

No. S044739

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)

Plaintiff and Respondent,)

v.)

ANTHONY G. BANKSTON,)

Defendant and Appellant.)

(Los Angeles
County Superior Court
No. VA007955)

**SUPREME COURT
FILED**

JUN 20 2014

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

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HONORABLE NANCY BROWN, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)

Plaintiff and Respondent,)

v.)

ANTHONY G. BANKSTON,)

Defendant and Appellant.)

(Los Angeles
County Superior Court
No. VA007955)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

* * *

ARGUMENT

I

THE TRIAL COURT'S FAILURE TO CONDUCT A PROPER *MARSDEN* INQUIRY REQUIRES REVERSAL

Appellant contends that he sought substitution of counsel prior to trial, but was denied a meaningful *Marsden*¹ hearing because the judge who heard the motion misinformed appellant about what he had to prove in order to obtain relief. (AOB 64-75.)² More specifically, the judge told appellant that he had to prove an actual conflict of interest existed between himself and his current counsel in order to obtain a new attorney. (2RT 228-229.)³ This was the wrong legal standard. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.) Then, at the inquiry on appellant's motion, the court told appellant that it could not evaluate his complaints regarding his attorney's performance, which is precisely what a *Marsden* inquiry requires the trial court to do. (2RT 235.)

Respondent contends that appellant never made a *Marsden* motion, but instead, only requested to represent himself. (RB 59, 71-72.)⁴ Respondent also argues – apparently in the alternative – that appellant's request for substitution of counsel was not sufficiently clear and unequivocal to warrant a proper *Marsden* inquiry. (RB 67-69.) Putting

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

² The abbreviation "AOB" refers to Appellant's Opening Brief.

³ The abbreviation "RT" refers to the Reporter's Transcript, and the abbreviation "CT" refers to the Clerk's Transcript. The number immediately preceding these abbreviations refers to the volume number, while the number following the abbreviation refers to the page number.

⁴ The abbreviation "RB" refers to Respondent's Brief.

aside for a moment that the court ultimately excused the prosecutor and conducted a confidential *Marsden* inquiry – albeit a flawed one – the record belies respondent’s positions.

Appellant, through his then-appointed counsel, sought to be heard on a *Marsden* motion when he appeared before Commissioner Peter Espinoza. (2RT 222-223; 1CT 213-214.)⁵ When the commissioner stated that he could not hear a *Marsden* motion until the following week, appellant personally requested that the hearing be conducted sooner. (2RT 222.) The commissioner explained why that was not possible, and appellant said he had no choice but to wait to be heard. (2RT 223.)

The following week, the prosecutor refused to stipulate to the commissioner hearing the motion. (2RT 225) The commissioner stated that he would transfer the case “for the *Marsden* motion” that same day, to which the prosecutor replied, “I understand that.” (RT 225.) The case was then transferred to the superior court “. . . for pre-trial conference/trial setting and a *Marsden* motion.” (1CT 214.)

There was some initial confusion about the nature of the motion when appellant first appeared before Superior Court Judge Robert Armstrong. This confusion arose when appellant’s appointed counsel – the attorney whom appellant sought to replace – erroneously told the court that appellant had advised the commissioner that he wished to represent himself, and that the matter was put over for a hearing on that motion. (2RT 227-228.) Although respondent contends that this was a “clarifi[cation]” of

⁵ In the introduction to this argument in appellant’s opening brief, appellant stated that the date of this hearing was March 11, 1993. (AOB 64.) Although appellant’s record citation was correct, the date of the hearing was in fact March 25, 1993.

appellant's motion (RB 68), the record does not reflect such an exchange. And while respondent argues that Judge Armstrong "accepted [counsel's] characterization" of the pending motion as a motion for self-representation (RB 69), the record shows that the court remained momentarily uncertain as to how to proceed. For that reason, *after* appointed counsel first mentioned self-representation, Judge Armstrong stated that he needed "to straighten out exactly what the motion [was]" before him. (2RT 228.) Then, following further discussion, Judge Armstrong understood that a *Marsden* hearing was required; the prosecutor absented himself without objection and the court conducted a *Marsden* hearing. (2RT 233-239.)

Thus, appellant sought to be heard on a *Marsden* motion when he appeared before the commissioner, who transferred the matter to the superior court for that hearing. The prosecutor understood that a *Marsden* hearing was to be held in superior court, and excused the himself so the court could conduct a *Marsden* hearing. On this record, it is incorrect to argue, as respondent does for the first time on appeal, that appellant did not make a *Marsden* motion, or that the motion was somehow too unclear to require a *Marsden* hearing, which was held.

Respondent next faults appellant for the trial court's failure to conduct an adequate *Marsden* inquiry, arguing that appellant did not press his request for substitution of counsel during the hearing, but rather sought self representation. (RB 65-72.) Respondent also contends that appellant was given a sufficient the opportunity to state his complaints about his attorney's performance, but failed to do so. (RB 73-77.)

Both claims lack merit because respondent ignores the critical fact that, *prior to the in camera hearing*, Judge Armstrong completely foreclosed any meaningful inquiry into appointed counsel's performance.

More specifically, the court first asked appointed counsel whether there existed an actual conflict of interest between himself and appellant; counsel replied that there was none. (2RT 228.) Turning to appellant, the Court stated that he could only succeed on a *Marsden* motion if he established the existence of an actual conflict of interest. (2RT 228.) Then, after giving appellant an example of an actual conflict – where appointed counsel represented a witness who was scheduled to testify against appellant – the court explained that because appointed counsel had already stated that no such conflict existed, appellant was not entitled to a new attorney and his remaining option was self representation. (2RT 228-229.) It was in light of this legally erroneous description of appellant’s rights under *Marsden* that appellant finally said, “. . . I have to choose to represent myself.” (2RT 231.)

Only when appellant began discussing his reasons for wanting appointed counsel dismissed did Judge Armstrong excuse the prosecutor to conduct a *Marsden* hearing; but that hearing was inappropriately focused on appellant’s right to self representation. Indeed, once the prosecutor had been excused, Judge Armstrong even more directly articulated that he would not review appointed counsel’s performance. Responding to appellant’s complaint that appointed counsel was not investigating his innocence, the court stated: “I don’t know anything about this case. I just got this file cold. So I sure am not able to evaluate what’s appropriate and what’s not.” (2RT 234.)

Under these circumstances, appellant cannot be faulted for not providing the court with a complete accounting of how his appointed counsel was failing to effectively represent him. But even if this Court were to accept respondent’s position that appellant was required to make a

more fulsome record of appointed counsel's failings notwithstanding Judge Armstrong's mis-advisements, appellant did set out sufficient detail of appointed counsel's failings to warrant further inquiry under *Marsden* and its progeny. For example, at the *Marsden* hearing, appellant complained that appointed counsel was not investigating his innocence defense. (2RT 233.) He told the court that he had discussed the charged crimes with appointed counsel; that he was "not satisfied" with his representation (2RT 235); and that he did not commit the charged offenses (2RT 236). These complaints alone should have triggered an inquiry by the court into counsel's effectiveness. (See *People v. Munoz* (1974) 41 Cal.App.3d 62, 66; see also *People v. Miranda* (1987) 44 Cal.3d 57, 77, abrogated on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn.4.) But instead of inquiring further of appellant, or at a minimum asking appointed counsel to respond to appellant's assertions that counsel was not investigating his innocence defense, Judge Armstrong merely replied that he was not in a position to evaluate counsel's performance. (2RT 234.)

Respondent cites a trio of this Court's cases – *People v. Crandell* (1988) 46 Cal.3d 833 (*Crandell*),⁶ *People v. Mendoza* (2000) 24 Cal.4th 130 (*Mendoza*), and *People v. Valdez* (2004) 32 Cal.4th 73 (*Valdez*) – claiming that in each this Court rejected a claim similar to appellant's, under similar facts. Appellant disagrees.

In *Crandell*, the defendant did not seek to be heard on a *Marsden* motion at all. In rejecting the defendant's claim that his complaints about appointed counsel's activities required the court to conduct a *Marsden* inquiry, this Court concluded: "As no request for substitute counsel was

⁶ Abrogated in *People v. Crayton* (2002) 28 Cal.4th 346.

made in municipal court, the *Marsden* procedures were not required.” (*Crandell, supra*, at p. 855.) Similarly, in *Mendoza*, the defendant moved to “dismiss” his attorney and represent himself. Finding that the defendant made no *Marsden* motion, this Court held: “Although no formal motion is necessary, there must be ‘at least some clear indication by defendant that he wants a substitute attorney.’ [] Here, defendant did not do that.” (*Mendoza, supra*, at p. 155, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

In this case, unlike the defendants in *Crandell* and *Mendoza*, appellant not only sought to be heard on a *Marsden* motion when he appeared before Commissioner Espinoza, but he asked that the motion be heard sooner, rather than later. (2RT 222-223.) After the commissioner inquired of appointed counsel as to whether “the 31st [of March, 1993 would] be a good day to conduct a *Marsden* motion,” the court scheduled the hearing for that date. (2RT 222-223.) Then, after the prosecutor declined to stipulate to the commissioner hearing the motion, the court transferred the matter to Judge Armstrong specifically so that appellant could be heard on his *Marsden* motion. (2RT 222-223, 225; 1CT 213-214.) On this record, there can be no doubt that appellant provided “‘at least some clear indication’” that he wanted a new lawyer. (*Mendoza, supra*, 24 Cal.4th at p. 150.)

Respondent’s reliance on *Valdez* is equally misplaced. There, the defendant made two *Marsden* motions prior to his guilt-innocence trial; both were denied. Then, during the penalty phase, the defendant asked to speak with the trial judge out of the prosecutor’s presence. On appeal, Valdez claimed the trial court erred in denying the guilt-innocence trial *Marsden* motions, and that the trial court failed to conduct a *Marsden* hearing at all during the penalty phase proceedings.

This Court concluded that both guilt-innocence trial motions were properly denied because (1) the trial provided the defendant with ample opportunity to detail his concerns and state the grounds for his motion; (2) after hearing the defendant's complaints, the trial court asked counsel to respond; and then (3) trial counsel addressed each of the defendant's specific concerns to the trial court's satisfaction. (*Valdez, supra*, 32 Cal. 4th at pp. 95-96.) As for the defendant's penalty-phase request to meet with the judge outside the prosecutor's presence, this Court explained that Valdez made no *Marsden* motion during the penalty phase, and when asked whether the purpose for meeting with the judge outside the prosecutor's presence was to relieve counsel, the defendant did not respond in the affirmative. Accordingly, the lower court was under no duty to conduct a *Marsden* inquiry. (*Id.* at pp. 96-97.)

Here, unlike what occurred in *Valdez*, the trial court did not provide appellant with any meaningful opportunity to express his grounds for substitution of counsel because the court's circumscribed inquiry centered solely on the existence of an actual conflict of interest. Moreover, the court here did not ask counsel to respond to the complaints appellant lodged when explaining why he had no choice but to proceed in pro. per. And rather than carefully considering appellant's complaints and asking for counsel's response, as the trial judge did in *Valdez*, Judge Armstrong stated that he was unable to even consider whether counsel was performing effectively. Finally, while Valdez made no motion at the penalty phase of his capital trial triggering a *Marsden* inquiry, appellant here not only made a *Marsden* motion, but he pressed to be heard on that motion as soon as possible. (2RT 222-225; 1CT 214.)

Respondent further faults appellant for not now arguing that he was

ultimately entitled to substitution of counsel; for not claiming that appointed counsel was actually performing ineffectively at the time appellant made his *Marsden* motion; and for not establishing that the outcome of the *Marsden* proceeding was wrong. For these reasons, respondent concludes, any error under *Marsden* must be deemed harmless beyond a reasonable doubt. (RB 76-77.) But respondent misapprehends the law.

It is true that one cannot ascertain whether appellant had a meritorious *Marsden* motion. That is because the trial court mishandled the motion by erroneously telling appellant that he had to prove an actual conflict of interest in order to prevail under *Marsden*, and that the court could not (and therefore did not) evaluate counsel's effectiveness. In similar cases, this Court has consistently maintained that it would be unfair to require an appellant to prove prejudice: "On this record we cannot ascertain that defendant had a meritorious claim, but that is not the test. Because the defendant might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel, the trial judge's denial of the motion without giving defendant an opportunity to do so denied him a fair trial." (*People v. Lewis* (1978) 20 Cal.3d 496, 497-498; see *People v. Hill* (1983) 148 Cal.App.3d 744, 755 [failing to make an adequate inquiry makes appellate review impossible].) Indeed, for this very reason, "Marsden error is typically treated as prejudicial per se, since the very nature of the error precludes meaningful appellate review of its prejudicial impact. [Citations.]" (*People v. Hill, supra*, 148 Cal.App.3d at p. 755; *People v. Ortiz* (1990) 51 Cal.3d 975, 988 [per se reversal]; see also *United States v. Williams* (9th Cir. 1979) 594 F.2d 1258, 1260-1261.)

Moreover, a harmless-error analysis of any sort would be particularly

inappropriate here because the trial court's error contributed to appellant's decision to choose self-representation over proceeding with what he thought would be ineffective representation by the only attorney available to him. (See *Hendricks v. Zenon* (9th Cir. 1993) 993 F.2d 664, pp. 670-671 [per se reversal for denial of counsel on appeal, where denial of motion for substitution of appointed appellate counsel, without appropriate inquiry, forced appellant to represent himself].) Nevertheless, even were this Court inclined to conduct a harmless error analysis, reversal would be required because respondent has not met its heavy burden that, beyond a reasonable doubt, the error did not contribute to defendant's decision to proceed in pro. per. at his capital trial, and thereby contribute to the verdicts that resulted in a judgment of death. (*Marsden, supra*, 2 Cal.3d at p. 126; see also *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Accordingly, the entire judgment must be reversed.

* * *

II

APPELLANT WAS DENIED HIS RIGHT TO COUNSEL AND DUE PROCESS WHEN HE PROCEEDED TO TRIAL IN PRO. PER. WITHOUT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY WAIVING HIS RIGHT TO COUNSEL

Appellant maintains that he was denied his right to counsel because he proceeded to trial in pro. per. without voluntarily waiving that right (AOB 84-90), and because his purported waiver was neither knowingly nor intelligently made (AOB 90-106). Respondent counters that nothing in the record shows appellant lacked the capacity to waive his right to counsel, that he was not coerced to do so, and that appellant was sufficiently advised about the pitfalls of self-representation. (RB 78-105.)

A. Appellant Did Not Voluntarily Waive His Right To Counsel

When appellant first appeared in the superior court to be heard on his *Marsden* motion, Judge Armstrong misadvised him about his right to counsel. Judge Armstrong told appellant that he had to show the existence of an actual conflict of interest – specifically, proof that appointed counsel previously represented someone who would be a witness against appellant at his trial – before the court would appoint him a new attorney. (2RT 228-229.) This was a legally incorrect standard. Appellant had the right to the effective assistance of counsel – not just unconflicted counsel – and appellant was actually entitled to substitution of counsel upon a showing that appointed counsel's representation was inadequate. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.)

After Judge Armstrong accepted appointed counsel's statement that there existed no actual conflict of interest (2RT 228), the court left appellant with an untenable option: Appellant could proceed to trial with what he

believed was ineffective representation with no recourse to complain about his attorney's failings, or no counsel at all. Notwithstanding the court's general warnings against self-representation, appellant told the court, "I have to choose to represent myself. That's what I'm saying." (2RT 231.)

When appellant attempted to explain why he felt compelled to represent himself, Judge Armstrong reinforced the point that short of proof of an actual conflict of interest he would not appoint substitute counsel, telling appellant that the court was in no position to evaluate the propriety of counsel's actions or inactions (2RT 234-235), even though that is precisely what *Marsden* required the court to do. (*People v. Cruz* (1978) 83 Cal.App.3d 308, 316.) The court then granted appellant pro. per. status, and he proceeded to trial unrepresented by counsel.

At no point thereafter did any judge correct Judge Armstrong's initial and erroneous explanation regarding appellant's counsel rights. Appellant was never told that he had not only the right to un-conflicted counsel, but also the right to the effective assistance of counsel, and that if appellant believed that his counsel rights were in jeopardy, he could raise a complaint with the court, which would then consider whether appointed counsel was performing competently. This is so even after appellant explained to the court that he chose to proceed in pro. per. because: "What I'm saying is I'm not the perpetrator of these crimes. The reason I elected to go to pro per – to go pro per is because of the way the Public Defender didn't plan presenting a defense." (2RT 325.)

It is in this context that appellant has argued that his "choice" to represent himself was unconstitutionally impaired, resulting directly from Judge Armstrong's misstatements concerning appellant's right to substitution of counsel, and the court's mishandling of appellant's *Marsden*

motion. More specifically, appellant was improperly forced to choose between proceeding with incompetent counsel, and no counsel at all, making his subsequent waiver an involuntary one. (*Crandell v. Bunnell* (9th Cir. 1994) 25 F.3d 754, 755.) Under these circumstances, appellant's purported waiver cannot be deemed a free and voluntary one. (See *People v. Hill* (1983) 148 Cal.App.3d 744, 755-756; *People v. Cruz, supra*, 83 Cal.App.3d at pp. 317-318; *Crandell v. Bunnell* (9th Cir. 1998) 144 F.3d 1213, 1214-1218; *Crandell v. Bunnell, supra*, 25 F.3d at p. 755; *Maynard v. Meachum* (1976) 545 F.2d 273, 278; see *Pazden v. Maurer* (3d Cir. 2005) 424 F.3d 303, 314-318.)

Respondent disagrees, first arguing that the record does not reflect that appellant lacked the capacity to voluntarily waive his right to counsel and represent himself. (RB 78.) But while a defendant's mental capacity to represent himself may be an issue in a particular case (see, e.g., *Indiana v. Edwards* (2008) 554 U.S. 164), appellant made no such argument in his opening brief. Thus, respondent's assertion on this point is inapt.⁷

Respondent next argues that appellant's alleged waiver was not the result of Judge Armstrong's mishandling of appellant's *Marsden* motion, claiming that appellant never made a *Marsden* motion, but instead made only a *Faretta* motion. (RB 93-94.) Respondent is wrong. Appellant

⁷ It may be that respondent is confused because appellant cited *Godinez v. Moran* (1993) 509 U.S. 389 – a *Faretta* competency case – in his opening brief. (AOB 76.) But appellant cited *Godinez* for the proposition that a trial court considering a counsel waiver must not only satisfy itself that a defendant understands the potential dangers and pitfalls of self representation, but also that the waiver was voluntary and uncoerced. (*Godinez v. Moran, supra*, at pp. 400, 401, fn. 12; see *People v. Lawley* (2002) 27 Cal.4th 102, 139.)

sought to be heard on a *Marsden* motion when he appeared before Commissioner Espinoza, and asked that it be heard as soon as possible (2RT 222-223; 1CT 213-214); Commissioner Espinoza put the matter over for a hearing the following week (*ibid.*); the commissioner transferred the matter to the superior court specifically so that appellant could be heard on a *Marsden* motion (1CT 214); the district attorney stated he understood that a *Marsden* hearing was to be held in superior court (RT 225-226); and the superior court ultimately excused the prosecutor – without any objection by the district attorney – to conduct a *Marsden* hearing, albeit a flawed one (2RT 233-239). On this record, there can be no doubt that appellant sought substitution of counsel.⁸

Respondent also appears to argue that appellant's decision to proceed in pro. per. was freely made because it was not improperly influenced by Judge Armstrong's failure to conduct a proper *Marsden* hearing. Respondent claims that appellant expressed only "mild tactical disagreements about defense strategy" for which a *Marsden* hearing was not required. (RB 93.)

Respondent's point is not well taken because it fails to acknowledge that Judge Armstrong began his inquiry into appellant's *Marsden* motion by setting out an incorrect legal standard, which affirmatively misadvised appellant that he could succeed on a *Marsden* motion upon proof of an actual conflict of interest between himself and appointed counsel. (2RT

⁸ In reviewing the record, this Court must indulge every reasonable inference against a finding that appellant intended to waive the right to counsel. (*Brewer v. Williams* (1977) 430 U.S. 387, 404; *People v. Roldan* (2005) 35 Cal.4th 646, 683, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22.)

228-229.) Then, at the hearing itself, the court repeated that it could not evaluate appointed counsel's effectiveness. Thus, while appellant ultimately attempted to explain to the court why he felt compelled to choose to represent himself, he had no reason to detail all of his counsel's failures.

Notwithstanding Judge Armstrong's stated refusal to consider any complaint about appointed counsel's performance, appellant did provide specific details about his problems with appointed counsel's representation. For example, appellant told the court that he was not guilty, that he was dissatisfied with appointed counsel's investigation, and he questioned why appointed counsel was doing no fact-finding as to his innocence. (2RT 233, 236.) Appellant also told the court that he was hoping that he could present a defense to the charges and obtain a more favorable result than he could get from appointed counsel's approach. (RT 239.) In addition, appellant subsequently explained that his appointed counsel did not intend to present a defense to the charges. (2RT 325.) Under any metric, appellant's complaints that his trial attorney was not pursuing a defense that considered appellant's innocence cannot be reasonably deemed mere "mild tactical disagreements."

Respondent also argues that appellant's waiver of counsel must have been voluntary because Judge Armstrong warned appellant about the risks of self-representation. (RB 94-95.) It is true that the court told appellant that self-representation would be foolish, and that appellant would be outmatched by an experience prosecutor. (2RT 230, 235.) But while those warnings may be relevant as to whether appellant knowingly and intelligently waived his right to counsel, they have little to do with whether appellant's decision was *voluntary*, particularly given that appellant's decision to proceed in pro. per. was the result of Judge Armstrong's

affirmative misadvisement regarding his right to substitution of counsel, and the botched *Marsden* proceedings.

