

[207] Appellant Vo refers to and incorporates Argument 2 of his AOB, and Argument III of this brief, regarding denials of his right to counsel via denials of necessary continuances, second counsel, and necessary funding.

> (9) Payment issues that caused counsel to be unprepared at trial, prevented counsel from preparing and presenting additional evidence for sentencing, and prevented full investigation of matters concerning jury deliberations; all resulting in an unfair trial for appellant Vo.[208]

(CT 2764-2772.) This motion was also supported by a Declaration of James W. Blackman Respecting Juror Interview. (CT 2773-2774.)

Further litigation ensued, as investigation revealed that jurors had spent considerable time listening to Exhibit 53, an audiotape introduced at trial, and – contrary to the evidence presented at trial that appellant Vo's voice was inaudible, jurors thought they heard admissions by appellant Vo. Respondent admits that much of the tape is inaudible; the examples given of audible portions were all statements of co-defendant Hajek. (RB 117-118.)

In its response to the argument that a new trial was warranted because jurors heard something nobody else heard, respondent contends that "all presumptions must be drawn in favor of the court's ruling." (RB 243.) Respondent argues that there were no violations of notice or due process, since appellant Vo's counsel "had a copy of the tape" (RB 244), and that "It is of no moment that the defense claims it did not hear what the

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[208] Appellant Vo again refers to and incorporates Argument 2 of his AOB, and Argument III of this brief, regarding denials of his right to counsel via denials of necessary continuances, second counsel, and necessary funding.

jurors apparently heard." (*Ibid.*, emphasis added.) Respondent also argues that "the jury committed no misconduct by listening to a tape admitted into evidence." (*Ibid.*)

Respondent's argument is utter nonsense. Officer Walter Robinson testified that only Hajek's statements are audible on the tape. (RT 3818, 3844.) At no point were any alleged admissions by appellant Vo introduced via testimony.[209] That jurors thought they heard an admission by appellant Vo was a lightning bolt out of the blue, something he and his counsel could not have anticipated, and what the jurors thought they heard was devastating: what could be more damning than thinking one hears an admission of guilt to which nobody testified? How can respondent treat such a startling circumstance, in a capital case where the outcome was a death sentence, as a matter of "no moment?" (RB 244.)

In capital cases,

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

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[209] Appellant Vo addresses this issue in more depth in Argument 5 of his AOB, pp. 238-249, and Argument XII of this brief, incorporated herein.

(*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; emphasis added.) Having one's jury consider non-existent information[210] of a supposed admission of guilt – information appearing no where in the trial transcripts, and of which appellant and counsel had no notice – fits the description of an event akin to being "struck by lightning." (*Furman v. Georgia* (1972) 408 U.S. 238, 309 (conc. opn. of Stewart, J.).) It is the very definition of an arbitrary and capricious determination of sentence, one prohibited by our state and federal Constitutions. A death sentence founded on such unreliable evidence cannot stand.

The trial court was obligated to grant a new trial, and it refused to do so. Reversal is required.

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[210] Even respondent frames what happened as the jurors "apparently" hearing this purported admission. (RB 244.) Respondent can muster no better evidence, because the record does not demonstrate any admission on the part of appellant Vo. Still, public prosecutors are expected to seek justice rather than endeavoring to win by any means. (*Berger v. United States* (1935) 295 U.S. 78, 88.)

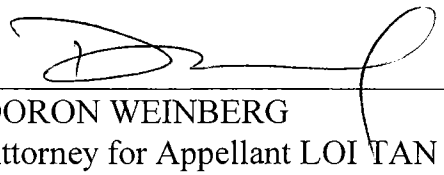
CONCLUSION

For all of the reasons set forth in this brief, appellant Loi Tan Vo respectfully requests this Court to reverse the judgment of guilt and sentence of death, and grant him a new trial.

Dated: February 22, 2012

Respectfully submitted,

LAW OFFICES OF DORON WEINBERG



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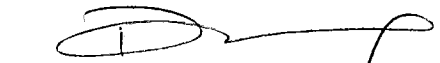
CERTIFICATION OF WORD COUNT
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 13

I certify that Appellant Loi Tan Vo's Reply Brief consists of 57,311 words.

Dated: February 22, 2012

Respectfully submitted,

LAW OFFICES OF DORON WEINBERG



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PROOF OF SERVICE BY MAIL -- 2015.5 C.C.P.

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APPELLANT'S REPLY BRIEF

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

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I certify or declare under penalty of perjury that the foregoing is true and correct.

Executed on February 22, 2012, at San Francisco, California.