Finally, respondent contends that appellant's waiver was voluntary because he subsequently completed written waiver forms. (RB 95-96.) Putting aside for the moment the inadequacies of those purported waivers (discussed in greater detail, *post*), this argument again misses the point. Appellant proceeded in pro. per. because he was told that he had to choose between proceeding with counsel who he believed was ineffective and about whom he could not be heard to complain unless there were proof of an actual conflict of interest, and proceeding with no counsel at all. The waiver forms were silent on Judge Armstrong's legally erroneous statements regarding appellant's right to counsel.

In fact, neither Judge James A. Bascue – before whom he appeared five months after the flawed *Marsden* proceedings – nor the trial court said anything to correct the misperception that proceeding in pro. per. was the only way appellant could be guaranteed that a defense to the charges would be presented at his capital trial. Both judges *failed* to correct Judge Armstrong's errors. Appellant was never told that he had the right to the effective assistance of counsel, and that a *Marsden* motion could be entertained upon appellant's belief that his counsel was performing inadequately.

Judge Bascue remained silent on the point even after appellant stated that the reason he had elected to represent himself was because he was innocent and his appointed counsel did not intend to present a defense to the charges. (2RT 325.) Such a comment should have triggered the court to review the prior *Marsden* proceedings, or at the very least explain that appointed counsel would have a duty to present a defense to the charges if

his client demanded it. Instead, Judge Bascue merely repeated that appellant had the right to counsel (2RT 325), thereby doing nothing to correct appellant's misperception that he could only be guaranteed that he would have a defense presented to the charges if he proceeded in pro. per.

Similarly, the trial court failed to correct Judge Armstrong's misstatements about appellant's *Marsden* rights, which left appellant with the false belief that he could only be relieved from an inadequate attorney if there existed an actual conflict of interest. This is so even though the trial court must have been aware of the error: When appellant first appeared before the trial court, it guaranteed appellant, "... I'll read your file very carefully, Mr. Bankston." (3RT 426.) At the very next hearing, the trial court stated that it was now familiar with appellant's case because it had read the transcripts and "every document" in his file. (3RT 436.)

In sum, appellant's waiver of his right to counsel cannot be deemed a voluntary one because he was "forced to choose between incompetent counsel and no counsel at all." (*Crandell v. Bunnell, supra*, 25 F.3d at p. 755, citing *Lofton v. Procutier* (9th Cir. 1973) 487 F.2d 434, 436.) As a result of that involuntary waiver, appellant proceeded to his capital trial without the assistance of counsel. Accordingly, his conviction and sentence must be reversed.

B. Appellant Did Not Knowingly And Intelligently Waive His Right To Counsel

In addition to the fact that appellant's purported waiver of his right to counsel was not voluntarily made, the waiver cannot be deemed to have been knowingly and intelligently made because the record as a whole does not demonstrate that appellant understood "the disadvantages of self-representation, including the risks and complexities of the particular case."

(*People v. Bloom* (1989) 48 Cal.3d 1194, 1225.) More specifically, the trial court did not conduct a “penetrating and comprehensive examination into [appellant’s] apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.” (*United States v. Padilla* (10th Cir. 1987) 819 F.2d 952, 956-957, quoting *Von Moltke v. Gillies* (1948) 332 U.S. 708, 723-724, internal quotation marks and punctuation omitted; accord *People v. Koontz* (2002) 27 Cal.4th 1041, 1070-1071, discussing *People v. Lopez* (1977) 71 Cal.App.3d 568.)

Appellant and respondent agree that no specific litany of advisements is required under *Faretta*. But here, the trial court’s advisements were clearly deficient in several ways, including because (1) the court affirmatively misadvised appellant about the nature of his Sixth Amendment right to the effective assistance of counsel; (2) the court failed to explain the difference between the right to the assistance of counsel, and the right to proceed by way of self-representation with the assistance of advisory counsel, even after it had become clear that appellant was confused about the difference; and (3) the court failed to advise appellant about the unique nature of capital proceedings, as well as the capital charges he was facing and the possible defenses available to him. (See *People v. Koontz, supra*, 27 Cal.4th at p. 1071.) As a result of these failures, this Court can have no confidence that appellant’s purported waiver of counsel was knowingly and intelligently made.

Turning first to the fact that Judge Armstrong affirmatively misadvised appellant about his right to substitution of counsel, respondent

contends that appellant's resulting confusion between his *Marsden* and *Faretta* rights was remedied during subsequent proceedings before Judge Bascue and the trial court, particularly in light of the forms appellant filled out stating that he understood that he was giving up his right to counsel. (RB 101-102.) This is simply not the case. Neither Judge Bascue nor the trial court told appellant that he had not only the right to un-conflicted counsel, but also the right to the effective assistance of counsel, and that he could effectuate that right by asking the court to consider whether appointed counsel was performing competently.

In addition, the waiver forms shed no light on Judge Armstrong's misstatements about appellant's right to counsel. The forms were silent on appellant's right to be relieved of appointed counsel upon a showing of ineffectiveness. In fact, the manner in which appellant completed the forms – including his decision not to initial certain sections of the forms, and his inter-lineation of other sections indicating that he was not waiving his right to the assistance of counsel – demonstrate appellant's lack of understanding of the very right he was purportedly waiving. (2CT 306-307; see 2RT 319, 324-325, 3RT 459.)

As to that point, the record shows that appellant was confused about the difference between his Sixth Amendment right to the assistance of counsel at trial, and his right to represent himself at trial with advisory counsel. But rather than clarifying the difference between these two legal concepts, Judge Bascue and the trial court exacerbated the confusion by conflating the distinct legal statuses. (AOB 95-102.) During the first *Faretta* colloquy, Judge Bascue repeatedly told appellant that he would have to proceed without the assistance of counsel *if his motion for advisory counsel were denied*. (2RT 324-326.) Then, after granting appellant's

motion for advisory counsel, the trial court added to the confusion by telling appellant that he would in fact have “the assistance of counsel” at trial, but not “lead counsel;” appellant would serve in that role because he was in pro. per. (3RT 459.) The trial court next went through the waiver form that appellant completed with Judge Bascue and struck out each admonition that stated appellant would have to proceed “without the assistance of counsel;” the court had appellant fill out another such waiver form with the same interlineations. (3RT 477-478; 2CT 301-304.) In sum, by the time the court finished going through the waiver forms, appellant was left with the false impression that he was *not* actually waiving his right to the assistance of counsel at all; that he would have the assistance of an attorney but, because he was in pro. per., he would serve as “lead counsel.”

Respondent does not disagree that both Judge Bascue and the trial court failed to clarify for appellant the difference between proceeding without the assistance of counsel, and proceeding in pro. per. with advisory counsel. Rather, respondent argues that none of this matters, insisting that it was enough that appellant was told about the disadvantages of self-representation and the risks and complexities of his case. (RB 102.) But respondent misses the point: The question here is not whether appellant was informed of the foolishness and general dangers of self-representation, but whether the record demonstrates that appellant understood that he was actually relinquishing his Sixth Amendment right to the assistance of counsel at trial. The answer to that question is “no,” because appellant was not told that proceeding in pro. per. – with or without the appointment of *advisory* counsel – meant that he alone would be responsible for his representation, and that he was giving up his right to the assistance of counsel. Indeed, appellant was affirmatively misinformed that he *would*

have the assistance of counsel at his trial, but not as “lead counsel,” which would be appellant’s role. (3RT 459.)

Respondent contends that the courts’ general admonitions about the dangers of self-representation were sufficient, and that no additional admonishments are required in a capital case. (RB 102-104.) But appellant’s position is not that special or additional admonitions are required in a capital case. Rather, the test is whether the record establishes that the defendant waived his right to counsel with an understanding of the “the risks and complexities of the particular case.” (*People v. Bloom, supra*, 48 Cal.3d at pp. 1224-1225, emphasis supplied.) This case happened to be a death penalty case, and while no specific set of admonitions is required, the complete absence of any discussion about the capital-case procedures that appellant faced in this particular case – examples of which are outlined in the opening brief (AOB 102-106) – makes it impossible to conclude that appellant understood the dangers of self-representation in this particular case. (*People v. Bloom, supra*, 48 Cal.3d at pp. 1224-1225; *People v. Burgener* (2009) 46 Cal.4th 231, 240-241.)⁹

Finally, respondent contends that none of the three judges showed concern during any *Faretta* proceedings that appellant did not understand what he sought to undertake. (RB 105.) This is not true. As discussed in greater detail above, and at length in appellant’s opening brief (see AOB 95-102), both Judge Bascue and the trial court struggled to explain that

⁹ Respondent contends that the trial court did inform appellant that there may have been a separate proceeding to determine penalty. (RB 102.) But appellant’s point was and remains that there was no discussion that there could be a separate penalty-phase *trial*, which would include its own complex and unique set of requirements, evidentiary rules, and standards of proof.

appellant's waiver of counsel was unrelated to his request for advisory counsel. For example, as he went through the counsel-waiver form that appellant did not complete as requested, Judge Bascue repeatedly attempted to focus appellant's attention on the waiver issue separate and apart from appellant's request for advisory counsel. (2RT 319-328.) Judge Armstrong similarly struggled with appellant's conflation of his Sixth Amendment right to the assistance of counsel and his right to request the assistance of advisory counsel. Then, while working through appellant's waiver form, Judge Armstrong made the distinction completely opaque – and thereby meaningless – by telling appellant that he would in fact have the assistance of counsel but not “lead counsel.” (3RT 459.)

C. Reversal Is Required

Appellant has demonstrated that he did not voluntarily, and knowingly and intelligently waive his right to counsel. Appellant proceeded in pro. per. after being affirmatively misadvised about his right to substitution of counsel, and the record indicates that he did not understand the difference between his right to counsel, and his right to proceed by way of self-representation with advisory counsel. Further, appellant was not apprised of the risks and complexities of his particular case, a death penalty case. Respondent chooses not discuss the remedy required for this error. Appellant contends the error – a denial of counsel – requires reversal. (AOB 106-107.)

* * *

III

APPELLANT'S CONVICTIONS AND SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT CONDUCTED CRITICAL PROCEEDINGS IN HIS ABSENCE

Prior to the start of appellant's first trial, the court held several proceedings in his absence, including one on August 30, 1993, and another on September 7, 1993.¹⁰ Both proceedings concerned the appointment of standby counsel, whether appellant had the right to advisory counsel, and who would serve in those important roles. Appellant argues that conducting these proceedings in his absence denied him (1) his due process right to be present at critical proceedings held during his capital trial (AOB 113-115); and (2) his constitutional right to representation during criminal proceedings, because appellant was representing himself when the trial judge went forward in his absence and nobody was present to represent his interests at the hearing (AOB 116-119).

Respondent's position as to whether the trial court erred at all is murky, at best. Recognizing that the trial court's decision to proceed in appellant's absence is legally "disfavored," respondent makes two points. First, it argues that a trial court retains discretion to conduct in camera ex parte proceedings when "compelling reasons justify them." (RB 110, citing *People v. Valdez* (2012) 55 Cal.4th 82, 152.) Second, it argues that appellant's absence was not reversible error because appellant had no constitutional right to be present during discussions of matters that bore no reasonable relation to his ability to defend against the charges. (RB 110,

¹⁰ In the introduction to this argument in appellant's opening brief, appellant stated that the first of these two proceedings were held on August 20, 1993. (AOB 107.) The correct date – provided throughout the body of the argument – was August 30, 1993. (See AOB 110, 113-116, and 118.)

citing *People v. Rogers* (2006) 39 Cal.4th 826, 855, and *People v. Waidla* (2000) 22 Cal.4th 690, 742.)

As to its first point, respondent does not identify any reason, compelling or otherwise, that required the trial court to conduct the proceedings in appellant's absence. Appellant submits none existed: While the issues discussed during the ex parte hearing were essential to appellant's counsel rights and his ability to defend himself at trial, there was nothing so pressing about those issues that the court had to discuss them in appellant's absence while he was representing himself, rather than waiting for his arrival.

As to its second point regarding reversible error, respondent would have this Court draw the unprecedented conclusion that neither appellant's right to self-representation nor his right to be present attached to the pre-trial proceedings regarding appellant's own motion for advisory counsel, and his specific request that a particular lawyer fulfill that function. That simply cannot be the case.

The high court has made clear that the constitutionally guaranteed right to representation, which includes the right to self-representation, attaches to every critical stage of a criminal proceeding from arraignment and throughout trial. (*United States v. Wade* (1967) 388 U.S. 218, 224, citing *Powell v. State of Alabama* (1964) 287 U.S. 45, 60-65; *Faretta v. California* (1975) 422 U.S. 806, 821 & 834; see *Iowa v. Tovar* (2004) 541 U.S. 77, 80-81; see *United States v. Cronin* (1984) 466 U.S. 648, 653-654.) The right to self-representation includes, inter alia, the right to control the organization and content of his defense, to make motions, to argue points of law, and to address the court when appropriate. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 174.)

Similarly, “even in situations where the defendant is not confronting witnesses or evidence against him, he has a due process right ‘to be present in his own person whenever his presence has a relation, reasonable and substantial, to the fulness of his opportunity to defend the charge[,]’ . . . [but] ‘not when the presence would be useless, or the benefit but a shadow.’” (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1039.)

The ex parte proceedings at issue here were critical stage proceedings because not only did they occur at a point in the proceedings when appellant had a clear constitutional right to self-representation (between arraignment and sentencing), but because the proceedings directly related to appellant’s ability to make motions and address the court as to his substantive rights. At the proceedings, summarized at length in the opening brief (AOB 108-112), the court specifically addressed *appellant’s* motion for advisory counsel, and both the court and attorney Mark Borden discussed in detail who would be appointed to assist appellant with his defense through his capital proceedings. These were not merely ministerial discussions about scheduling. Rather, the first ex parte discussion centered on the merits of appellant’s request for advisory counsel (the role which both the court and Borden denigrated), while the second ex parte discussion centered on who would serve in that critical role.

This Court has long recognized the critical role advisory counsel plays in death penalty cases (*People v. Bigelow* (1984) 37 Cal.3d 731, 742-746), cases in which the issues tend to be so complex that the court may even have to appoint two lawyers to properly defend against the charges (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 432). And who serves in

that advisory role is similarly important because attorneys are simply not fungible. As the high court recently emphasized when considering the related choice of counsel issue:

Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

(*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150.)

Thus, the proceedings at issue here related directly to appellant's substantial rights, and his exclusion from them denied appellant his right to make motions, to argue points of law, and to address the court as required. (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 174.) Proceeding in appellant's absence likewise denied appellant his due process right to be personally present, because serving as his own counsel he would have been more than merely "a shadow" had he attended the proceedings. (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745.) Accordingly, the trial court erred in conducting ex parte proceedings.

Turning to the question of prejudice, respondent argues that the error here was harmless beyond a reasonable doubt because, in respondent's view, the proceedings were nothing more than "brief conversations with Mr. Borden" (RB 112) during which the court made no "substantive legal error . . . that appellant's presence might have helped prevent" (RB 114). Again, respondent is incorrect.

First, because appellant was completely denied his Sixth Amendment right to self-representation at both of the proceedings that implicated his substantial rights, reversal is required. (*United States v. Cronin, supra*,

466 U.S. 648, 659 [the deprivation of representation at a critical stage requires automatic reversal]; see *Hall v. Moore* (11th Cir. 2001) 253 F.3d 624, 628 [deprivation of counsel at a critical stage – re-sentencing following remand – requires automatic reversal].) The rule of automatic reversal makes particular sense here because it is impossible to know whether appellant would have succeeded on his request to have Jackson Chandler¹¹ appointed as his standby and advisory counsel; and it is equally impossible to know how a trial that followed would have differed under the guidance of Chandler as opposed to Borden. (See *United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150.)

State courts similarly have required automatic reversal when a defendant is excluded from critical proceedings while representing himself. “Such a situation offends the most fundamental idea of due process of law, as defendant is totally deprived of presence at trial and even knowledge of what has taken place. Because defendant represented himself, his removal from the court room deprived him not only of his own presence, but of legal representation.” (*People v. Carroll* (1983) 140 Cal.App.3d 135, 141-142.)

But even were this Court to engage in a harmless error analysis, it would have to reverse because respondent has failed to show that the error was harmless beyond a reasonable doubt. Respondent’s position is that the court made no decisions at the ex parte hearing, but “merely informed Mr. Borden that it had researched the issue of advisory counsel and would revisit appellant’s request ‘ab initio’ when appellant was present.” (RB

¹¹ Appellant had sought to have Chandler appointed as advisory counsel. Judge Bascue denied appellant’s request at a time when the judge apparently and erroneously believed appellant had no such right. (2RT 317(4), 332-336.)

113.) Respondent is wrong.

At the second ex parte proceeding, the trial court met with Borden and a deputy district attorney to consider expanding Borden's role in the case. After the court admitted erring when it denied appellant's motion for advisory counsel, the court indicated that it would appoint Borden to serve as both standby counsel *and* advisory counsel. (3RT 447-448.) When Borden asked if the court intended to discontinue his appointment, the trial court said: "No, absolutely not[.]" adding, "If anything happens, it's going to be an increase as opposed to a decrease in services." (3RT 447.) Thus, when appellant appeared in court the following week, Borden's appointment as advisory counsel was a fait accompli, and the court announced it as such. (4RT 451-454.)

Moreover, a fair reading of the record demonstrates that the proceedings conducted in appellant's absence went far beyond merely giving Borden information about the trial court's research into appellant's motion. During the first ex parte proceeding, the court informed Borden that appellant had requested advisory counsel and that it had no intention of appointing advisory counsel, stating – erroneously – that "there is no such animal as advisory counsel" in California. (3RT 430.) Neither Borden nor the prosecutor corrected the trial court.

Then, while discussing his availability, Borden opined: "I don't think you are going to get any attorney in here who is going to be ready in the next 30 days to do a death penalty case even on a standby status because basically you are put in a worse position because you don't control the tactical decisions." (3RT 431.) Because appellant was not present, he could not counter Borden's assertion by pointing out that Chandler – who had appeared months earlier, who had met multiple times with appellant,

and who was already familiar with the case – might very well be willing to proceed without the need for additional time to prepare.

Continuing in appellant's absence, the court informed Borden that, as standby counsel, he would not be allowed to advise appellant in any way. The court again made clear that it had no intention of appointing advisory counsel, stating, "I don't know of anyone who would be willing to undertake that type of situation." (3RT 434.) Borden then spoke directly against the reasonableness of appellant's request for advisory counsel, telling the court that such an appointment would be the "worst of all possible worlds." The trial court agreed saying, "Worst of the worst of the worst. So he's either pro per or he's not. And I have told him that in open court about 25 times." (3RT 435) Again, because appellant was not present, he was denied the opportunity to argue that Chandler had already stated that he was willing to "undertake that type of situation," notwithstanding Borden's argument to the contrary. Nor was appellant present to hear his putative standby counsel – and later, advisory counsel – state that being appointed as appellant's advisory counsel would be the "worst of all possible worlds."

As noted, at the second ex parte proceeding, the trial court met with Borden and a deputy district attorney to consider Borden's status in the case. At that proceeding, the court decided it would expand Borden's role to include advisory counsel, and that it would "absolutely not" replace him. (3RT 447.) The following week, the trial court told appellant – without any further hearing on the matter – that it had decided to appoint Borden as both standby and advisory counsel. (3RT 451-452.)

In short, only after the trial court realized that it had erroneously denied appellant's request for advisory counsel did it decide to appoint

advisory counsel. The court made this decision in appellant's absence after denying appellant an opportunity to hear Borden denigrate the advisory counsel role, to object to Borden's expanded appointment, and to press again for appointment of Chandler. Because the court proceeded in his absence, appellant was denied a full opportunity to be heard as to the court's ex-parte selection of Borden as advisory counsel, and for a full opportunity to renew his request for a particular attorney to be appointed as his advisory counsel.

Respondent has not met its burden that trial court's denial of appellant's due process right to be present (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745), and his right to representation at the hearings (*Iowa v. Tovar, supra*, 541 U.S. at p. 87), was harmless beyond a reasonable doubt (*Chapman, supra*, 386 U.S. at p. 24). Reversal of appellant's conviction and death sentence is required.

* * *

IV

THE TRIAL COURT'S VOIR DIRE WAS SO INADEQUATE THAT IT DENIED APPELLANT HIS RIGHT TO DUE PROCESS, AN IMPARTIAL JURY, AND A RELIABLE DEATH JUDGMENT

Appellant has argued that the trial court's voir dire in this case was so inadequate that it amounted to an abdication of its jury-selection responsibility, thereby denying appellant his right to due process, an impartial jury, and a reliable death judgment. Appellant has focused on two related problems with the voir dire: (1) the trial court refused to ask appellant's requested open-ended questions, including proper questions on key issues in the case, but instead asked only closed-ended and leading questions that were not likely to expose any existing juror bias to support challenges for cause (AOB 126-137); and (2) the court rejected appellant's juror questions and questionnaire and instead used an inadequate short-cut approach that resulted in unexplained, illogical and often meaningless responses from many of the prospective jurors, including several who sat on appellant's jury (AOB 137-149). Respondent contends that appellant failed to preserve the error for review (RB 126-130), and that in any event, the general voir dire was adequate (RB 131-141).

At the outset, it is important to note what is not in dispute. First, respondent does not disagree that appellant made a motion that proposed open-ended questions to be asked of each juror. Nor does it argue with the fact that the trial court rejected appellant's proposed questions and specifically refused to ask any open-ended questions.

Second, respondent does not take issue with appellant's argument that the trial court's refusal to ask open-ended questions was based on the court's erroneous view that open-ended questions are legally prohibited

because they are not “neutral” and would not support challenges for cause.

Third, there is no dispute that the parties had agreed that each juror would complete a questionnaire, but that when the case was transferred to the trial court it refused to use the previously agreed upon format. The court also stated it alone would question the jurors.

Fourth, respondent does not disagree that appellant submitted open-ended questions to be asked of each of the jurors, and that many of those questions – particularly those about gangs and gang members – were proper in form and content. The court refused to ask appellant’s questions in their proposed form, and ruled that it would ask them only after first converting them from open-ended questions to “yes” or “no” questions.

Fifth, respondent does not disagree that the closed-ended and leading questions posed by the court asked the jurors to assess their own ability to be fair and impartial.

Sixth, respondent does not contest that, beyond providing the basic biographical information, numerous jurors were asked only a single closed-ended general voir dire question. That question was, in essence, whether the juror’s answers to the more than 100 questions asked of prior prospective jurors “would differ in any way” from the various divergent answers already given by other prospective jurors. Finally, respondent does not disagree that many of the prospective jurors’ gave negative responses to that single close-ended question, and that such an answer could not possibly have yielded relevant and meaningful information about critical aspects to the case, including information on any potential biases the jurors had regarding gangs and gang members.

A. The Issue Is Preserved For This Court’s Review

Respondent first argues that the issue here is forfeited because

appellant did not use all of his peremptory challenges. (RB 115, 127.) It also contends that appellant forfeited any complaint about the inadequacy of general voir dire because he did not object to the court's procedures when the court explained those procedures to the jurors. (RB 120, 127, 129-130.) Respondent is wrong.

Initially, respondent relies on *People v. Hart* (1999) 20 Cal.4th 546, 589, for the general proposition that a defendant who does not use all of his peremptory challenges cannot complain on appeal that any particular juror selected to serve on his jury was unacceptable to him. (RB 127-128.) But appellant does not argue here that any specific juror was unacceptable. Rather, appellant's position is that the voir dire procedure employed by the trial court made it *impossible to assess* whether any particular juror held a bias that would have supported a for-cause or peremptory challenge.

In *People v. Pearson* (2013) 56 Cal.4th 393, this Court recently confirmed that exhausting peremptory challenges is not necessary to review this particular issue: "[W]ithout an adequate voir dire, 'the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges. Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, we have never required, and do not now require, that counsel use all peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire.'" (*Id.* at p. 411, quoting *People v. Bolden* (2002) 29 Cal.4th 515, 537-538.) Accordingly, the fact that appellant did not use all of his peremptory challenges matters not to this particular issue.

Respondent also relies on *People v. McKinnon* (2011) 52 Cal.4th 610, 640-641 (*McKinnon*), and several cases cited therein, for the proposition that a defendant must preserve a claim of inadequate voir dire.

Respondent contends that appellant waived any appellate challenge to the court's imposed procedure by agreeing to the excusal of several jurors for cause based on their answers to the court's questions. (RB 130.) Appellant agrees that *McKinnon* is instructive, but not in the manner in which respondent contends.

McKinnon involved a *Witt/Witherspoon*¹² issue in which the defendant had argued that (1) the procedure by which the trial court resolved challenges for cause was constitutionally defective, and (2) particular jurors were wrongly excused for cause. (*McKinnon, supra*, 52 Cal.4th at p. 619.) In considering the first issue, this Court found that the defendant had expressly *agreed and stipulated* to the court's procedures, and by doing so, the defendant forfeited any claim of error related to them. (*McKinnon, supra*, 52 Cal.4th at p. 620.)

Here, appellant neither agreed nor stipulated to the trial court's refusal to ask each juror his proposed open-ended proposed questions, nor did he agree or stipulate to the court's insistence that it ask only closed-ended and leading questions. And appellant certainly did not agree to the court's substitution of his proposed open-ended questions for and single close-ended question asked of many of the prospective jurors: whether their answers to any of the questions asked of previous jurors would differ in any way. To the contrary, the record demonstrates that appellant expressly sought to have each juror individually asked each of the open-ended questions he submitted to the court about major issues in the case.

Prior to the transfer of this case to the trial court, the parties had

¹² *Wainwright v. Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510.

agreed upon a juror questionnaire containing open-ended questions to be used during jury selection. (1CT 271-295; 2RT 297-306; 8RT 775.) But when the issue of voir dire was raised with the trial court, the court ruled that it would not use jury questionnaires. (5RT 670.) The trial court explained that the court alone would question the jurors with “relevant” questions submitted by the parties. (5RT 670-671.) The court instructed appellant to draft any questions he wanted it to ask of the jurors, stating that it would ask only questions that were relevant to establishing good cause for excusal. (5RT 671.)

Appellant did exactly that: He filed a motion to ask each prospective juror specific open-ended questions covering various topics relevant to the case. (2CT 439-447.) At the next hearing, the trial court repeated that it would not allow juror questionnaires to be used for voir dire, and that it alone would personally ask appropriate questions. (8RT 776.) Appellant replied that he had “no problem with that procedure” (*ibid.*), but at that time, the court had yet to address appellant’s proposed open-ended questions.

At a subsequent hearing, the trial court finally addressed appellant’s proposed questions. The court began by stating that it would not ask some of appellant’s questions because they did not go to cause, but that it would ask some of his questions after they were rephrased “so that they are neutral.” (9RT 791.) At that point, the court converted appellant’s questions from open-ended questions to closed-ended “yes” or “no” questions, mistakenly stating that open-ended questions categorically do not go to cause.

Thus, appellant’s proposed open-ended questions asking each juror to describe his or her view, if any, on gangs and gang members, was

converted to: “If you have a viewpoint on the gang problem, would those views impair your ability to be fair and impartial?” (30RT 3422; 1CT 285, proposed question No. 70.) Similarly, prior to appellant’s second trial, the trial court again repeatedly (and erroneously) stated that she would ask only close-ended questions during voir dire because open-ended questions do not go to cause. (See, e.g., 30RT 3419, 3422, 3435; 32RT 3701-3702.)

To allay any residual question that the trial court expressly rejected appellant’s open-ended questions, one need only look at the motion itself. The trial court wrote the word “No” next to each open-ended question in appellant’s motion that the court refused to ask. (See, e.g., 2CT 439 [question 3: “No” written next to open ended question about gangs and gang members]; 2CT 440 [question 7, “No” written next to open ended question about active gang members serving as informants]; see also 2CT 441-447 [the word “No” written next to open-ended questions 20, 25-31, 34-35, 42, 45, & 47].) The court then converted appellant’s open-ended questions to close-ended ones, and as to those questions, the court asked many of the prospective jurors only whether their answers to the close-ended questions asked of the other jurors would differ in any way.

Accordingly, the record shows that the trial court rejected the previously agreed upon voir dire procedure and replaced it with its own. Appellant fairly presented his open-ended questions to be asked of each juror, and the court rejected them in the form appellant requested. The court then redrafted its own version of the questions, and those are the questions that were asked of many, but not all, of the jurors. On this record, appellant cannot be found to have agreed to the court’s questions and procedures, and whether its general voir dire was adequate is preserved for this Court’s review.

Returning to *McKinnon*, this Court also considered whether the defendant was required to object to the excusal of jurors for cause in order to preserve the *Witt/Witherspoon* issue. In *People v. Velasquez* (1980) 26 Cal.3d 425 (*Velasquez*), this Court created a non-forfeiture rule, holding that a defendant need not object at trial to the erroneous for-cause dismissal to preserve a *Witt/Witherspoon* claim on appeal. In overturning its decision in *Velasquez*, the *McKinnon* court held that a non-forfeiture rule was inconsistent with the requirement of an objection that applies to other jury selection issues, which “promote fair and orderly judicial administration” by permitting the court to “correct the problem” and “eliminate the unfair risk of ‘sandbagging’ the court.” (*McKinnon, supra*, 52 Cal.4th at p. 642.) Thus, this Court concluded, a defendant must preserve a *Witt/Witherspoon* claim for review, a rule that was made prospective only. (*Id.* at p. 643.)

To the extent respondent relies on this portion of *McKinnon*’s forfeiture analysis outside the *Witt/Witherspoon* context, appellant emphasizes again that he is not complaining here about the excusal of any particular juror, but rather the general voir dire process that made it impossible to assess whether a particular juror should have been removed for cause. Because the court rejected appellant’s request that every potential juror be asked the specific open-ended questions, respondent cannot complain that appellant unfairly “sandbagged” the trial court, or that the court was somehow denied an opportunity to rule correctly on appellant’s proposal to ask each juror the questions he submitted.

Finally, this Court has never held that a defendant is required to debate or argue with a court about its ruling in order to promote “orderly judicial administration.” This seems particularly true here, where the court repeatedly (and erroneously) stated that open-ended questions were not

neutral and did not go to cause. Thus, any effort to renew his request to have each juror asked the open-ended questions supplied in appellant's motion would have been futile and counterproductive. (See *People v. Hill* (1998) 17 Cal.4th 800, 821.)

For these reasons, respondent's contention that appellant forfeited this claim must be rejected.

B. The Trial Court Erred By Refusing To Ask The Prospective Jurors Open-Ended Questions Related To Key Issues In Appellant's Case, Including Questions About Gangs And Gang Members

Turning next to the merits of appellant's claim, respondent contends that the voir dire at both of appellant's guilt-innocence trials was adequate. (RB 131-141.) Respondent first argues that appellant did not use all of his peremptory challenges during voir dire, and does not now identify any particular juror who was biased against him. (RB 131-132.) But respondent misses the point. The issue here is not that the court refused to excuse a biased juror for cause, or that a particular juror who served was biased. Rather, the problem is that the court's voir dire procedure "denied [appellant] information upon which to intelligently exercise both its challenges for cause and its peremptory challenges." (*People v. Pearson, supra*, 56 Cal.4th at p. 411; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) The fact that appellant cannot establish whether or not a particular juror who served was biased is because the court failed to conduct an adequate voir dire in the first place. (*Ibid.*)

Next, respondent contends that the trial court's questioning of the prospective jurors was "both individually and collectively" extensive, and "far exceeded the legal minima." (RB 133.) It argues that each of the numerous "content" issues was explored during voir dire (RB 136), and that

the court followed up with a juror whenever it was necessary (RB 122, 135, 140). Along these same lines, respondent argues that the voir dire covered the topics enumerated in Standard 4.30(b) of the California Standards of Judicial Administration, as well as the important issues in appellant's case. (RB 133.)

Respondent is factually wrong. Many of the jurors – including several of those who sat on appellant's jury – were asked only one non-biographical general voir dire question, without any follow-up, to wit: Whether their answers to the other questions would differ from the answers given previously by other jurors. (See AOB 137-139.) Moreover, respondent confuses the overall length of the voir dire proceedings with what is actually at issue here: Whether the trial court met its "responsibility to assure that the [voir dire] process [was] meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*People v. Wilborn* (1999) 70 Cal.App.4th 339, 343, quoting *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314, citing Code of Civ. Proc. § 223; accord *United States v. Howell* (9th Cir. 2000) 231 F.3d 615, 627 ["the function of the voir dire is to ferret out prejudices in the venire that threaten the defendant's Sixth Amendment right to a fair and impartial jury"].) Appellant contends that it did not.

For example, Jurors Willoughby, Taylor, Kane, Torres, and White, each served on appellant's first guilt-innocence trial. But the trial court's voir dire procedure made it impossible to know whether any or all of those jurors held specific biases about gangs or gang members; whether they had been victims of or perpetrators of any crime; and whether they had biases for or against informants or police officers that threatened appellant's right to a fair and impartial jury, and which would have supported a challenge for

cause. That is because after listening to other prospective jurors answer the more than 100 close-ended questions, each of these jurors was asked simply whether their answers would differ from the *divergent* answers that other prospective jurors gave.

Juror Willoughby stated only that he had heard all the questions, and his answers would not differ. (12RT 1234.) Juror Kane answered that she knew attorneys, but that her other answers would not differ in any way. (12RT 1249-1250.) Similarly, Jurors Taylor, Torres and White all said their answers would not differ *in any way* from the various and diverse answers given by prior jurors. (12RT 1243 [Taylor]; 1251 [Torres]; 1253 [White].) These answers could not have been correct, and they yielded no meaningful information about the critical issues in the case. And this same procedure was employed at appellant's second trial, to the same effect and with the same result. (See AOB 144-147.)

On this record, notwithstanding the length of the voir dire proceedings and the minimal follow-up done only when a particular juror happened to volunteer information that he or she believed was in some important way different from what others had said, the trial court failed to meet its responsibility to ensure that the voir dire was meaningful and sufficient to "ferreting out" any bias and prejudices on the part of all the prospective jurors.

Respondent also argues that "contrary to appellant's suggestion" a trial court is under no obligation to ask only open-ended "content" questions, and that asking only close-ended questions does not automatically render voir dire inadequate. (RB 135.) But appellant has not argued for an absolute prohibition on close-ended voir dire questions. Rather, appellant's position is that the jury selection process in this case was

inadequate due to the trial court's pervasive – nearly exclusive – use of closed-ended questions in place of appellant's requested open-ended questions on key issues in the case.¹³

And while appellant agrees there is no absolute prohibition on “yes” or “no” questions, this Court has cautioned against the use of such questions, particularly when those questions suggest a “correct” response, which is exactly what happened here. (See, e.g., *People v. Balderas* (1985) 41 Cal.3d 144, 183-184; *People v. Crowe* (1973) 8 Cal.3d 815, 831, fn. 31.) Justice Liu recently addressed this exact issue in a related context: “I believe the following guidance offered by a sister high court is well-taken: ‘We have disapproved close-ended questions that predetermine answers or elicit narrow ‘yes’ and ‘no’ responses. [Citation.] We have encouraged the formulation of additional questions that will provide insight into a juror’s views on the controversy. Obviously, a court must control *voir dire* examination, but in doing so it must remain neutral. The court must not proselytize; it must not indicate its views of the ‘right’ or ‘wrong’ answers to voir dire questioning. The voir dire should be probing, extensive, fair and balanced.’” (*People v. Whalen* (2013) 56 Cal.4th 1, 102, (conc. opn. of Liu, J.), quoting *State v. Papasavvas* (2000) 163 N.J. 565, 585.)

Here, the court’s near exclusive use of closed-ended questions made

¹³ Respondent points out that the trial court ruled that asking some of appellant’s proposed voir dire questions – e.g., regarding television-watching habits – were properly rejected because they did not go to cause, and would delay the proceedings if asked. But appellant has not argued here that the court erroneously rejected those questions. Rather, appellant’s argument is that the court converted appellant’s proper voir dire questions into close-ended ones, and then asked them in a manner that failed to yield meaningful voir dire.

it impossible for the parties to determine whether various jurors had biases sufficient to warrant a challenge for cause. For example, regarding one of the most important issues in the case – gangs and gang members – the trial court asked only closed-ended questions of the entire group. At appellant’s first trial, the court asked: “Do any of you have personal feelings . . . regarding individuals who actually belong to gangs who are gang members?” (11RT 1082.)¹⁴ “The prospective jurors answered collectively in the negative.” (11RT 1082.) Then, the trial court immediately followed up with another equally ineffective “yes” or “no” question, this time telegraphing to the jurors the answer the court wanted to hear: “You won’t automatically determine in your mind that just because the person admits gang membership, that the person is lying, right?” Not surprisingly, all 25 prospective jurors again collectively answered this question in the manner suggested by the court. (11RT 1083.)

The ineffectiveness of these closed-ended questions about gangs is demonstrated by the fact that not one of the first 25 questioned prospective jurors – in a downtown Los Angeles jury pool at a time when gang activity and gang publicity were at their peak – provided any information concerning their thoughts and impressions about street gangs in their community. That this occurred because the court substituted its own closed-ended questions for appellant’s open-ended ones, is not to argue that a trial court may never ask close-ended questions.¹⁵ Rather, the fact is that

¹⁴ This close-ended question was repeated with both of the subsequent panels of prospective jurors.

¹⁵ Tellingly, respondent does not claim the trial court correctly rejected appellant’s relevant open-ended questions regarding the key issues
(continued...)

the questions posed in this case resulted in voir dire that did not assist the parties and the court at uncovering potential bias on this and other key issues in the case.

C. The Trial Court's Short-Cut Voir Dire Resulted In A Constitutionally Inadequate General Voir Dire

Next, respondent contends that appellant's complaint about the trial court's short-cut voir dire procedure – during which numerous jurors, including several who served, were asked only a single general voir dire question – is too “narrow” and “hypertechnical a view of the voir dire process” that ignores “the juror's common sense.” (RB 137.) In respondent's view, the jurors who were asked only the single short-cut voir dire question – i.e., would their answers differ from those answers they heard other jurors give on 100 or more general voir dire questions – would have understood that the court actually wanted them to volunteer any information about the topics previously addressed that might influence their ability to be fair and impartial. (*Ibid.*)

Respondent's argument is incorrect for several reasons. First, the trial court never told the prospective jurors subjected to the short-cut voir dire process that they were to volunteer information on each subject area if they believed that they held a bias that might influence their ability to be fair and impartial. Rather, it told the prospective jurors only to listen to the answers given by the other jurors, write down their answers on paper, and then state their answers to any of the questions that differed from previous answers they had heard. Hypertechnical or not, that is all that the court

¹⁵ (...continued)

in this case, nor does it assert that the court was correct in concluding that appellant's open-ended questions did not go to cause.

asked the jurors to do. Respondent would have this Court ignore what was asked of the jurors and instead speculate about what they might have understood from the gist of the court's process. Such speculation would be improper.

Second, the record makes clear that jurors did *not* simply volunteer relevant information about potential biases on the various subject areas when asked the short-cut voir dire questions. For example, at appellant's first guilt-innocence trial, prospective Juror Buchanan stated that her responses to the 100 or more questions would not have differed in any way from the answers given by the first set of 25 prospective jurors. (12RT 1293.) But later, when discussing whether Juror Buchanan would suffer a hardship because she was needed to babysit a family member, the prospective juror reported for the first time that a family member had recently been a victim of a serious crime, a question specifically asked of the first 25 prospective jurors, but unreported during the trial court's short-cut voir dire of Buchanan. (12RT 1299.)

Similar examples are reflected in the record of voir dire at appellant's second guilt-innocence trial. There, prospective Juror Gonzalez was asked whether his answers to the general voir dire questions would differ in any way from the answers previously given. Gonzalez responded, "Not that I can think of." (33RT 3929.) Then, for reasons known only to the trial court, the court asked a single general voir dire question plucked from the list of questions asked of the first set of 25 prospective jurors: "Have you had any personal experience with firearms?" Gonzalez then admitted: "Yeah. I do own a gun, a .357 magnum." (*Ibid.*)

In yet another example from appellant's second trial, the trial court lumped a series of "yes" or "no" questions into one question asked of

prospective Juror Vella: “Do you have any strong views or views whatsoever regarding gang association, gang activity, gang membership, gang anything?” (32RT 3864.) The prospective juror replied: “Nothing out of the ordinary.” (*Ibid.*) But rather than questioning the juror on the substance of her views on gangs – which is exactly what appellant sought to learn from the questions he submitted to be asked during voir dire – the trial court simply asked additional “yes” or “no” questions that asked the juror to evaluate her own ability to be fair. (*Ibid.*) The juror was never asked to explain or describe – nor did she volunteer – information about her “ordinary” views on gangs and gang membership.

Even if, as respondent speculates, some or even most of the jurors understood that they were to listen to all of the questions asked of the other jurors, and then volunteer any information that they believed might be relevant, the problem remains the same: Such a procedure improperly relies on the jurors’ self-evaluation as to whether their yet-to-be-disclosed answers might indicate a bias that should be shared with the court and the parties, and whether they believe that they can be fair and impartial jurors.

Asking the jurors to evaluate their own potential bias fails to take into account unconscious biases or unknown prejudices that the jurors possess. As the high court explained:

One touchstone of a fair trial is an impartial trier of fact – ‘a jury capable and willing to decide the case solely on the evidence before it.’ Voir dire examination serves to protect that right by exposing possible biases, *both known and unknown, on the part of potential jurors*. Demonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.

(*McDonough Power Equip., Inc. v. Greenwood* (1984) 464 U.S. 548, 554, citation omitted, emphasis supplied.)

This Court has observed that a trial court has a duty to ask prospective jurors relevant questions likely to reveal conscious or unconscious bias or prejudice on key issues in the case. (*People v. Taylor* (2010) 48 Cal.4th 574, 639; *In re Hitchings* (1993) 6 Cal.4th 97, 110-111.) Because biases may be unconsciously held by a prospective juror, closed-ended questions asking a juror to self-assess for bias will usually fall short. “Questions which merely invite an express admission or denial of prejudice are, of course, a necessary part of voir dire because they may elicit responses which will allow the parties to challenge the jurors for cause. However, such general inquiries often fail to reveal relationships or interests of the jurors which may cause unconscious or unacknowledged bias. For this reason, a more probing inquiring is usually necessary.” (*Darbin v. Nourse* (9th Cir. 1981) 664 F.2d 1109, 1113.)

Here, the prosecutor succinctly explained the problem at the start of appellant’s second guilt-innocence trial: “My problem is the way the court has suggested [asking the jurors about any group memberships that would cause them not to be fair and impartial] . . . , that’s asking them to make a conclusion. And so Mr. Bankston and I will be denied the benefit of making our own opinion whether or not we think that would affect their ability to be fair and impartial.” (30RT 3419.)

On the present record, there can be no doubt that the court’s short-cut voir dire resulted in a constitutionally deficient jury selection process because the court’s procedure undermined the very purpose of general voir dire: discovering whether a prospective juror may be biased or unable to follow the law. (*People v. Wilborn, supra*, 70 Cal.App.4th at p. 343;

Rosales-Lopez, supra, 451 U.S. at p. 189.) The trial court rejected appellant's requested jury questionnaire, which would have resulted in individual and specific answers to each of the voir dire questions, and instead, used a short-cut procedure resulted in a complete lack of voir dire in many instances, and only a partial voir dire in others.

D. Reversal Is Required

Turning to the question of prejudice, respondent contends reversal is not required because the court's voir dire covered all applicable legal principles and "nothing in the record established that the impaneled jury was not fair and impartial or that the jury-selection process prejudiced appellant in any way." (RB 141.) Respondent is wrong.

As demonstrated in appellant's opening brief and here, the trial court's voir dire at both his first and second guilt-innocence trial was not reasonably sufficient to test the jury for bias or partiality. For this reason, it is impossible to determine whether a seated juror held disqualifying views. (*People v. Chapman* (1993) 15 Cal.App.4th 136, 141 [trial court commits reversible abuse of discretion if its voir dire is not reasonably sufficient to test the jury for bias or partiality]); *People v. Cash* (2002) 28 Cal.4th 703, 723 [failure to conduct adequate voir dire results in reversible error because it is impossible to determine whether jurors seated held disqualifying views]; see *Morgan v. Illinois* (1992) 504 U.S. 719, 739 [inadequate voir dire requires reversal].) Reversal is required.

* * *

V

**THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS
TO DUE PROCESS AND A FAIR AND IMPARTIAL JURY WHEN
IT REOPENED JURY SELECTION BUT DENIED APPELLANT'S
USE OF HIS PEREMPTORY CHALLENGES AGAINST THE
ENTIRE PANEL**

During selection of the alternates at appellant's first guilt-innocence trial, the parties agreed to excuse one of 12 regular jurors – the juror seated in seat five – from the panel for a late-disclosed hardship. (13RT 1314-1315.) The panel had not been sworn, and the trial court reopened jury selection. But in doing so, the court restricted the parties' use of their remaining peremptory challenges only to the one seat vacated by the excused juror. (13RT 1316-1317.)

Appellant has argued that his rights to due process and a fair and impartial jury were violated when the trial court reopened jury selection of the 12 *unsworn* regular jurors without permitting him to use his remaining peremptory challenges against the entire panel. (AOB 150-156; *People v. Armendariz* (1984) 37 Cal.3d 573, 581-585; *In re Mendes* (1979) 23 Cal.3d 847, 855; *Lewis v. United States* (1892) 146 U.S. 370, 378; and former Pen. Code § 1068.) Respondent does not contest the fact that appellant had the right to use his remaining peremptory challenges against the entire unsworn panel after the court excused one of the selected 12 jurors. Rather, respondent claims that the constitutional violation was forfeited because appellant did not object to the denial of his peremptory challenges.

It is true that appellant did not expressly object to the trial court's constitutionally flawed procedure. (AOB 155.) Nevertheless, the error is cognizable here because (1) any express objection to the court's procedure under the circumstances would have been futile (see *People v. Hill* (1998)

17 Cal.4th 800, 820); and (2) violations of certain constitutional rights, including the right to a fair and impartial jury trial, can be considered for the first time on appeal (see *People v. Vera* (1997) 15 Cal.4th 269, 276-277; see also *Hale v. Morgan* (1978) 22 Cal.3d 388, 394).

Turning first to why challenging the trial court's procedure would have been futile, the context of the trial court's ruling is important: This is a case where the trial court took complete control over the jury selection process, including refusing to allow questionnaires that had already been agreed to by the parties; preventing the parties from directly questioning the prospective jurors; refusing to ask open-ended questions on key issues in the case, insisting (incorrectly) that such questions do not go to cause; and refusing to allow the parties to contemporaneously object during voir dire, instead requiring the parties to hold any objections until the break.

It is in this context that the trial court *three times* told the parties that they would be permitted to exercise challenges only to the future occupant of seat five. (13RT 1315-1317.) After the second time the court explained the process, appellant inquired: "It's no limit on the peremptories?" The court treated that question as one about the number of peremptory challenges each party had left. (13RT 1316-1317.) But then the prosecutor inquired further, asking specifically whether the parties could challenge regular jurors other than the juror in seat five because the process was "now open again." (13RT 1317.) The court said only, "No." (*Ibid.*)¹⁶

¹⁶ Contrary to respondent's argument, appellant has not claimed that the prosecutor's question about the trial court's procedure served as an objection that preserved the claim for appellate review. (RB 148.) Rather, appellant points to the prosecutor's question as part of the record that shows why an objection would not have altered the trial court's decision to restrict
(continued...)

In addition the trial court also explained its reasoning for this procedure: Allowing challenges to the entire panel of 12 was not necessary because the parties had already accepted the other 11 unsworn jurors. (13RT 1316-1317.) Even after the prosecutor pointed out that voir dire was now reopened, the court repeated that the parties would be limited to challenging the juror in “[j]ust this one seat because both sides accepted everybody else.” (13RT 1317.)

The reason the parties were entitled to exercise challenges to the entire unsworn panel is because the makeup of the panel had changed following the excusal of the juror in seat five; “what followed was merely a continuation of the jury selection which had been previously commenced.” (*In re Mendes, supra*, 23 Cal.3d at p. 855.) The trial court knew that this was the case, but mistakenly believed that the operative fact was that the parties had already agreed on the other unsworn jurors. The court was wrong, and an objection pointing out that which the court already knew would not have altered its decision regarding the procedure to be used to replace the excused juror. Under these circumstances, an objection to the limitation on use of peremptory challenges would have been futile.

Respondent relies on *People v. Caro* (1988) 46 Cal.3d 1035 (*Caro*), and *People v. Griffin* (2004) 33 Cal.4th 536 (*Griffin*) (disapproved of by *People v. Riccardi* (2012) 54 Cal.4th 758), for the proposition that a party must normally object to preserve a claim of error of the type at issue here. Appellant agrees with this rule, and has already conceded the absence of an express objection here. But neither *Caro* nor *Griffin* take exception to this

¹⁶ (...continued)
the use of challenges.

Court's long-standing rule that a trial court's error may be reviewed even in the absence of an objection where the record demonstrates that such an objection would be futile. That is precisely the case here.

In addition, respondent fails to mention important distinctions between what happened here and what occurred in *Caro* and *Griffin*. In both of those cases, the 12 regular jurors had already been sworn when a regular juror was excused and replaced. (*People v. Caro, supra*, 46 Cal.3d at p. 1046; *People v. Griffin, supra*, 33 Cal.4th at p. 562.) Thus in *Griffin* the issue was whether the court erred in not reopening jury selection at all, particularly as an alternative to granting the defense mistrial motion arguing that jeopardy had attached. (*People v. Griffin, supra*, 33 Cal.4th at pp. 563-564.) In *Caro* the defense stipulated to fill the vacancy with an alternate, making it unnecessary to reopen jury selection. (*People v. Caro, supra*, 46 Cal.3d at pp. 1046-1047.)

By contrast, jury selection here was in fact reopened; the regular jurors had not been sworn; there was no issue regarding double jeopardy; there was no mistrial motion; and appellant acknowledged but never agreed or stipulated to the court's procedure. Because voir dire of the 12 regular unsworn jurors was reopened, the parties were entitled to exercise their remaining challenges to the entire panel. (*In re Mendes, supra*, 23 Cal.3d at p. 855.)

Indeed, in *Caro* this Court observed: "Had defendant requested that the court reopen jury selection and been refused, he would have a claim for reversal under *Armendariz* [citation omitted]." (*People v. Caro, supra*, 46 Cal.3d at p. 1047.) This is so even though the defendant in *Caro* made no objection that the court's restriction of his use of peremptory challenges. Of course, no request to reopen voir dire was necessary here because jury

voir dire was in fact reopened when the court imposed its restrictions on his use of his existing challenges.

Finally, respondent does not disagree that, even absent an objection, this Court may review violations of certain constitutional rights, including the right to a fair and impartial jury trial. (AOB 155-156, citing *People v. Vera*, *supra*, 15 Cal.4th at pp. 276-277, and *Hale v. Morgan*, *supra*, 22 Cal.3d at p. 394.) This Court has explained that “[a] court commits reversible error if its procedures deny a party’s right of peremptory challenge.” (*People v. Avila* (2006) 38 Cal.4th 491, 538, citing *People v. Wright*, *supra*, 52 Cal.3d at pp. 397-398; see *Pointer v. United States* (1894) 151 U.S. 396, 408-409.) That is exactly what happened here when the trial court reopened jury selection and denied appellant his right to exercise his remaining peremptory challenges against 11 of the 12 prospective jurors.

Accordingly, appellant’s convictions arising from his first trial and his death judgement must be reversed.

* * *

VI

APPELLANT'S RIGHTS TO DUE PROCESS AND TO A FAIR AND IMPARTIAL JURY WERE DENIED WHEN THE TRIAL COURT PREVENTED HIM FROM USING HIS ALLOCATED PEREMPTORY CHALLENGES DURING SELECTION OF THE ALTERNATE JURORS

Appellant was denied the use of five of his peremptory challenges when the trial court decided – without discussion or consultation with the parties – to reduce the number of alternate jurors from twelve to seven, and then immediately empaneled the seven unchallenged prospective jurors as alternates. (AOB 157-164.) Appellant objected to this procedure, explaining that when he passed on the first seven potential alternates he had saved some of his peremptory challenges because he believed they would be selecting twelve alternates. (14RT 1554-1556.) Respondent argues that appellant forfeited this claim by failing to object to the error, by failing to exhaust his peremptory challenges, and by stating satisfaction as to the seven alternates who were sworn and served. (RB 149-160.)

First, respondent is wrong in arguing that appellant did not object to the court's procedure. After exhausting a third panel of prospective jurors, the trial court stated that its clerk had requested another panel, but that there were no available prospective jurors in the jury room. (14RT 1451.) The court added: "So what I think we'll do is just proceed with the exercise of the peremptories as far as the alternates are – are concerned, and let's see what we end up with." (*Ibid.*) The parties then exercised additional challenges.

After the prosecutor accepted the panel of seven alternates, but *before* appellant accepted them, appellant asked to have a bench conference. The court refused, stating "I don't think that's necessary at this point."

(14RT 1553.) Appellant then stated, “Your honor, I accept the panel at this time.” (14RT 1553.) Then, turning to the prospective jurors, the court asked whether they were feeling “exceedingly healthy” and stated, “I think I’ll chance it, ladies and gentlemen, and I will go with – with seven alternates.” (14RT 1554.) The alternates were immediately sworn, and then released for the day. (14RT 1554-1556.)

Once the jurors had left the courtroom, the court turned to appellant and asked, “Now, you wanted a bench conference, Mr. Bankston. What was that all about?” (14RT 1557.) Appellant stated his objection to the trial court’s procedure: “Precisely what happened here, saving the peremptories for the possible fourth panel to try to find out maybe if we did exercise them, were we going to go with less [jurors] or not. I didn’t know that at first until when I accepted the panel and then you made up your mind it seems to me to not call the fourth panel, and then you decided to go with only seven when I was under the impression that we were going to go with twelve. That’s why I saved five peremptories. But that was just about the size of it there.” (*Ibid.*)

Respondent fails to acknowledge that the trial court’s procedure for objecting and bringing an issue to the court’s attention during voir dire required appellant to request a side bar, and then state his challenge or objection at the bench conference, rather than making speaking objections and challenges in front of the jury. (10RT 840-841 [process for objecting or challenging a juror for cause discussed and agreed upon]; 13RT 1371 [trial court explains reason for bench conferences to the jurors]; see, e.g., 12RT 1165, 1226; 13RT 1314-1315, 1366-1367, 1425-1427; 14RT 1510-1512; 15RT 1683-1684.) That is exactly what appellant did. Because appellant clearly stated his problem with the court’s surprise procedure, and

because the trial court was given a full opportunity to remedy the error but did not, the issue is preserved for this Court's review. (See *People v. Whalen* (2013) 56 Cal.4th 1, 29 [claim challenging court's voir dire procedure preserved for review where "implications of defendant's objection were sufficiently clear"].)

Respondent is also incorrect in faulting appellant for failing to exercise all of his peremptory challenges. (RB 156.) But appellant is arguing that he was *prevented* from exercising his remaining peremptories by the trial court's surprise change in procedure. It would make no sense to fault appellant for failing to exercise all of his challenges when his complaint is that he was denied their use. (See *People v. Pearson* (2013) 56 Cal.4th 393, 411 [where the defendant claimed improper restrictions on voir dire he was not required to exhaust his peremptory challenges in order to preserve an issue for review].)

Respondent also argues that appellant forfeited this claim by passing on the seated alternates, thereby expressing a degree of satisfaction with them. (RB 156.) But respondent ignores the fact that appellant said he accepted the panel "at this time" only *after* the trial court refused his request for a bench conference to discuss the court's process. (14RT 1553.) Then, when finally given the opportunity to speak, appellant explained that he had accepted the alternates at that time because the court had said appellant would be selecting twelve, not seven, alternates, and appellant had to reserve some of his peremptory challenges for the voir dire yet-to-come. (14RT 1557.)

Respondent also tries to make much of the fact that appellant, when later questioned by the court, echoed a degree of relative satisfaction with the alternates on whom he had already passed. (14RT 1573.) However,

nothing changed – legally or factually – between the time the trial court empaneled the jurors and the time it asked appellant if he was satisfied with the panel: the trial court never acknowledged its error, did nothing to attempt to remedy it, and instead repeatedly sought to justify retrospectively its actions. More specifically, appellant was never provided any opportunity to use his reserved challenges, and he cannot be faulted for not requesting to do so given the fact that jeopardy attached when the alternates were sworn (*People v. Armendariz, supra*, 37 Cal.3d at pp. 580-581), and at which point a juror could only be removed for good cause (*People v. Cottle* (2006) 39 Cal.4th 246, 255; Cal. Code of Civ. Proc. §§ 226, 231; Pen. Code § 1089). Rather, after appellant presented the problem to the trial court, the court was required to do one thing: begin jury selection anew. It failed to do that.

Appellant also cannot be faulted for not identifying which specific prospective alternate(s) he would have challenged without knowledge of what pool of potential alternate jurors – if any – might lay ahead. (AOB 162-164.) As explained in *People v. Box* (1984) 152 Cal.App.3d 461, 461-466, when a trial court denies peremptory challenges, the “satisfaction” with the panel expressed by passing on the jurors is not dispositive of the error, because experienced counsel will seldom use remaining challenges without confidence that they may get a better juror than the one to be excused. That is precisely the case here.

For these reasons, it would be unreasonable to conclude that appellant’s passing on the prospective alternates and holding some challenges in reserve, at a time when the trial court had assured the parties that an additional panel of jurors would be called, forfeited this claim.

As for the merits, respondent does not directly defend the trial

court's snap decision to "chance it" and, without warning, to abandon its decision to use 12 alternates, and simply empanel the seven prospective alternates then in the box. Nor does respondent contest the fact that two of the alternates served on appellant's capital-case jury. (15RT 1688-1689; 25RT 3110-3114.) Rather, respondent notes that a trial court has discretion in determining the number of alternates to empanel, and it points to Penal Code section 1089,¹⁷ which states that a party is entitled to as many peremptory challenges as alternates to be empaneled. Respondent argues that because appellant used seven of his challenges and the trial court in its discretion empaneled seven alternates, appellant received the number of challenges to which he was lawfully entitled and should not be heard to complain now. This argument misses the point entirely.

Appellant agrees that a court has discretion with regard to the number of alternates to empanel, and he has not argued that he was statutorily entitled to twelve peremptory challenges. Rather, the error here is that the trial court substantially altered the stated voir dire procedure as it was in progress by *altering* the number of alternates to be empaneled, without advance warning or hearing, and then immediately empaneling the jurors without hearing appellant's objection to the changed procedure. Up to that point, the parties exercised their challenges in reliance on the court's assurances that there would be twelve alternates. This is precisely what appellant pointed out to the court when finally given the chance to address the matter. (14RT 1553, 1557.) Tellingly, respondent does not, because it cannot, argue that appellant would have passed on the jurors when he did –

¹⁷ All section references are to the Penal Code unless otherwise indicated.

much less that appellant would have exercised his challenges in the same manner – had the parties proceeded from the outset with the understanding that there would be seven, rather than twelve, alternates empaneled.

Respondent's reliance on *People v. Crowe* (1973) 8 Cal.3d 815 (*Crowe*) is also misplaced. In that case the trial court prematurely swore the jurors because it mistakenly believed that the defendant had exhausted his peremptory challenges. The defendant made no attempt to object to the court's error. Then, during a break in the proceedings, the trial court realized its error and, when the proceedings resumed, offered the defense an opportunity to exercise additional challenges. (*Id.* at p. 831.) After consulting with the defendant, defense counsel announced that he would make no further challenges. (*Ibid.*) This Court concluded that, under those circumstances, there was no indication that the trial court's mistake denied the defendant the use of peremptory challenges. (*Id.* at pp. 831-832.)

By contrast, appellant here objected to the trial court's procedure, but the trial court made no offer to remedy the problem, and appellant did not decline any opportunity to exercise additional challenges because none was extended. In fact, rather than offering to remedy the problem, as did the court in *Crowe*, the trial court here attempted to justify the denial of peremptory challenges after appellant complained, pointing out that seven alternates seemed sufficient in light of the uncertainty about when another panel would be available. (14RT 1557.) For these reasons, *Crowe* is inapposite.

This Court has consistently maintained that “[a trial] court commits reversible error if its procedures deny a party's right of peremptory challenge.” (*People v. Avila* (2006) 38 Cal.4th 491, 538; see *United States v. Annigoni* (9th Cir. 1996) 96 F.3d 1132, 1139 [“Although a trial court has

considerable discretionary authority in administering peremptory strikes, a trial court commits reversible error if its procedures effect an impairment or an outright denial of a party's right of peremptory challenge"].) The high court has similarly held that "[a]lthough there is nothing in the Constitution of the United States which requires . . . peremptory challenges (citation omitted), nonetheless the challenge is one of the most important of the rights secured to the accused. . . . [and t]he denial or impairment of the right is reversible error without a showing of prejudice." (*Swain v. Alabama* (1965) 380 U.S. 202, 219; but see, *Rivera v. Illinois* (2009) 556 U.S. 148, 159-160 [trial court's good-faith refusal to permit exercise of single peremptory challenge, without more, is not structural error for federal constitutional purposes].)

Accordingly, reversal is required because the trial court's sudden change in procedure denied appellant his right to peremptory challenges. (*People v. Avila, supra*, 38 Cal.4th at p. 538; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, p. 957; see *Pointer v. United States* (1894) 151 U.S. 396, 408-409.)

* * *

VII

THE TRIAL COURT'S EXCLUSION OF PROSPECTIVE JURORS WHO OPPOSED THE DEATH PENALTY, WITHOUT ANY MEANINGFUL DEATH QUALIFYING VOIR DIRE, REQUIRES REVERSAL OF APPELLANT'S DEATH JUDGMENT

Appellant has argued that the trial court improperly excluded prospective jurors who stated or implied opposition to the death penalty or the manner in which it is imposed. Those prospective jurors were Donald Whitehead, Roy Gilstrap, Darlene Johnson, and Mary Perez. (AOB 170-179.) Each was excused without sufficient death-qualifying voir dire aimed at determining whether they could put aside their personal views and follow the law as instructed by the court. Three of these jurors were asked a single death-qualifying question, while the fourth was asked a second question that yielded nothing more than the first. Because the jurors' answers provided an insufficient basis for concluding that they were unwilling to follow the law and the trial court's instructions, their removal was improper and reversal of appellant's death judgment is required. (AOB 165-189; *Witherspoon v. Illinois* (1968) 391 U.S. 510 (*Witherspoon*); *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*).)

The trial court similarly excused four other death-scrupled prospective jurors for cause after conducting only perfunctory and insufficient death-qualifying voir dire. Those prospective jurors were Patricia Cruise, Genoveva Ortega, Belma Adamos, and Teresa Nakashima. (AOB 179-186.) Their answers provided insufficient grounds for concluding that their views on the death penalty would substantially impair their ability to follow the law, obey their oaths as jurors, or impose a death sentence following proper instructions. Exclusion of these prospective jurors also denied appellant his constitutional rights and requires reversal of

the death judgment. (*Witherspoon, supra*, 391 U.S. 510; *Witt, supra*, 469 U.S. 412.)

Respondent disagrees, arguing that each prospective juror was properly excluded from the jury. But as a threshold matter, respondent contends that appellant forfeited his right to challenge the adequacy of the death-qualifying voir dire by not objecting to the trial court's procedure. (RB 160, 176-183.)¹⁸ The record shows otherwise. (See AOB 166-168.)

The trial court and parties settled on a series of required death-qualifying questions to be asked of each prospective juror, and the court explained the procedure it would use: If a juror makes an "unequivocal statement" that it could not "impose the death penalty," the court would treat such an answer as invoking a challenge for cause by the prosecutor. (32RT 3827.) Appellant explained why the court's proposed procedure was insufficient, stating that the removal of a juror based on that single statement would be "premature." (*Ibid.*) Appellant then gave a specific example of why the court needed to probe further even after a juror initially indicates an inability to vote for death. (32RT 3827-3828.)

After the court balked at the notion of having to probe further, appellant asked: "Whatever line of questioning asked that gave you the indication that it was a challenge for cause on behalf of the prosecution, would that – that would be after you went through the mandatory questions, the *Witherspoon*?" (*Ibid.*) The court said it would ask "[a]ll of the

¹⁸ Respondent does not argue forfeiture with regard to appellant's challenge to the removal of the eight death-scrupled jurors. That claim is subject to the no-forfeiture rule in effect at the time of appellant's capital trial and is preserved for this Court's review. (*Velasquez, supra*, 26 Cal.3d at p. 443, overruled in *McKinnon, supra*, 52 Cal.4th at pp. 637-638 [*Velasquez's* non-forfeiture rule is overruled prospectively only].)

mandatory questions regarding penalty,” to which appellant again complained, saying “. . . I just don’t want you to stop there. That was the purpose of modifying side bars.” (*Ibid.*)¹⁹

After the court repeated its intended procedure for a third time, appellant requested that the court ask each juror, at the very minimum, the complete set of the death-qualifying questions prior to excluding any juror for cause. The prosecutor agreed with this request, and the trial court said it would do so. (32RT 3829.) But the court did not do so.

Given these circumstances – where appellant repeatedly asked the court to go further and follow-up with any jurors who initially indicated that they could not vote for death – it would be incorrect to conclude that appellant failed to invoke his right to an adequate voir dire and a fair and impartial jury. (*Witherspoon, supra*, 391 U.S. at p. 522, fn. 21; *Morgan v. Illinois* (1992) 504 U.S. 719, 730-734; see *Mu’Min v. Virginia* (1991) 500 U.S. 415, 431-432 [given the crucial role of voir dire in protecting right to trial by impartial jury, perfunctory voir dire on key issues is not sufficient].) Accordingly, that aspect of the claim is preserved for this Court’s review.

A. Prospective Jurors Donald Whitehead, Roy Gilstrap, Darlene Johnson, And Mary Perez Were Improperly Excused For Cause After Insufficient Death-Qualifying Voir Dire

Appellant argued that the trial court improperly excused jurors for cause without conducting sufficient voir dire to determine whether those

¹⁹ Appellant had earlier requested that the court permit sidebar conferences prior to excluding jurors for cause, so that the parties could discuss such challenges prior to the court ruling on them and excluding jurors. The prosecutor refused to participate in such conferences with appellant. (30RT 3404-3405.)

jurors could follow the court's instructions and apply the law to the facts of this case. Respondent disagrees, claiming the record shows that each juror could not follow the law. Respondent is wrong.

1. Prospective Juror Donald Whitehead

Donald Whitehead – a civil servant, and armed forces veteran, who had served on two prior criminal juries that reached verdicts – was excused for cause after the trial court asked him only one death-qualifying question: Whether he could “impose death” if “the record” justified it. Whitehead answered, “No, I don’t believe in the death penalty for the state of California, in particular the method used. So I could not render a verdict in that respect.” (33RT 3920.)

Appellant maintains the court erred by excluding Whitehead from jury service in appellant’s case. At a minimum, the court should have asked whether he could set aside his views and follow the court’s instructions, including that he was not to consider the method of execution in reaching a decision regarding the death penalty. (*People v. Stewart* (2004) 33 Cal.4th 425, 446-449; *People v. Heard* (2003) 31 Cal.4th 946, 964.) Indeed, such clarification was particularly necessary here because Whitehead had previously answered that his responses to the general voir dire questions would not differ from those given by other jurors, who stated that they could follow the court’s instructions if called upon to decide whether appellant should receive death or life without the possibility of parole. (AOB 179, fn. 83; RB 125-126; see 31RT 3676; 33RT 3917-3920.)

Citing this Court’s decisions in *People v. Cook* (2007) 40 Cal.4th 1334 (*Cook*), and *People v. Holt* (1997) 15 Cal.4th 619 (*Holt*), respondent argues that Whitehead’s response showed an “unwillingness or inability to follow the law” sufficient to warrant his removal from appellant’s jury.

(RB 171.) Neither case supports respondent's position.

First, *Cook* involved a court that adhered to an agreed-upon death qualification procedure, and a defendant that *waived* his opportunity to engage in follow-up clarifying voir dire. Specifically, the juror at issue in *Cook* stated in her questionnaire, inter alia, that she "could never vote for the death penalty" even if someone were convicted of murder with special circumstances. But the juror also stated that she could set aside her personal feelings about the death penalty. (*Cook, supra*, 40 Cal.4th at pp. 1342-1343.) The prosecutor moved to exclude that juror, and the defendant *agreed* that no further clarifying voir dire was needed. The trial court then discussed the matter with the parties, the defendant submitted the issue, and then the court granted the prosecutor's motion. (*Ibid.*)

This Court concluded that the Cook had waived his right to a thorough and clarifying voir dire by stipulating to the court's procedure, and by specifically agreeing that no further voir dire of the juror at issue was required. Cautioning that a procedure that fails to ensure sufficient clarifying voir dire may result in excluding jurors erroneously, this Court added: "Although this procedure may sometimes result in the exclusion of prospective jurors whose ambiguous responses might be clarified on voir dire, we see no legal impediment to such procedure. Capital defendants are permitted to waive 'the most crucial of rights,' including the rights to counsel, to a jury trial, to offer a guilt phase defense, and to be present at various stages of trial. [Citation omitted.] And counsel, as 'captain of the ship,' maintains complete control of defense tactics and strategies, except that the defendant retains a few 'fundamental' personal rights." (*Cook, supra*, 40 Cal.4th at pp. 1342-1343.) It is in this context – where the *defense* foreclosed any necessary clarifying voir dire – that this Court found

no error in excluding the juror for stating that she could not consider voting for death in that case. (*Id.* at pp. 1343-1344.)

By contrast, the court here did not follow the agreed upon death-qualifying procedure, and did not discuss the juror's responses with the parties prior to excluding the juror. Also, while this Court found that Cook had forfeited his right to complain about the voir dire after he expressly declined to further question the juror at issue, appellant was afforded no opportunity to clarify Whitehead's position and determine whether he could set aside his views and follow the law. Indeed, given that he was not permitted to question the prospective jurors, appellant specifically asked the court to perform such follow-up of any prospective juror who appeared, at first blush, to be unable to vote for death; the court agreed to do so, but then did not. (32RT 3827-3839.)

Moreover, *Cook* supports appellant's position in that it explains that a procedure that excludes jurors without follow-up voir dire "may sometimes result in the exclusion of prospective jurors whose ambiguous responses might be clarified." (*Cook, supra*, 40 Cal.4th at pp. 1342-1343.) As discussed in appellant's opening brief (AOB 178-179), Whitehead's response to the single death-qualifying question required exactly the kind of follow-up that appellant requested, and was the type of answer that this Court has stated may be necessary in order to understand whether a juror is qualified to serve on a capital jury (see *People v. Heard* (2003) 31 Cal.4th 946, 964; see *Brown v. Lambert* (9th Cir. 2006) 451 F.3d 946, 953).

Respondent's reliance on *Holt, supra*, is similarly misplaced. There, two jurors were subjected to extensive voir dire before the trial court excused them due to their inability to consider the death penalty as a potential punishment in that case. (*Holt, supra*, 15 Cal.4th at pp. 650-654.)

Affirming the trial court's decision, this Court observed that the first prospective juror (Jerry Richards) initially stated that he would not be able to vote for death absent evidence of an intentional killing. When the trial court attempted to clarify Richards' attitude toward the death penalty, the juror became even more unequivocal that he could only vote for death if there was evidence that the defendant intended to kill. The trial court then offered the defendant an opportunity to voir dire Richards further, but the defendant declined. (*Id.* at pp. 651-652.) Under those circumstances, this Court found the trial court was correct to excuse Richards.

As for the second juror at issue in *Holt* (Erlinda Jones), this Court found that Jones repeatedly stated that she did not know whether she could vote for death under the appropriate circumstances. (*Holt, supra*, 15 Cal.4th at pp. 652-653.) To emphasize the completeness of the voir dire, this Court observed: "The trial court exercised considerable restraint and patience attempting to elicit meaningful responses from Jones, and was justified in concluding that she could not carry out her obligations as a juror at the penalty phase. After the prosecutor challenged Jones for cause, defense counsel, apparently satisfied with the voir dire by the court and the prosecutor, twice declined the opportunity to inquire further into her views." (*Id.* at pp. 653-654.) For those reasons, this Court affirmed the trial court's exclusion of Jones.

By contrast, the court here did no follow-up voir dire of Whitehead. It made no effort to clarify his views and overcome any perceived impediment to his serving on appellant's capital-case jury. Nor did the trial court offer appellant the opportunity to voir dire Whitehead (or any other juror, for that matter), much less conduct the additional probing that appellant had specifically requested that the court conduct prior to

excluding the jurors for cause. For these reasons Whitehead was improperly excused for cause.

2. Prospective Juror Roy Gilstrap

Prospective Juror Roy Gilstrap – a married engineer with three professional adult children, who had served on four prior juries, including three criminal juries (33RT 3933) – was deemed unqualified to serve on appellant’s jury after the trial court asked him only one death-qualifying question, to which he provided an equivocal answer:

THE COURT: If the record justified it, Mr. Gilstrap, could you impose death?

[GILSTRAP]: No, I don’t believe so.

THE COURT: I’ll treat that as a challenge for cause. You may return to the jury assembly room. Thank you very much.

(33RT 3933.) Appellant objected to Gilstrap’s removal at the first opportunity he was provided to do so, correctly pointing out that the court failed to follow-up and clarify Gilstrap’s views. (33RT 3946.)

Relying on this Court’s decision in *People v. Tully* (2012) 54 Cal.4th 952 (*Tully*), respondent argues that the trial court properly excused Gilstrap because his “position was plain, and it appears that at the time he was excused neither the court nor the parties believed he could be rehabilitated.” (RB 173.) In the alternative, respondent argues that if this Court finds Gilstrap’s answer to be equivocal, then it must defer to the trial court’s evaluation of the prospective juror’s mental state and demeanor. (*Ibid.*) Respondent is wrong on both counts, and *Tully* is inapposite.

First, respondent’s representations regarding the facts in *Tully* are inaccurate. Specifically, respondent suggests that this Court affirmed the

removal of one of the jurors at issue in *Tully* – Juror T.L. – after that juror responded simply “No” to a single voir dire question asking whether he could impose the death penalty. (RB 172.) That is not at all what happened in *Tully*. Rather, the prospective jurors in *Tully* each completed a juror questionnaire. Then, based on their answers, each prospective juror was subjected to follow-up voir dire by the trial court. (*Tully, supra*, 54 Cal.4th at pp. 997-1003.)

On his questionnaire, T.L. stated that the death penalty was “[n]ot really a big problem for me,” that he was neutral toward the death penalty, and was not sure how he would vote on a death penalty ballot measure. (*Tully, supra*, 54 Cal.4th at p. 1002.) Then, during follow-up voir dire, T.L. initially said he could consider both penalties. But when asked directly whether he could vote for death, he replied, “No,” shaking his head. (*Id.* at pp. 1002-1003.) The court clarified further, asking whether the juror understood the question about considering both penalties; T.L. responded in a manner that made it clear that he understood the question. (*Id.* at p. 1003.) At that point, defense counsel had the opportunity to further probe T.L. on his death penalty views, *but declined to do so*. The prosecutor challenged the juror for cause, defense counsel submitted without argument, and the challenge was granted. (*Id.* at p. 1002.)

On these facts, this Court rejected *Tully*’s complaints about the voir dire and affirmed the trial court’s exercise of discretion in removing T.L. (*Tully, supra*, 54 Cal.4th at pp. 1002-1003.) In reaching these conclusions, this Court emphasized how “[t]he fact that neither the prosecution nor the defense asked him questions suggests that his position was so plain neither side believed it worthwhile to attempt to rehabilitate him[,]” and that type of voir dire in this case created a classic situation requiring deference to the

trial court's evaluation of the prospective juror's mental state and demeanor." (*Ibid.*, citation omitted.)

Here, by contrast, the trial court engaged in no follow-up voir dire, notwithstanding Gilstrap's less-than-certain response to the court's single death-qualifying voir dire question. Also, the trial court here failed to adhere to its stated voir dire procedure; denied the parties an opportunity to probe and clarify the jurors' death penalty views; and set up a process that made it impossible for appellant to be heard on his objection *prior* to excluding the juror.

As to this latter point, respondent disingenuously tries to blame appellant for the premature excusal of Juror Gilstrap, arguing that appellant's objection was "too late and vague to make any difference," and that "at the time he was excused neither the court nor the parties believed [Juror Gilstrap] could be rehabilitated." (RB 173.) In addition to the fact that no objection was required to preserve this issue for review, respondent knows full well that appellant objected at the first opportunity he had to do so; that the trial court imposed a procedure – over appellant's objection – prohibiting bench conferences to discuss a juror's voir-dire answers *before* that juror was dismissed; and that appellant stated plainly – when finally afforded the opportunity to speak – that the trial court should have further questioned Gilstrap. (See AOB 166-168 [discussing the trial court's procedures and appellant's objections to them].) For these reasons, respondent's reliance on *Tully* is misplaced.

Respondent also argues, in the alternative, that if Gilstrap's response to the single voir dire question – "No, I don't believe so" – is deemed equivocal, then this Court must defer to the trial court's evaluation of the prospective juror's mental state and demeanor. (RB 173, citing *Tully*,

supra, 54 Cal.4th at p. 1002.) Not so.

As discussed at greater length in the opening brief (AOB 186-189), this Court has explained that the trial court has a duty to conduct careful and thorough questioning prior to excluding a prospective juror based on his or her death penalty views. That voir dire must include follow-up questions where necessary to determine whether the juror can put aside his or her views on the death penalty, follow the court's instructions and law, and otherwise perform the duties of a juror. (*People v. Heard, supra*, 31 Cal.4th at p. 965.) Absent such a thorough inquiry, no deference will be given to trial court's exercise of discretion about the impartiality of a prospective juror. (*Id.* at p. 968; see *People v. Stewart, supra*, 33 Cal.4th at p. 455.)

Here, because the trial court excused Gilstrap with no follow-up or clarifying voir dire after asking the juror only a single question, the trial court's decision cannot be afforded this Court's deference. (*People v. Heard, supra*, 31 Cal.4th at p. 968; *People v. Stewart, supra*, 33 Cal.4th at p. 455.) This is so notwithstanding respondent's reliance on *Tully*, where the juror at issue was not only subjected to substantial follow-up voir dire, but the record specifically indicated that the juror engaged in non-verbal communication (head shaking) that necessitated the trial court's interpretation of the juror's response. (*Tully, supra*, 54 Cal.4th at pp. 1002-1003.)

For these reasons, the trial court erroneously excused prospective juror Gilstrap for cause.

3. Prospective Juror Darlene Johnson

Prospective juror Darlene Johnson – a mother of five adult children and a secretary, who had served on two prior juries – was deemed unfit to serve on appellant's capital jury after the following perfunctory exchange:

THE COURT: If the record justified it, could you impose death?

[JOHNSON]: No. Religious.

THE COURT : Thank you very much. ¶ I'll treat that as a challenge for cause and you may proceed to the jury assembly room.
Thank you very much.

(33RT 3935.) Appellant objected to the removal of Johnson at the first opportunity he had to do so. (33RT 3946.)

Respondent contends that Johnson was properly excused for cause based on her two-word answer to the court's voir dire. As to the thoroughness of the voir dire, respondent makes the same arguments regarding Johnson that it made with regard to prospective Gilstrap, *supra*. (RB 174-175.) But for the same reasons respondent's argument fails with regard to Gilstrap and Whitehead, *supra*, it fails with regard to Johnson.

In addition, relying on this Court's decision in *People v. Thomas* (2011) 51 Cal.4th 449 (*Thomas*), respondent argues that Johnson was properly removed because her religious beliefs were such that they would conflict with her duties as a juror. (RB 175.) However the record does not support respondent's assertion, and this Court's decision in *Thomas* actually demonstrates how and why the voir dire in this case was insufficient.

In *Thomas*, a juror completed a questionnaire in which she explained that opposition to the death penalty as follows: "I am a Christian, it would be difficult for me to sentence someone to death because of my belief in the goodness of God's creation." (*Thomas, supra*, 51 Cal.4th at p. 470.) She added: "I'm not sure I could sentence someone to death even if I did find them guilty." (*Ibid.*) As to whether she would vote for life in prison

regardless of the circumstances, the juror wrote: “I’m really not sure. My feeling is that I would find it very difficult to vote for the death penalty.” (*Ibid.*)

Then, in open court, the juror in *Thomas* was subjected to follow-up and clarifying voir dire by both the court and counsel. The court asked whether the juror was capable of voting for the death penalty if she were to find it was the appropriate penalty, to which she replied: “I really don’t know.” (*Thomas, supra*, 51 Cal.4th at p. 470.) The juror, a registered nurse, went on to explain that she could not put herself in the position of being the person that executed the defendant, later repeating that she could not administer the lethal injection herself. (*Ibid.*) Then, although the juror told defense counsel she “would consider” voting for the death penalty, she told the prosecutor that she did not think she could actually vote for death. (*Ibid.*) The juror explained to the court that by saying “I don’t think so” she meant that she could not vote for the death penalty. (*Ibid.*) The court further inquired as to whether there was a reasonable possibility that she could ever vote for the death penalty, and the juror replied, “I don’t know. I don’t know.” (*Ibid.*) The trial court then granted the prosecutor’s motion to excuse the juror for cause, finding that she would be unable to faithfully and impartially apply the law and therefore was substantially impaired. (*Id.* at pp. 470-471.) Based on the juror’s questionnaire statements, as well as the extensive record of careful clarifying voir dire by the parties and the court, this Court found that substantial evidence supported the trial court’s finding and ruling. (*Id.* at p. 471.)

By contrast to the thorough voir dire that took place in *Thomas*, the entirety of the death qualifying voir dire of Johnson resulted in just two words: “No. Religious.” (33RT 3935.) There were no juror questionnaires

shedding light on the intersection between the juror's religious beliefs and her view of the death penalty. The court conducted no follow-up or clarifying voir dire to determine whether the juror could set aside her personal and religious beliefs – whatever they might be – and follow the law and the court's instructions.

For these reasons, the record does not support a finding that, if instructed to do so, juror Johnson would refuse or be unable to set aside her personal beliefs and follow the law; and her exclusion from jury service based simply on her two-word response to a single voir-dire question cannot be affirmed. Indeed, to affirm the removal of Johnson based on this record would conflict with high court precedent (see AOB 168-170, 187-188), and jettison this Court's long-held jurisprudence that requires thorough and careful voir dire prior to excluding a juror from jury service based solely on the juror's views on the death penalty. (*People v. Heard, supra*, 31 Cal.4th at p. 968 ["the trial court's expenditure of another minute or two in making thoughtful inquiries . . . would have made the difference between rendering a supportable ruling and a reversible one"].)

4. Prospective Juror Mary Perez

Prospective Juror Mary Perez – a married mother of two adult children, who had served on a prior criminal jury – was deemed unfit to serve on appellant's capital jury following this perfunctory exchange:

THE COURT: All right. Now, if the record justified it, could you impose the death penalty?

[PEREZ]: No.

THE COURT: That is because?

[PEREZ]: Religious.

THE COURT: Religious beliefs. All right. ¶ I'll consider that a challenge for cause. Thank you very much. . . .

(33RT 4001-4002.) Appellant maintains that the voir dire of Perez was insufficient, and that the resulting record does not support a finding that the juror, if selected to sit on appellant's jury, would have been unable to set aside her personal views and follow the court's instructions and the law. (*People v. Stewart, supra*, 33 Cal.4th at pp. 446-449; *People v. Heard, supra*, 31 Cal.4th at p. 964.)

Respondent disagrees, arguing that "the analysis for Ms. Johnson and Perez is the same" and that the trial court was entitled to conclude Perez was properly excluded based on her religious-based inability to impose death. (RB 176.) Appellant agrees that the analysis of the two jurors is the same. And just as with Johnson, the trial court's removal of Perez was unjustified.

B. Prospective Jurors Patricia Cruise, Genoveva Ortega, Belma Adamos, And Teresa Nakashima Were Unconstitutionally Excluded From Serving On Appellant's Capital-Case Jury

In addition to the jurors who were excused for cause after just a single death-qualifying question with no significant follow-up and clarifying voir dire, four other jurors expressed anti-death penalty views and were improperly deemed unfit for capital-case jury service after only perfunctory follow-up voir dire. Those prospective jurors were Patricia Cruise (32RT 3849-3850), Genoveva Ortega (32RT 3853-3855), Belma Adamos (*id.* at pp. 3856-3857), and Teresa Nakashima (*id.* at pp. 3873-3878). (See AOB 179-186.) Each of these jurors was unjustifiably deemed unfit for jury service after the trial court failed to conduct even the minimal

voir dire agreed upon by the parties. The court excused each juror without knowing whether they could put aside their personal feelings about the death penalty and follow the law as provided by the court were they instructed to do so. (*Witherspoon, supra*, 391 U.S. at p. 522, fn. 21; *People v. Stewart, supra*, 33 Cal.4th at pp. 446-449; *People v. Heard, supra*, 31 Cal.4th at p. 964.)

Relying on this Court's decision in *People v. Roldan* (2005) 35 Cal.4th 646 (*Roldan*),²⁰ respondent argues that this Court must defer to the trial court's decision to exclude Cruise because she equivocated about whether she could vote for death, and the trial court was in the best position to evaluate the juror's demeanor and state of mind. (RB 165-166.) But as discussed in greater detail in the opening brief and above, the trial court's decision here is not entitled to this Court's deference because it failed to conduct more than a perfunctory voir dire, and failed to follow-up and clarify whether the juror could set aside any biases and follow the law. Moreover, this Court's decision in *Roldan* further illustrates appellant's point.

In *Roldan*, the prospective jurors completed questionnaires that required responses to numerous open-ended questions about the death penalty. The two jurors at issue both expressed grave reservations about being capable of voting for death. (*Roldan, supra*, 35 Cal.4th at pp. 696-698.) Then, in response to their questionnaire answers, the trial court conducted extensive follow-up voir dire and probing to clarify both jurors' specific concerns. (*Ibid.*) Only after each juror's position was clarified,

²⁰ Disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.

and each continued to express an inability to vote for death in that case, did the trial court entertain the prosecutor's motion for cause. After the defense was provided an opportunity to be heard, the trial court ruled and excused both jurors for cause. (*Ibid.*) On that record, this Court deferred to the trial court's rulings and found it had not abused its discretion with regard to either juror. (*Id.* at pp. 698-699.)

Here, by contrast, the trial court conducted only perfunctory voir dire of Cruise, and did not question her based on her stated "sticking point" with regard to the death penalty, which was the standard of proof that the court would require her to apply were she selected to serve on appellant's jury. More specifically, Cruise explained that she could not vote for death if not "thoroughly convinced" of the defendant's guilt. (32RT 3850.) But rather than following-up on the juror's concern – as the court did in *Roldan* – the court here merely deemed the juror unfit for service and excused her. (*Ibid.*) And because the court did not clarify the level of proof required during the weighing of mitigating and aggravating factors, we do not know, and the trial court could not have known, whether Cruise could have applied the proper legal standard and voted for death if the circumstance warranted it. (*People v. Heard, supra*, 31 Cal.4th 946, 964.)

With regard to Genoveva Ortega (32RT 3853-3855), Belma Adamos (*id.* at pp. 3856-3857), and Teresa Nakashima (*id.* at pp. 3873-3878), respondent argues that the trial court properly excluded these prospective jurors from service on appellant's jury because each stated that they could not "impose death." (RB 166-170.) But just as with the jurors discussed above, Ortega, Adamos and Nakashima were each asked just one of the agreed-upon death-qualifying voir dire questions, and the court improperly removed each juror based on the answer to that one question, without any

substantive follow-up or probing. This was insufficient voir dire to protect appellant's jury trial right.

For example, Ortega initially volunteered that she did not "agree" with the death penalty. (32RT 3855.) But the trial court never asked Ortega the rest of the death-qualifying voir dire questions agreed upon by the parties. Nor did it ask whether she could put aside any personal disagreement with the death penalty and follow the court's instructions and the law. (*Adams v. Texas* (1980) 448 U.S. 38, 49-50; see *Uttecht v. Brown* (2007) 551 U.S. 1, 6, 9.) Instead, the court asked only whether the juror could "impose" the death penalty and then excluded her from service when she said she could not do so. (32RT 3855.)

Adamos similarly volunteered her religious opposition to the death penalty. She too was excused for being unable to "impose" the death penalty without any follow-up or clarifying voir dire concerning her ability to set aside her religious views and *vote* for a death sentence if the aggravating evidence, weighed against the mitigating evidence, justified such a sentence. (32RT 3856-3857.) Nakashima was also excused without such clarifying and follow-up voir dire. (32RT 3857.)

Accordingly, prospective jurors Cruise, Ortega, Adamos, and Nakashima were improperly excluded from serving on appellant's jury following insufficient voir dire.

**C. Deference To The Trial Court's Conclusions With
Regard To The Dismissed Death-Scrupled Jurors Is
Unwarranted, And Reversal Is Required**

Appellant argued in his opening brief that the death-qualifying voir dire was so lacking that the trial court's decisions about the impartiality of the jurors are unworthy of this Court's deference, and de novo review is

required. (AOB 186-189; *People v. Stewart*, *supra*, 33 Cal.4th at pp. 455; *People v. Heard*, *supra*, 31 Cal.4th at p. 968.) Respondent disagrees, arguing that appellant forfeited any challenge to the sufficiency of the voir dire, with which respondent finds no fault. (RB 176-182.) Appellant has already explained why respondent is wrong regarding forfeiture, and why the trial court's death-qualifying voir dire was insufficient and unworthy of deference; appellant will not revisit those arguments here.

Respondent additionally contends, however, that any *Witherspoon-Witt* error in this case was merely a technical mistake that must be deemed harmless beyond a reasonable doubt. Respondent acknowledges that the high court's decision in *Gray v. Mississippi* (1987) 481 U.S. 648 (*Gray*) holds that a *Witherspoon-Witt* error *requires* reversal of a death judgment. But citing to Chief Justice Cantil-Sakauye's critique of *Gray* in *People v. Riccardi* (2012) 54 Cal.4th 758, 840-846 (*Riccardi*), respondent invites this Court to reject *Gray* and apply a harmless error analysis in this case. (RB 181-183.)

Respondent's position is misguided. In *Riccardi*, this Court unanimously held that it was bound by *Gray*. (*Riccardi*, *supra*, 54 Cal.4th at p. 778.) More recently, in *People v. Whalen* (2013) 56 Cal.4th 1, 26, this Court again acknowledged that *Gray* remains controlling authority on this point. Thus, until the high court indicates otherwise, a *Witherspoon-Witt* error requires automatic reversal of a death judgment.

Moreover, appellant disagrees with respondent's view that the *Witherspoon-Witt* errors here were mere "technical error" that do not invoke "cognizable prejudice" from the exclusion of a particular viewpoint among the jurors. (RB 183.) A *Witherspoon-Witt* error is a violation of the defendant's jury trial rights protected by the Sixth and Fourteenth

Amendments to the United States Constitution, and as such, is not a mere “technical error.” The error violates the defendant’s rights because it “subjects the defendant to trial by a jury ‘uncommonly willing to condemn a man to die.’” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon, supra*, 391 U.S. at p. 521.) Indeed, the high court has explained that when all of the jurors who express conscientious or religious scruples against capital punishment are swept away, what is left is “a tribunal organized to return a verdict of death.” (*Witherspoon, supra*, 391 U.S. at pp. 520-521 (footnotes omitted); *Lockhart v. McCree, supra*, 476 U.S. at pp. 179-180 [Constitution does not prohibit removing death-scrupled jurors who cannot follow the law].) That is precisely what happened here.

Accordingly, the trial court’s removal of death-scrupled jurors, after an insufficient death-qualifying voir dire, denied appellant his right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments. Reversal of the death judgment is required. (*Witherspoon, supra*, 391 U.S. 510; *Witt, supra*, 469 U.S. 412.)

* * *

VIII

APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT ALLOWED THE PROSECUTOR TO PRESENT THE CONTENTS OF HIS “RAP SHEET” TO THE JURY

Appellant maintains that the trial court erred when it permitted the prosecutor to present the contents of his “rap sheet” to the jury at both his first and second guilt-innocence trials. (AOB 191-228.) At the first trial, the contents of the rap sheet were erroneously admitted under Evidence Code section 1103, subdivision (b) (hereafter, “section 1103(b)”), while at the second trial the same evidence was erroneously admitted on the grounds that appellant had allegedly challenged the accuracy of a document that formed the basis of an expert’s opinion that appellant was a street gang member at the time of the shooting. In addition, because this highly inflammatory evidence was admitted at the second guilt-innocence trial, the jury was free to consider it at appellant’s penalty trial, notwithstanding that much of the evidence, including hearsay evidence of appellant’s arrests, would not have been otherwise admissible during the penalty-phase proceedings.

A. The Trial Court Erred By Admitting The Contents Of Appellant’s Rap Sheet Into Evidence At His First Guilt-Innocence Trial

At appellant’s first guilt-innocence trial, the prosecutor moved to present evidence of appellant’s alleged criminal history to show that he had a violent character. Relying on section 1103(b), the prosecutor argued that this otherwise inadmissible evidence was made admissible because appellant had opened the door for evidence of his bad character by presenting evidence of the victims’ bad character. (20RT 2628.) When the

trial court required the prosecutor to identify the specific evidence that appellant presented to open the door, the prosecutor stated that (1) appellant had cross-examined Benjamin and Linda Jones about possessing guns; (2) appellant cross-examined Benjamin and Linda Jones about an argument that their brother, Benson, had with his wife on the day of the shooting; (3) appellant questioned the prosecutor's gang expert about whether gang members like the Joneses would be armed and prepared for confrontation were they to enter a rival gang's territory; and (4) appellant had questioned Ernest Johnson about a prior act of violence against a police officer. (20RT 2628-2629.)

The trial court permitted Sergeant Doral Riggs of the Los Angeles County Sheriff's Department to read appellant's four-page "rap sheet" to the jury, and to describe each of appellant's arrests for alleged criminal conduct, including an incident that occurred when appellant was a minor. Based on this evidence, Riggs offered his opinion that appellant had a propensity for violence. (21RT 2683-2690; see AOB 198.)

As explained in detail in the opening brief, all of this testimony about appellant's bad-character and propensity for violence was inadmissible and the trial court erred by allowing the prosecutor to present it. (AOB 198-215.) Respondent disagrees, largely adopting the arguments of the prosecutor below, claiming that the trial court did not abuse its discretion, and arguing that in any event appellant was not prejudiced by the error. (RB 190-199.)²¹

²¹ Respondent apparently agrees that the trial court was incorrect when it ruled initially that appellant presented propensity evidence as to Ernest Johnson in front of the jury; appellant asked Johnson about his prior
(continued...)

Respondent contends that appellant presented evidence of Benson Jones' "bad acts or reputation" to show that Benson was "a violent, armed, convicted gang member who, prior to the shooting, had committed acts of domestic violence." (RB 191.) Respondent also claims that appellant presented similar evidence of bad character with regard to Benjamin Jones. (*Ibid.*) None of this is true: Appellant presented no propensity evidence regarding the Jones brothers.

Like the trial court below, respondent apparently does not understand that the facts and circumstances surrounding the charged crime(s) are not propensity evidence, even when those facts coincidentally impugn the defendant's or victim's character. (*People v. Myers* (2007) 148 Cal.App.4th 546, 552-553.) "If evidence of a victim's conduct at the time of the charged offense constitutes character evidence under Evidence Code section 1103, then every criminal defendant claiming self-defense would open the door for evidence of his own violent character. Evidence Code section 1103 cannot be read so broadly." (*Id.* at p. 553.)

Here, while respondent claims that appellant presented evidence that the Jones brothers were "violent," "dangerous, convicted, gang member[s]" (RB 191), it does not identify any specific instance of their prior violent conduct or other gang activity presented at trial by appellant. That is because appellant adduced no such evidence. Moreover, respondent neglects to mention that it was the *prosecutor's theory* that the shootings in this case were all gang related (15RT 1643, 1657; 23RT 2932-2933); it was *the prosecutor* who first told the jurors that Benson and Benjamin Jones

²¹ (...continued)
felony conviction at a 402 hearing. (RB 188; AOB 201-202.)

were Crip gang members, and that appellant was a rival Blood gang member (15RT 1657; 1754-1757); and it was *the prosecutor* who presented evidence and established that Benson, Benjamin and Linda Jones were each convicted criminals who had been recently released from prison at the time of the shooting (15RT 1756-1757; 16RT 1821).

As for the evidence about gun possession, recall that the defense theory was that Benson and Benjamin Jones were armed when they arrived at Walter's Market. Appellant attempted to show that Benson drew his weapon as he suddenly approached the men; Benson was then shot dead, and Benjamin was shot and wounded. Linda Jones, who was down the street when the shooting occurred, ran to the scene and secreted away the guns used by her brothers. Respondent – like the prosecutor below – argues that appellant impugned the Jones' character by asking witnesses whether Benjamin owned guns on the day of the shooting, asking the prosecutor's expert whether gang members carry guns, and asking whether Linda Jones spirited away a gun from the scene for fear that her Benjamin – who was on parole – would be found in possession of a weapon when the police arrived. (RB 184-187.)

Once again, however, respondent does not identify what specific incidences of prior misconduct appellant offered to show that the victims had a propensity for violence. (Evid. Code §§ 1101, 1103.) Appellant offered no such evidence. The prosecutor, however, did. (15RT 1754-1757; 16RT 1821.)

Further, presenting evidence that the Jones brothers owned or carried guns at the time of the crime – or even in the past – is not evidence of bad character. (AOB 202-206; see *People v. Thomas* (1992) 2 Cal.4th 489, 522.) Respondent concedes that point, admitting that even possession of a

concealed gun without a permit is not evidence of bad character. (RB 192.) But respondent appears to argue that connecting a victim's gun ownership to his status as a felon is propensity evidence. (*Ibid.*) Respondent is wrong on this point as well, first because appellant did not present evidence that the Jones brothers were felons. But also because it fails to distinguish between (1) evidence of a victim's specific acts of prior misconduct to establish a character trait, offered to prove present conduct in conformity with the victim's character trait (Evid. Code § 1103, subds. (a) & (b); *People v. Fuiava* (2012) 53 Cal.4th 622, 694-696); and (2) evidence of the victim's conduct leading up and to the time of the crime – that may show the victim to be a person of bad character – offered to establish the circumstances and facts surrounding the charged offenses. The former is propensity evidence, and the latter is what appellant offered here: relevant evidence concerning the underlying facts of the charged crime. (*People v. Myers, supra*, 148 Cal.App.4th at pp. 552-553.)

As for respondent's claim that appellant presented evidence that Benson Jones engaged in a "prior" act of domestic violence, respondent again hides the ball. The so-called act of domestic violence was part of what happened leading up to the charged offenses, and it was *the prosecutor* who first brought up what had happened at Benson's home. In fact, the prosecutor began his case-in-chief by asking Benjamin about going to Benson's home, and whether he and Linda went there to "try to get [him] out of the home" immediately prior to driving to Walter's Market. (15RT 1662-1663.) The prosecutor similarly began his questioning of Linda Jones by asking how and why she and her brothers met at Benson's home just prior to the shooting. (16RT 1818-1822.)

Appellant's subsequent inquiry into these same circumstances

leading up to the shooting, and the answers the witnesses gave about their activities, was not propensity evidence because the testimony was about the events surrounding the charged offenses; events which the prosecution placed in issue, and which appellant claimed were the actual reason that the shooting occurred.²² (*People v. Myers, supra*, 148 Cal.App.4th at pp. 552-553 [specific instance of violent behavior just prior to the charged offense did not amount to character evidence triggering section 1103(b)].)

Further, evidence of Benson Jones' single instance of marital discord immediately prior to the shooting was not "offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code § 1103, subd. (b).) Rather, it was offered to prove a fact in the chain of facts that made out the defense theory of what really happened at Walter's Market. In addition, evidence of a single argument is not propensity evidence. (*Rea v. Wood* (1894) 105 Cal. 314, 320 ["The rule is uniform that general character cannot be proved by a single act"].) That is because a person's character "is generally described as 'the aggregate of a person's traits' and means 'disposition' (i.e., the tendency to act in a certain manner under given circumstances)." (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 447, fn. 2, citing the *Model Code of Evidence*, rule 304, com. (1942), and 1 Wigmore, *Evidence* (3d ed. 1940) § 52, p. 446.) Thus, a single incident of marital strife is not character evidence demonstrating a "continuity of character over time." (See *People v. Myers, supra*, 148

²² The defense theory was that Benson and his wife argued after Benson learned that his wife was pregnant with Nate's child. Linda and Benjamin took Benson out of the house, and then drove him to Walter's Market, where Benson confronted Nate. After Benson approached and drew his weapon, Nate shot him.

Cal.App.4th at pp. 552-553, citation omitted.)

Much of respondent's argument relies heavily on what appellant told the jury in his opening argument made *after* the trial court allowed Sergeant Riggs to testify to the facts of appellant's rap sheet and opine that appellant had a propensity for violence. (RB 193-194.) Although nothing respondent points to shows that appellant offered specific evidence of the victim's character evidence and propensity for violence, the fact that appellant subsequently made argument about Benson's character – and requested instructions that corresponded to the trial court's ruling – did not somehow make the trial court's erroneous ruling retroactively correct. (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 243 [in assessing the trial court's ruling on the admissibility of propensity evidence, a reviewing court must consider only the facts known to the court at the time the ruling was made].)

Moreover, this Court has long recognized that “defensive acts” to mitigate the effects of an adverse ruling cannot be subsequently relied upon to defeat an appellant's challenge to the original ruling. (See, e.g., *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213, [counsel's submission of an instruction on a particular topic, after unsuccessfully objecting to providing any instruction on the topic, did not waive right to challenge original ruling]; *People v. Turner* (1990) 50 Cal.3d 668, 704 fn. 18; see also, *People v. Venegas* (1998) 18 Cal.4th 47, 94.) Thus, respondent cannot rely on the fact that appellant submitted to the court's erroneous section 1103(b) ruling and took defensive actions to make the best of a bad situation for which he was not responsible.

Appellant also established that the trial court erred by failing to exclude Sergeant Rigg's testimony about the rap sheet under Evidence

Code section 352 (hereafter, “section 352”), thereby also violating appellant’s constitutional right to due process. (AOB 209-212.) Respondent contends that the trial court’s ruling was “within the bounds of reason,” and that the prejudicial effect of the uncharged bad acts was “minimal” because the charged crime of murder was more serious than the uncharged acts. (RB 195-197.)

Notably absent from respondent’s argument is any discussion of the fact that, at the time the trial court stated it had performed its section 352 analysis, the court was operating under the mistaken belief that appellant had questioned Ernest Johnson about his criminal record in front of the jury, a “fact” that the court specifically identified as triggering section 1103(b). (20RT 2628-2631; 21RT 2639.) Indeed, the court’s misapprehension regarding Johnson was the only specific victim-character evidence that the court identified as being a basis for allowing the prosecutor to present appellant’s entire rap sheet to the jury. (20RT 2631.)²³ Respondent does not, because it cannot, attempt to explain how this mistaken basis for the court’s ruling does not establish that the court’s decision “falls outside the bounds of reason.” (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Also absent from respondent’s argument is any effort to explain just how the numerous incidents of police detention and/or arrest for which no charges were filed (much less proved) – including a 13-year-old incident that involved a detention when appellant was a high school student – were

²³ Contrary to respondent’s position, the trial court did *not* admit its error: It did *not* review the transcripts prior to making its final ruling (21RT 2678), but simply summarized and confirmed appellant’s and the prosecutor’s respective positions (21RT 2678-2679), told appellant “I hear what your saying” (21RT 2680), and ruled that her prior ruling would stand (21RT 2679-2680).

probative on the issues before the jury. The prosecution's theory of the case was that the shootings were motivated by gang *animus*, and yet none of the alleged incidences in the rap sheet were shown to be gang related.

Similarly, the principal issue at appellant's trial was the identity of the shooter at both crime scenes, which was based primarily on eyewitness identifications made from photo lineups and in court. But nothing about appellant's rap sheet – his juvenile arrest, adult detentions, conviction, and his prison sentence, all underlying the assertion that appellant had a propensity for violence – had anything to do with the ability of the eyewitness to observe the shooter, or whether the photo lineup and other identification procedures were fair. And because appellant did not testify, his credibility was not at issue, making the allegations of police detentions and suspicions even less relevant to the proceedings.

While the probative value of the contents of appellant's rap sheet was nonexistent with regard to the disputed issues in the case, its prejudicial effect was certainly undue. The prosecutor was permitted to allege that appellant was not simply a person of bad character with a propensity for violence, but that he was a career criminal whose bad conduct was rooted in his adolescence. On this record, notwithstanding respondent's assertion to the contrary, it was outside the bounds of reason for the trial court to draw any conclusion other than that this propensity evidence would "produce[] an over-strong tendency to believe the defendant guilty of the charge[s] merely because he is a likely person to do such acts" without sufficient proof of the charged offenses. (*People v. Thompson* (1980) 27 Cal.3d 303, 317.)

The erroneous admission of the contents of appellant's rap sheet and opinion testimony about his alleged criminal propensity violated appellant's right to due process under the Fourteenth Amendment, which "protects the

accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (*In re Winship* (1970) 397 U.S. 358, 364.) Admission of this evidence lightened the prosecution’s burden of proof by improperly painting appellant as a career criminal who must be guilty of the charged offenses notwithstanding the weakness of the prosecution’s case. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) And introduction of this evidence, which was not relevant to the jury’s resolution of the only disputed issue at trial (motive and identity), so infected appellant’s capital trial as to render appellant’s conviction fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.) For this reason, the error requires reversal unless respondent can prove that it was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

Respondent disagrees, arguing that no constitutional violation occurred, and does not attempt to show that the admission of the propensity evidence was harmless beyond a reasonable doubt. (RB 197-198.) Rather, respondent views the admission of appellant’s rap sheet and the propensity evidence as only a “‘garden-variety evidentiary error,’” and argues that it is not reasonably probable that appellant would have received a more favorable result but for the error. (RB 198-199.) In so claiming, respondent dismisses the inflammatory impact of the sweeping and unproved propensity evidence that painted appellant as a career criminal, arguing that because the offenses on the rap sheet were less serious than the homicide charges, the jury would not have been inflamed by them.

But that analysis puts the cart before the horse: The question is not whether the jurors would have been unswayed by the propensity evidence

due to the seriousness of the homicide charges, but rather, whether a juror might have been swayed to concluded that appellant must have committed the charged offenses based on his propensity for violence, as evinced by a life as a career criminal, notwithstanding the prosecutor's scant, conflicting, and dubious evidence that appellant was the shooter. The answer to that correct question can only be "Yes" on the present record.

As respondent points out, two eyewitnesses – Benjamin and Linda Jones – testified at trial that appellant shot Benson Jones in front of Walter's Market. That was the entirety of the direct evidence linking appellant to that crime. But as described in detail in appellant's opening brief, both of the witnesses gave far from reliable testimony. (AOB 212-215.) Not only were both prior felons, but both gave accounts of the crime that conflicted significantly with their own earlier statements, and each other's, about what they saw on the day of the shooting. For example, shortly after the shooting, Linda Jones said that the shooter had black hair, wore black glasses and stood between 5'9" and 5'11." But at trial, Linda testified that the shooter – consistent with how appellant appeared before the jury – had no hair, wore no glasses, and was much shorter than she originally thought. (16RT 1856; 22RT 2816-2818, 2780; see Def. Exh. A, 1CT Supp.II 106-107.)

Also shortly after the shooting, Linda Jones told her sister Etta Jones that the shooter wore a red-checkered shirt. (22RT 2780.) Only later did Linda describe a gray sweat suit like that found in appellant's room, a description that she repeated at appellant's trial. (16RT 1826, 1857-1858; 22RT 2823.) Also, it was Etta Jones – who was *not* present at Walter's Market during the incident – who first thought appellant might be involved in the shooting, and it was Etta who first picked out appellant's picture from

a mug book. Then, when Linda was shown appellant's picture, she said she was not certain whether appellant was the shooter. (19RT 2384-2385.)

Benjamin Jones' testimony was similarly dubious. Not only did the *prosecutor* establish that Benjamin Jones perjured himself before the jury when he denied ever having been a gang member, but Benjamin was impeached with his prior felony conviction. Also, while he originally told the police that the shooter had black hair, Benjamin's story changed at trial when he claimed that the shooter, like appellant, was baldheaded. (15RT 1741; 23RT 2894.)

Finally, respondent claims that it is not reasonably probable that appellant would have received a more favorable result but for the improper introduction of the propensity evidence. It argues that because the jury was instructed that appellant's rap sheet could be used only as the basis of Sergeant Riggs' opinion testimony and not its truth, we must assume they followed the court's instructions and only used the prior crimes evidence for that limited purpose. (RB 198-199.) Respondent is wrong. The instruction did nothing to prevent or cure the prejudice from Sergeant Riggs' opinion testimony about appellant's alleged propensity for violence.

Immediately prior to reading and describing the contents of appellant's rap sheet to the jury, Sergeant Riggs testified that, in his opinion, appellant's rap sheet was "unusual" because it not only showed a propensity for violence but also involved only crimes with weapons and violence, and no theft or drug offenses. (21RT 2684-2691.) The jurors were later instructed that they were free to consider the rap sheet evidence in evaluating Sergeant Riggs' opinion testimony that appellant had a violent character, which they could use in turn to conclude that appellant acted violently during the charged offenses. (24RT 3046-3047.) Thus, the jurors

here could not, as respondent claims, simply discount appellant's rap sheet because the alleged crimes therein were less serious than the charged crimes. Rather, it can be assumed the jurors considered each of the allegations in appellant's rap sheet, as well as Riggs' description of them, as those allegations bore on the prosecution's opinion evidence that appellant was the kind of person likely to commit the charged offenses.

Moreover, it is fanciful to suggest that the jurors could thoughtfully consider and use the allegations about appellant's prior criminal history to evaluate Sergeant Riggs' opinion, without accepting as a premise that the allegations were either true or false. "Since the prosecution's goal was to buttress [the expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true . . . The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context.' [¶] We agree [. . .] that where basis evidence consists of an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion. [Footnote omitted.]" (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1130-1131, quoting *People v. Goldstein* (2005) 6 N.Y.3d 119, 127-128.)

Recently, five members of the high court agreed that a hearsay statement offered as the basis for an expert's opinion is, in fact, offered for its truth. In *Williams v. Illinois* (2012) 567 U.S. ___, 132 S.Ct. 2221 (*Williams*), a confrontation clause case, Justice Thomas explained:

There is no meaningful distinction between disclosing an out-of-court statement so that the fact finder may evaluate the expert's opinion and disclosing that statement for its truth. 'To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary

judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.

(*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at p. 2257, Thomas J, concurring.)

In her dissent, Justice Kagan, joined by Justices Scalia, Ginsburg and Sotomayor, agreed with and expanded on Justice Thomas's analysis on this point, thereby establishing a five-justice majority view. Justice Kagan explained:

The situation could not be more different when a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, because the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the fact finder must assess the truth of the out-of-court statement on which it relies. That is why the principal modern treatise on evidence variously calls the idea that such 'basis evidence' comes in not for its truth, but only to help the fact finder evaluate an expert's opinion 'very weak,' 'factually implausible,' 'nonsense,' and 'sheer fiction.' D. Kaye, D. Bernstein, & J. Mnookin, *The New Wigmore: Expert Evidence* § 4.10.1, pp. 196-197 (2d ed. 2011); *id.*, § 4.11.6, at 24 (Supp.2012). 'One can sympathize,' notes that treatise, 'with a court's desire to permit the disclosure of basis evidence that is quite probably reliable, such as a routine analysis of a drug, but to pretend that it is not being introduced for the truth of its contents strains credibility.'

(*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at pp. 2268-2269.)

Accordingly, in light of the closeness of appellant's first guilt-innocence trial and the lack of materiality of Sergeant Riggs' opinion testimony about appellant's rap sheet and alleged violent character, the trial

court's erroneous admission of appellant's alleged history of juvenile and adult detentions, arrests, and prior convictions denied him due process and a fair trial. The evidence that included unproved police suspicions of criminal conduct unfairly cast appellant as a violent career criminal, and invited the jury to discount the conflicting eyewitness accounts of the shooting, and convict appellant merely because of his alleged propensity for violence. Reversal of appellant's convictions on Counts 2, 3 and 5 is required.

B. The Trial Court Erred By Admitting The Contents Of Appellant's Rap Sheet At The Second Guilt-Innocence Trial

At appellant's second guilt-innocence trial, Los Angeles County Sheriff Deputy Alexander MacArthur testified that it was his expert opinion that appellant was an active member of the Nine Deuce Bishops street gang at the time of the charged offenses. (40RT 5127, 5136, 5190.) MacArthur based his opinion on notations made by law enforcement on a Field Identification Card (hereafter "F.I. Card"), and on information from those cards that was entered into a record-keeping program called the "General Reporting Evaluation and Tracking" system, known as "GRATE." (40RT 5133-5136, 5197-5198.)²⁴

MacArthur explained that an individual is supposed to be purged from the GRATE system when he or she has no new law enforcement contacts over the course of a five-year period. (40RT 5190, 5200-5201.) Relying on that assertion, appellant challenged MacArthur's opinion that

²⁴ At appellant's first trial, the Reporter's Transcript refers to this printout as "GREAT," while at the second trial it refers to the printout at "GRATE."

appellant was a street gang member *at the time of the charged crime* by showing that he had not been purged from the system even though there were no new law enforcement contacts listed for the five-year period between 1984 and 1989. (40RT 5190, 5194, 5197-5199.) Appellant also elicited that there was no procedure for identifying whether a listed gang member was in prison; a person could be sent to prison on a life sentence and that person would still be listed as an active *street* gang member. (40RT 5199-5201.)

Whether by guile or mistake, the prosecutor relied on the above exchange to claim that appellant had elicited evidence that he had not been arrested during the five-year period between 1984 and 1989. The prosecutor argued that it was entitled to rebut this evidenced by presenting his rap sheet to show that he in fact had been arrested during that period. (40RT 5240.) Appellant pointed out that the prosecution's assertion was false, because he did not claim or present evidence that he had not been arrested; he showed only that the GRATE system was unreliable because he was not purged as the system's own parameters required. (*Ibid.*) Nevertheless, based on the prosecutor's misrepresentation of the record, the trial court allowed the gang expert to read and discuss the details of appellant's rap sheet. (41RT 5212-5217.)

Appellant maintains that the trial court was wrong in concluding that appellant had opened the door to the contents of his rap sheet. (AOB 216-225.) Respondent disagrees, arguing that the trial court was entitled to find that appellant's cross-examination suggested that he had no arrests or police contacts other than those listed on the GRATE system printout, the same document he was attacking as inaccurate and under inclusive. (RB 204.) This position, like the court's ruling, is unsupportable.

Respondent's view of record ignores completely the context of appellant's cross-examination. For example, respondent does not mention that it was *the prosecutor*, who introduced the GRATE system printout as a document on which MacArthur had relied in forming his opinion that appellant was an active gang member at the time of the shooting. (40RT 5135-5136.) As such, it was *the prosecutor*, not appellant, who inferred the accuracy and reliability of that document, which reflected none of appellant's police contacts between 1984 and 1989. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618 [information relied on by expert – even if inadmissible hearsay – must be reliable]; see also *People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5 [trial court may not admit expert opinion based on information furnished by others that fails to meet a threshold requirement of reliability].) Under these circumstances it is patently unreasonable to conclude that appellant “opened the door” to his rap sheet simply by pointing out and emphasizing for his own purpose what the prosecutor had already presented to the jury. This is particularly so because appellant was attempting to prove the *unreliability* of the GRATE system and the expert's testimony.

Even assuming the trial court was correct, it erred by allowing the prosecutor to present inflammatory bad-character evidence that went beyond that necessary to rebut any inference about the number of times appellant had been arrested. (AOB 221-225, discussing *People v. Coleman* (1985) 38 Cal.3d 69, 87-93.) Respondent does not dispute that a trial court has a duty to limit the admission of this type of evidence to that which is necessary to rebut the inference, but argues that no redaction was necessary here. (RB 205-206.) This position also lacks merit.

Respondent's does not suggest, much less establish, how or why it was necessary to present the details of appellant's arrests; the criminal offenses that he allegedly committed; the fact that the offenses occurred while he was in prison; and the names of the prisons in which the police contacts occurred. To the contrary, all that was necessary to rebut any suggestion that the GRATE printout was inclusive of all of appellant's police contacts was to ask the expert that exact question. None of the details of the unproved alleged misconduct was necessary to rebut the inference that the prosecutor argued it had the right to rebut.

This Court has repeatedly emphasized the hazards of admitting evidence of unrelated other crimes, and cautioned that they can be admitted only after careful scrutiny by the trial court. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007; see *People v. Abilez* (2007) 41 Cal.4th 472, 500.) Here, the trial court conducted no such careful scrutiny. Rather, it erred in ruling that the evidence was admissible at all, and then failed to confine the character evidence to that which was needed to rebut the supposed inference that appellant had no police contacts between 1984 and 1989. (*People v. Coleman, supra*, 38 Cal.3d at pp. 87-93.)

Because the evidence about appellant's prior convictions, prison term, and the various charges on which he was arrested did not support any permissible inference, and was irrelevant to any issue the jury had to resolve, the trial court's admission of that evidence lightened the prosecution's burden of proof. (See, e.g., *Sandstrom v. Montana, supra*, 442 U.S. at pp. 520-524.) And because the inadmissible evidence of appellant's alleged illegal conduct in prison so infected appellant's capital trial, it rendered appellant's conviction fundamentally unfair and violated his right to a fair trial and penalty determination. (*Estelle v. McGuire*

supra, 502 U.S. at p. 67; see also *McKinney v. Rees*, *supra*, 993 F.2d 1378 at pp. 1385-1386.) Accordingly, reversal of appellant's conviction is required unless respondent can prove that the error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

Respondent does not, because it cannot, claim that the constitutional error here was harmless under *Chapman*. Rather, respondent contends any such error was only one of state law, and that it is not reasonably probable that appellant would have received a more favorable result but for admission of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) In respondent's view, the improper evidence was not "inflammatory" at all; the prosecutor did not argue that the details of the arrests demonstrated a propensity for violence; and the evidence of appellant's guilt as to the charged offenses was "strong." (RB 207-208.) This view of the evidence and the record does not withstand scrutiny.

Indeed, it borders on preposterous to maintain that in this case, where the only issue in dispute was the identity of the shooter, that evidence of *seven* alleged violent assault and weapon crimes, committed over the course of five years, six of which occurred while appellant was in a prison, was not "inflammatory." While each individual allegation was itself inflammatory, taken together the evidence was particularly inflammatory because the allegations painted appellant as a violent career criminal who commits violent weapon offenses even in prison.

Finally, the evidence against appellant was not "strong." To the contrary, the closeness of this case cannot be overstated. Not only was appellant's first jury unable to reach a verdict on the very same charges and evidence, but like the first trial, the principal evidence against appellant was dubious eyewitness identification evidence that was fraught with

uncertainty. Appellant discussed the weakness of that evidence and all the evidence in the opening brief, and he will not repeat that discussion here. (AOB 225-228.)

In light of the closeness of this case and the immateriality of the uncharged crimes evidence to any disputed issue at trial, admission of the contents of the rap sheet denied appellant due process and fair guilt and penalty trial. The erroneously admitted evidence included details of unproven police suspicions of criminal conduct, and highly inflammatory evidence of his prior convictions and prior prison terms, all of which invited the jury to discount the conflicting eyewitness accounts of the shooting and convict appellant because of his purported bad character and propensity for violence. Reversal is required because respondent has failed to establish that the error was harmless beyond a reasonable doubt. Reversal is also compelled under state law. Had appellant's second jury not heard evidence of appellant's rap sheet, it is reasonably probable that it would not have convicted appellant of the charges, including the murder of Jesus Sanchez. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Reversal of appellant's convictions on Counts 1 and 4 is required.

* * *

IX

APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT ALLOWED THE PROSECUTOR TO USE TESTIMONIAL HEARSAY EVIDENCE TO PROVE APPELLANT'S ALLEGED STREET-GANG MEMBERSHIP AND BAD CHARACTER

Appellant argued in his opening brief that his due process and confrontation rights were violated at both his first and second guilt-innocence trials. (AOB 229-256.) These violations occurred when the trial court permitted two street gang experts – Los Angeles County Sheriff Deputy Alexander MacArthur, and Compton Police Department Sergeant Reginald Wright – to opine that appellant was an *active* street-gang member at the time of the charged offenses. Both experts' opinions about appellant's alleged gang status were based on testimonial hearsay from unidentified witnesses whom appellant did not have an opportunity to confront, and who were not shown to be unavailable at trial. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, 68-69 (*Crawford*).)

Appellant's confrontation rights were also violated when the trial court allowed the prosecutor's lead investigator, Sergeant Doral Riggs, to read appellant's rap sheet to the jury and explain the charges, which included arrests and unproven allegations of prior criminal conduct made by unidentified witnesses whom appellant did not have an opportunity to confront, and who were not shown to be unavailable. (*Crawford, supra*, 541 U.S. at pp. 59, 68-69.)

Respondent disagrees (RB 210-224), initially arguing that appellant forfeited his confrontation clause challenge by objecting to the evidence at trial only on hearsay and other grounds. (See 20RT 2629-2632; 21RT

2638-2641, 2678-2680; 21RT 2708-2711; 41RT 5208-5213.) But this case predates the high court's decision in *Crawford* by 10 years. At the time of appellant's trial, an objection on confrontation clause grounds would have been futile, because the trial court would have been bound to apply the constitutionally infirm "indicia of reliability" analysis articulated in *Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*). (See *In re Fields* (1990) 51 Cal.3d 1063, 1070; *People v. Clark* (1992) 3 Cal.4th 41, 158; see also *People v. Beeler* (1995) 9 Cal.4th 953, 979.)

Indeed, appellant's *unsuccessful* hearsay objections to the admission of the F.I. Card and the G.R.E.A.T. system printout (21RT 2708-2711), fairly informed the trial court that he objected to the admission of the out-of-court statements, an objection that would not and could not have been made had the declarants been called to testify at appellant's trial. That, of course, is what confrontation is all about, and "no purpose is served by formalistically requiring the party also to state every possible legal consequence of error merely to preserve a claim on appeal that error in overruling the objection had that legal consequence." (*People v. Partida* (2005) 37 Cal.4th 428, 437.) Accordingly, appellant's hearsay objections sufficiently preserved the confrontation clause issue for this Court's review. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809 [confrontation clause claim not waived in light of a hearsay objection].)

In addition, this Court has held that challenges to the admission of evidence normally are not forfeited despite a lack of an objection "when the pertinent law later changes so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (*People v. Black* (2007) 41 Cal.4th 799, 810-811, quoting *People v. Turner* (1990) 50 Cal.3d 668, 703; see also *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5.) That

is precisely the case here. Further, this Court should determine the merits of appellant's challenge because it raises a constitutional and legal question, rather than a credibility issue. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2.)

Turning to the merits of appellant's argument, respondent first claims that the admission of the hearsay did not violate state evidentiary laws. Relying on this Court's decision in *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*) and its progeny, respondent argues that a gang expert may rely on hearsay like that presented here, including "conversations with gang members, information gathered by other law enforcement officers, their own personal investigations of gang-related crimes, and other information to render their opinion." (RB 218.)

Respondent's point about "state evidentiary law," as juxtaposed against petitioner's confrontation clause argument, is not entirely clear. It certainly cannot be arguing that a state's hearsay rule need not comply with the high court's confrontation clause decisions. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 294-296, 301-302 [State's evidentiary rules may not deny a defendant his rights under the confrontation clause].) To the extent respondent is arguing that *Gardeley* and its progeny continue to permit the presentation of testimonial hearsay, without providing a defendant an opportunity to confront the declarant of the hearsay, it is mistaken.

As noted in appellant's opening brief, *Gardeley* was a pre-*Crawford* decision that relied on *Roberts'* now-defunct "indicia of reliability" framework. (AOB 233-234.) *Crawford* explained that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes:

confrontation.” (*Crawford, supra*, 541 U.S. at pp. 68-69.) While the court did not define all the types of out-of-court statements that are “testimonial,” it held that statements like those at issue here – those made during police questioning for the purpose of future prosecutions – are testimonial. (*Id.* at p. 68.) Thus, to the extent the court applied state evidentiary hearsay rules in violation of appellant’s confrontation rights, it erred under the state’s hearsay law, which must be read in concordance with the demands of the confrontation clause.

Respondent next claims that admission of evidence from the F.I. Card and the G.R.E.A.T. system printout did not violate appellant’s confrontation rights. (RB 219-222.) Relying on a trio of appellate court decisions, respondent argues that hearsay in support of an expert’s opinion is simply not the type of testimony condemned by *Crawford*. It argues that expert testimony is a class of evidence exempt from confrontation clause concerns because (1) a testifying expert who relies on extrajudicial testimonial statements is subject to cross-examination; and (2) the extrajudicial statements and materials on which an expert relies are not necessarily offered for their truth, but are offered so the jury can assess the weight of the expert’s testimony. (RB 219-221, citing *People v. Sisneros* (2009) 174 Cal.App.4th 142, 154, *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427, and *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.)

A majority of the high court has recently rejected both of respondent’s arguments. In *Bullcoming v. New Mexico* (2011) 564 U.S. ___, 131 S.Ct. 2705 (*Bullcoming*), the Supreme Court held, inter alia, that testimonial hearsay cannot be admitted through a surrogate expert, even though that expert is subject to cross-examination. Then, in *Williams*,

supra, 567 U.S. at p. ___, 132 S.Ct. 2221, five members of the high court agreed that extrajudicial statements and materials offered as the basis for an expert's opinion must comply with *Crawford's* confrontation clause requirements, even when those statements are not offered for their truth. Appellant addresses each decision in turn.

In *Bullcoming*, the defendant was accused of driving while intoxicated (DWI). At trial, the prosecution sought to present a laboratory report to establish that the defendant's blood-alcohol concentration was above the threshold level for aggravated DWI. Because the analyst who prepared the report was on a leave of absence, the prosecutor called a different expert who, over a defense objection, testified to the contents of the report that he did not create; the defendant was convicted on that evidence. The New Mexico Supreme Court affirmed and rejected the confrontation clause challenge because (1) the analyst who prepared the report was a "mere scrivener" who simply transcribed machine-generated test results; and (2) the analyst who testified to the report was qualified as an expert witness, could testify to the report's preparation and contents, and the expert was subject to cross-examination. (*Bullcoming, supra*, 564 U.S. at p. ___, 131 S.Ct. at pp. 2711-2713.)

The high court rejected both aspects of the New Mexico Supreme Court's analysis. As to the first point, the court disagreed that the report's author was a mere scrivener. To the contrary, the author's observations and representations relating to "past events and human actions" are "meet for cross-examination." (*Bullcoming, supra*, 564 U.S. at p. ___, 131 S.Ct. at p. 2714.) The high court emphasized that most witnesses testify to observations of factual conditions or events, and expert witnesses are no different: "Accordingly, the analysts who write reports that the prosecution

introduces must be made available for confrontation even if they possess ‘the scientific acumen of Mme. Curie and the veracity of Mother Teresa.’” (*Bullcoming, supra*, 564 U.S. at p. ___, 131 S.Ct. at p. 2715, quoting *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 319, fn. 6 (*Melendez-Diaz*).)

The high court similarly rejected the notion that a qualified testifying expert, who is subject to cross-examination, could substitute for the witness who gathered the information and generated the report. While the testifying expert could opine generally about the devices and procedures used to determine blood-alcohol concentration levels, he could not testify to the specific facts in the report that he did not observe. The court stated:

But surrogate testimony of the kind [the testifying expert] was equipped to give could not convey what [the reporting analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.

(*Bullcoming, supra*, 564 U.S. at p. ___, 131 S.Ct. at p. 2715, footnotes omitted.)

Finally, *Bullcoming* specifically rejected the notion that the defendant’s ability to cross-examine the testifying expert about another’s observations, offered under the guise of “expert testimony,” was a sufficient opportunity to confront the observing witness under the confrontation clause:

More fundamentally, as this Court stressed in *Crawford*, ‘[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.’ Nor is it ‘the role of courts to extrapolate from the words of the [confrontation clause] to the values behind it, and then to enforce its guarantees only to the

extent they serve (in the courts' views) those underlying values.' Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

(*Bullcoming, supra*, 564 U.S. at p. ___, 131 S.Ct. at p. 2716, internal citations omitted.)

Thus, *Bullcoming* puts to rest any question as to whether expert testimony – which relies on testimonial hearsay – is a type of testimony exempt from *Crawford's* confrontation clause requirements on the theory that the testifying expert is subject to cross-examination. The high court says it is not, and this Court must hold the same.

One year after *Bullcoming*, the high court decided *Williams*. There, a majority of the justices specifically rejected the argument that extrajudicial statements presented through an expert, but not offered for their truth, are not hearsay and therefore present no confrontation clause problem.

In *Williams*, an independent laboratory analyzed biological evidence, created a DNA profile, and produced a report. At a bench trial, a prosecution expert not affiliated with the laboratory testified about the DNA profile and the contents of the laboratory's report, including the fact that the laboratory had matched the sample to the defendant's DNA profile.

(*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at pp. 2227-2228.) Writing for the four-justice plurality, Justice Alito, joined by Justices Kennedy, Breyer, and Chief Justice Roberts, found no confrontation clause violation. The plurality concluded that the extrajudicial information contained in the report was not testimonial hearsay because (1) the report was not offered for

its truth; and (2) the primary purpose of the laboratory report was not to accuse the defendant or create evidence for use at trial against him.

(*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at p. 2228.)

Justice Thomas concurred with the plurality opinion but specifically repudiated any part of its rationale. Writing separately, Justice Thomas concluded that the laboratory report lacked the requisite “formality and solemnity” to be considered ““testimonial”” for purposes of the confrontation clause. (*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at pp. 2259-2260 (conc. opn. of Thomas, J.)) Justice Thomas *rejected* the plurality’s conclusion that extrajudicial statements presented by an expert but not offered for their truth – also referred to as “basis testimony” – does not implicate the confrontation clause. (*Id.* at pp. 2256-2259.) He explained:

There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert’s opinion and disclosing that statement for its truth. ‘To use the inadmissible information in evaluating the expert’s testimony, the jury must make a preliminary judgment about whether this information is true.’ [Citation omitted.] ‘If the jury believes that the basis evidence is true, it will likely also believe that the expert’s reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert’s conclusions.’

(*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at p. 2257 (conc. opn. of Thomas, J.)) Justice Thomas concluded that the laboratory report *was* introduced for its truth, notwithstanding the state’s evidentiary rules to the contrary. (*Id.* at pp. 2258-2259.)

Writing for the dissent, Justices Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor, saw the issue as straightforward and simple: The

laboratory report was made to establish “some fact” in a criminal trial, and therefore was testimonial under the confrontation clause. (*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at pp. 2266-2267 (dis. opn. of Kagan, J.).) Justice Kagan noted that what happened in *Williams* was “functionally identical” to what happened in *Bullcoming*: An expert, acting as a surrogate, testified to facts asserted by an absent declarant and about which the expert had no direct personal knowledge. (*Id.* at pp. 2266-2268.) “[W]hen the State elected to introduce’ the substance of [the laboratory’s] report into evidence, the analyst who generated that report ‘became a witness’ whom Williams ‘had the right to confront.’ As we stated just last year, ‘[o]ur precedent[s] cannot sensibly be read any other way.’” (*Id.* at p. 2268, quoting *Bullcoming, supra*, 564 U.S. at p. ___, 131 S.Ct. at p. 2716.)

Justice Kagan explained why the confrontation clause requires this conclusion. Just as with the defendant in *Bullcoming*, when the state opted to present an expert other than the person who analyzed the evidence, created the DNA profile, and drafted the report, Williams was unable to question the author of the report about the author’s proficiency, the care he took in performing his work, and his veracity. Nor could Williams probe whether the analyst had tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results. (*Id.* at pp. 2267-2268.)

As for the not-for-the-truth rationale applied by the Illinois Supreme Court, Justice Kagan observed that “[t]he plurality wraps itself in that holding” as well, “notwithstanding the fact that five Justices agree, in two opinions reciting the same reasons, that this theory has no merit.” (*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at p. 2268 (dis. opn. of Kagan, J.).) Agreeing with and expanding on Justice Thomas’s rejection of

the plurality view, Justice Kagan continued, “. . . when a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, [] the statement’s utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness’s conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies.” (*Id.* at pp. 2268-2269.)

Returning to the present case, at appellant’s first trial, the prosecution’s gang experts presented the testimonial hearsay contained on the F.I. Cards and G.R.E.A.T. system printout to support their conclusion that appellant was a street gang member at the time of the charged crimes.²⁵ Deputy MacArthur told appellant’s jury that the information on appellant’s F.I. Card states, inter alia, that appellant affiliates with the “Nine Bishop Blood” or “Eastside Bishops” street gang, and that his moniker is “Ant Dog.” (17RT 2040-2043; Peo. Exh. No. 22, 1CT Supp.II 212.) MacArthur did not know who put that information on the card. (17RT 2073.) He explained that his only contact with appellant – prior to appellant’s arrest on the current charges – was in 1989, and that at that time he added to the card certain identifying information that did not relate to appellant’s gang status: the name of appellant’s parole officer, appellant’s driver’s license number, and that appellant has the name “Stella” tattooed on his wrist. (17RT 2073, 2080-2083.) Later, over appellant’s hearsay objection, the trial court admitted into evidence the F.I. Card. Also over appellant’s objection, the

²⁵ Except that respondent contends that the information contained on the F.I. Card and in the G.R.E.A.T. system printout was not offered for its truth, respondent does not contest the fact that F.I. Card and printout were otherwise testimonial hearsay within the definition set out in *Crawford*, and as further explained in *Davis v. Washington* (2006) 547 U.S. 813, 822, and *Melendez-Diaz*, *supra*, 557 U.S. at pp. 310-311. (See AOB 235-239.)

court entered into evidence the G.R.E.A.T. system printout – which was a product of the notations on the F.I. Card – dated October, 13, 1992, which among other things labeled appellant as an “ACTIVE” street-gang member. (20RT 2708-2711; Peo. Exh. Nos. 22 & 24 at 1CT Supp.II 212-214.)

The prosecutor presented nearly identical evidence at appellant’s second trial. MacArthur testified that appellant was an active member of the Nine Deuce Bishops street gang. (40RT 5127, 5136, 5190.) Again, MacArthur explained that he reached this conclusion based on notations made by law enforcement officers on F.I. Cards, the information which was entered into the G.R.E.A.T. system database. (40RT 5127, 5133-5136, 5190, 5197-5198.)

As in *Bullcoming*, the experts in this case were equipped to testify about *how* the information on the F.I. Cards and in the G.R.E.A.T. system was collected, compiled and entered, and the procedures used to do so. But appellant’s confrontation rights were violated when the experts went beyond their own personal observations and knowledge of appellant, and presented the extrajudicial statements placed on the F.I. Cards and in the gang database by non-testifying unidentified officers who collected that information for the express purpose of prosecuting purported gang members. (AOB 230-231, 237-239.)

As in *Williams*, by opting to present information on the F.I. Card through an expert rather than the persons who conducted the interrogations, collected the information, placed it on the cards and entered it into the G.R.E.A.T. system database, appellant was unable to question the recording officers’ observations and proficiency, the manner in which they collected the specific information placed on the cards, the identity of the reporting subjects, the nature and location of the interrogations which might bear on

the accuracy of that information, and the officers' veracity. Nor could appellant probe whether an officer wrote the wrong information on the card, wrote information about another alleged gang member on the card identified as appellant's card, committed some policy violation, or simply made up the information. The gang experts were not competent to provide any of this specific information because they did not have first-hand knowledge of it. And under *Crawford*, *Bullcoming* and *Williams*, this type of inquiry is precisely that which the confrontation clause affords criminal defendants.

Appellant also has shown that the same type of confrontation clause violations occurred at his first trial when the trial court permitted Sergeant Riggs, the investigating officer in this case, to read appellant's rap sheet to the jury in order to support Riggs' opinion that appellant had a propensity for violence. (AOB 241-248.) Similarly, at appellant's second trial, appellant's confrontation rights were violated when the trial court allowed MacArthur to read to the jury a substantial portion of appellant's rap sheet, which was offered under the guise of rebuttal evidence. (AOB 252-256.)

Respondent disagrees that the testimony about the rap sheets implicated the confrontation clause. Relying heavily on a pair of appellate court decisions (*People v. Morris* (2008) 166 Cal.App.4th 363 (*Morris*)), and *People v. Taulton* (2005) 129 Cal.App.4th 1218 (*Taulton*)), respondent argues that rap sheets are not subject to *Crawford's* requirements because they are not testimonial hearsay. In respondent's view, rap sheets merely document the acts and events related to prior arrests and convictions, and are not prepared for use in a criminal proceeding. (RB 210-214.)

Respondent is wrong.

The extrajudicial statements that Riggs presented to the jury were

testimonial hearsay because they were initially made for the purpose of a future prosecution. (*Davis v. Washington* (2006) 547 U.S. 813, 822.) The descriptions of alleged criminal conduct contained in the rap sheet – which included allegations of arrests and uncharged crimes – were derived from allegations made during criminal investigations in order to further a prosecution. (21RT 2685-2691.) *This is a fact that respondent does not contest.* That is how and why the allegations exist in the first place. That the testimonial hearsay was ultimately distilled onto a rap sheet does not sanitize it, nor does it alter the nature of the hearsay and initial purpose for which the extrajudicial statements were made, gathered and recorded. (*Melendez-Diaz, supra*, 557 U.S. at p. 310-311 [compiling extrajudicial statements into a report, and then calling that report a “certificate,” did not alter the fact that the statements were testimonial hearsay made for the purpose of a future prosecution].)

Appellant has already addressed the flawed analyses in *Morris* and *Taulton* in his opening brief (AOB 242-246), and adds here only that the high court’s more recent decision *Bullcoming* – discussed in greater detail, *ante* – further undermines *Morris* and *Taulton*, as well as respondent’s position. In *Bullcoming*, a lab analyst tested blood evidence, compiled his observations and conclusions into a report (a “certificate”), and then at trial, an expert testified to the analyst’s findings. Echoing its decision in *Melendez-Diaz*, the high court reiterated that the expert was not qualified to testify to the facts in the report that he did not observe. The defendant had the right to confront the person who analyzed the evidence and made the statements in the report, and surrogate testimony of the kind offered through the expert did not conform to the requirements of the Confrontation Clause. (*Bullcoming, supra*, 564 U.S. at p. ___, 131 S.Ct. at p. 2715.)

Here, as in *Bullcoming* and *Melendez-Diaz*, appellant had the right to confront the officer(s) who made the testimonial hearsay about his alleged criminal conduct, which were later compiled in the rap sheet. Presenting that evidence through surrogates Riggs (at the first trial) and MacArthur (at the second trial), who did not claim personal and independent knowledge of the events, denied appellant any meaningful opportunity to challenge the allegations, which is at the heart of the confrontation clause.

Appellant has explained why this Court cannot find that the confrontation clause violations in this case were harmless beyond a reasonable doubt. (AOB 248-250 [first trial prejudice], 253-256 [second trial prejudice].) Respondent disagrees, arguing that the error in admitting the gang evidence and appellant's rap sheet was harmless for three reasons. (RB 214, 222-224.)

First, respondent claims that the illegally admitted evidence on the F.I. Card and reflected in the G.R.E.A.T. system database was merely cumulative of other properly admitted gang evidence, including gang evidence on the F.I. Card that MacArthur personally entered. Respondent suggests that the experts would have had the same opinions had they not considered the untested testimonial hearsay. This argument is simply not supported by the record.

There can be no question that untested hearsay evidence entered on F.I. Card and the G.R.E.A.T. system printout was at the core of the expert testimony that appellant had been a street gang member in the past, and more importantly, was one at the time of the charged crime. Neither expert suggested that they personally knew appellant to be a gang member. Nor did either expert suggest that their opinions about appellant's gang membership status – including his alleged gang moniker and the name of

the street gang to which he allegedly belonged – had any basis independent of the system used by their departments to track criminal street gangs. And contrary to respondent’s claim, MacArthur did not testify that he entered *any* gang information on the F.I. Card; rather, he entered only generic identifying information on the card. (17RT 2073, 2080-2083.)

There was some testimony that tended to corroborate the street gang evidence on the F.I. Card and in gang database printout, including an old tattoo on appellant’s earlobe, and times listed on some of the motions appellant filed. But the purported experts interpreted that evidence through the prism of what was shown on the hearsay documents, including the testimonial hearsay on the gang database printout, dated October, 13, 1992, which specifically labeled appellant as an “ACTIVE” street-gang member. (20RT 2708-2711; Peo. Exh. Nos. 22 & 24 at 1CT Supp.II 212-214.)

Neither expert suggested, much less testified, that the letters tattooed on appellant’s earlobe and the times on the motions independently established that appellant was a street gang member at the time of the charged offenses.

Second, respondent points out that the trial court instructed the jury that they could consider the testimonial hearsay as it bore on the experts’ testimony, but not for its truth. (RB 223-224.) Although it does not say so, respondent seems to be suggesting that the instructions protected appellant from the prejudice inherent in the testimonial hearsay improperly offered to show his propensity for violence and “prove” that he was a gang member at the time of the crime, which the prosecution claimed was based entirely on rival street gang *animus*.

But, as appellant has already shown, the hearsay evidence was of no value if it were not considered by the jury for its truth. (*Williams, supra*, 567 U.S. at p. ___, 132 S.Ct. at pp. 2257 (conc. opn. of Thomas, J.),

2268-2269 (conc. opn. of Kagan, J.).) This Court should recognize this fact, and conclude that the trial court's instructions did not insulate appellant from having the jurors consider the truth of this hearsay evidence.

Finally, respondent argues that all of this inadmissible evidence – the gang evidence from the F.I. Card and gang database, and the evidence of appellant's alleged criminal history going back to when he was minor – was “negligible when compared to the strong case against appellant” and the despicable nature of the crimes. (RB 214, 222.) Respondent concludes that “it is not reasonably probable” that, but for this evidence, appellant would have received a more favorable result at trial. (RB 224.)

First, respondent has the burden of proving to this Court that all of this evidence admitted in violation of appellant's confrontation rights was harmless beyond a reasonable doubt (*Chapman, supra*, 386 U.S. at p. 24), and its attempt to lighten its burden by relying on the “reasonably probable” standard should be viewed as exactly what it is: an implied acknowledgment that respondent cannot meet the more demanding test for prejudice.

At any rate, respondent's view that the prosecution's case against appellant was “strong” is untenable. As appellant argued in his opening brief, this was a very close case that turned on whether the jury accepted the prosecution's shaky and conflicting eyewitness identification evidence. (AOB 212-215 and 225-228.) Because the direct evidence was so unreliable, the prosecution bolstered it by first turning to hearsay about appellant's alleged street-gang member status to argue that appellant had a gang-related motive to shoot the victims, and then by presenting hearsay about appellant's prior arrests to argue he was a violent career criminal. (AOB 248-250, 253-256.) Indeed, the prosecution's direct evidence was so

weak that appellant's first jury could not reach a verdict on at least one count from each of the three charged incidents. And this is so even though appellant represented himself.

Respondent has utterly failed to demonstrate that the admission of the hearsay evidence from the F.I. Card, the G.R.E.A.T. system database printout, and the rap sheet was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) In addition, even assuming this Court accepts respondent's position, because this testimonial hearsay was also inadmissible at appellant's penalty phase trial, reversal of appellant's death judgment is required. (*Ibid.*) Further, even if that error were viewed solely as an error of state law, reversal is required, for there is at least "a reasonable (i.e., realistic) possibility' that but for this error the jury would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448; see *People v. Hamilton* (1963) 60 Cal.2d 105, 137 [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial].) For these reasons, reversal of appellant's convictions and death sentence is required.

* * *

X

THE ERRONEOUS ADMISSION OF PRISON-GANG EVIDENCE DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL

Appellant has argued that his right to due process and a fair trial was violated when the trial court allowed the prosecutor to present an array of inflammatory evidence about the U.B.N. prison gang. (AOB 257-277.) Appellant has established that (1) the evidence was inadmissible because prison gangs had nothing whatsoever to do with the charges against appellant; and (2) the prosecution's *street* gang experts were not competent to testify about *prison* gangs, and yet they were permitted to opine about the U.B.N. prison gang, and to interpret prison-gang writings and poetry. Respondent disagrees. (RB 224-240.)

Respondent begins by arguing that appellant failed to object to the prison-gang evidence on the grounds asserted here, to wit, that the evidence was irrelevant; that the evidence was too prejudicial, per Evidence Code section 352 (hereafter "section 352"); and that the street-gang experts were not qualified to opine about prison gangs. (RB 235-238.) Respondent is wrong.

First, on the question of relevancy, immediately after Deputy MacArthur first mentioned the "U.B.N."²⁶ and other prison gangs,²⁷ appellant objected on relevancy grounds. (17RT 2046.) He pointed out that prison gangs had nothing to do with the prosecution's theory that the

²⁶ "U.B.N." stands for United Blood Nation.

²⁷ MacArthur identified other prison gangs, including the Black Guerilla Family, the Mexican Mafia, and the Aryan Brotherhood.

charged offenses in this case were motivated by rival *street gang animus*. (*Ibid.*) The trial court then excused the jury and conducted a hearing on appellant's motion to exclude the prison gang evidence. (17RT 2046-2057.) What happened at this hearing is discussed in detail in appellant's opening brief. (AOB 257-260.) But on this record, there can be no question that appellant preserved the issue of the relevancy of the prison-gang testimony for this Court's review.

Second, on the question of the trial court's consideration of section 352, respondent needed only to review the hearing on appellant's relevancy objection to discover that issue is also preserved. At the hearing, appellant began by arguing the lack of relevancy, and the trial court expressly stated: "I'm going to have – *I will, of course, do a [Evidence Code section] 352 weighing here as well because of the potential for prejudice.* ¶ However, again, if [the prison gang evidence is] going to Mr. MacArthur's expertise, I will give the jury another limiting instruction. ¶ But what is the purpose of this testimony?" (17RT 2408, emphasis supplied.) Because the trial court stated it would conduct a section 352 weighing to determine whether the probative value of the evidence was outweighed by its prejudicial effect, and we assume that it did so, appellant was not required to request what the court specifically had already stated that it would do. Accordingly, that issue also is preserved for review.

Third, as to respondent's assertion that appellant did not object to MacArthur's lack of expertise as a *prison-gang* expert, the record again shows otherwise. After the trial court had ruled that the U.B.N. evidence was admissible as to appellant's motive and intent, appellant reiterated that there is a distinction between *street* gangs and *prison* gangs, and objected to MacArthur providing any testimony on this subject because he was not an

expert on *prison* gangs. (17RT 2049-2050.) The trial court ruled only that appellant would be afforded the opportunity to cross-examine the witness on his expertise when the issue is put to the jury. (17RT 2050.) Accordingly, appellant raised the issue of the expert's qualification to opine about *prison* gangs, and respondent's view to the contrary must be rejected.

Finally, respondent claims that appellant forfeited any complaint about the admission of the contents of the red photo album, which contained the prison-gang poetry that the officers read to and interpreted for the jury. (RB 236-237.) But respondent reaches this conclusion by ignoring the fact that appellant's objection to MacArthur's testimony about prison gangs was lodged when the deputy began testifying about the contents of the red photo album. (17RT 2045-2046.) The subsequent two-part hearing focused on whether the officer would be permitted to opine about the contents of the photo album and the U.B.N. prison-gang poems and writings in it. (17RT 2046-2060.)

Indeed, at the hearings, appellant even offered to stipulate to having been affiliated with the U.B.N., in order to keep the inflammatory writings and drawings contained in the red photo album – People's Exhibit No. 23 – out of evidence. (17RT 2053-2054.) In rejecting appellant's stipulation, the prosecutor explained that it was his intention to have MacArthur read the writings in the album to the jury. (*Ibid.*) Appellant again objected to the witness stating an opinion about his alleged prison-gang membership, and testifying about the writings in the album. (17RT 2054-2055.)

The trial court ruled that the officer could testify about the content of the red photo album and that such testimony was admissible as to motive, intent, bias and the witness' expertise. (17RT 2056-2057.) On this record alone there can be no doubt that appellant preserved the issue for this

Court's review. But there is more: When, at the close of the first trial, the prosecutor moved the photo album into evidence, appellant objected again to its admission, stating that the materials were "highly prejudicial." (21RT 2709.)

At appellant's second guilt-innocence trial, appellant lodged the same relevancy objection to the prison-gang evidence, as well as an objection to the witness's expertise as it related to interpreting the meaning of the documents. (40RT 5146-5147, 5159; AOB 275-276.) The trial court made essentially the same rulings that it made at appellant's first trial, including that MacArthur – who had admitted at the first trial a lack of expertise regarding prison gangs – could provide expert opinion evidence with regard to the U.B.N. prison gang issues. (40RT 5147-5164.) Thus, once again the record belies respondent's assertion that these issues were not preserved for this Court's review.

Turning to the merits of appellant's claim, respondent argues that the trial court acted within its discretion when it allowed the street gang experts to explain what the initials "U.B.N." stood for, including that it was a prison gang, and to read the contents of the U.B.N. poems in the album found in the appellant's motel room. (RB 238-239.) Respondent also argues that the mention of the U.B.N. prison gang was merely a "trifle," and the U.B.N. poetry that was read to the jury did not identify the author or when it was written, so it did not render appellant's trial unfair. (RB 236, 238-239.)

Tellingly, respondent does not argue that either of the purported *street* gang experts was qualified to provide any opinion testimony about *prison* gangs. Nor does respondent defend the trial court's rejection of appellant's challenge to MacArthur's expertise by ruling that appellant would have the opportunity to cross-examine the experts on their expertise.

(17RT 2049-2050.) Each of these issues is sufficiently addressed in the opening brief. (AOB 262-277.)

Rather, respondent appears to claim that the street gang experts did not opine about prison gangs at all, claiming that no witness ever rendered an opinion that appellant had been a member of a prison gang; that MacArthur and Wright merely testified about what the initials U.B.N. stood for; and that neither street gang expert established when the writings in the red photo album were authored. (RB 235, 239.) To the extent respondent is arguing that the prosecutor did not show that appellant had been in a prison gang, or present “expert” opinions about prison gangs, its argument cannot be taken seriously.

The prosecution connected appellant directly to the red photo album by showing that the album was found in appellant’s motel room and that it contained appellant’s alleged gang moniker. The prosecutor then had its experts identify the U.B.N. notations throughout the red album as referring to the Blood prison gang. (17RT 2044-2046.) The prosecutor then had the witnesses read *and interpret* for the jurors the prison-gang writings in the album, including the poem “U.B.N. Warrior.” (17RT 2062-2070, 2125; 20RT 2600-2603, 2607.)

For example, in interpreting the prison-gang writings, MacArthur opined that the author must have believed that his U.B.N. prison-gang affiliation was of greater importance than his street-gang membership. (17RT 2046.) In another example, Lieutenant Wright similarly opined that the author of the U.B.N. documents showed that appellant had “a lot of feelings about the superiority within the Blood Nation or the need for it.” (20RT 2602.) There can be no doubt that the state’s street gang experts opined about the U.B.N. prison-gang writings, and about appellant’s

connection to the U.B.N. And to the extent that the writings could not be dated, there was all the more reason that they should have been excluded due to the lack of nexus between them and the prosecution's claim that appellant was a street-gang member at the time of the charged crimes.

Regarding the evidentiary basis for trial court's ruling, respondent does not attempt to explain just *how* the U.B.N. prison-gang writings and drawings showed motive, intent and bias with regard to the charged shootings, which were allegedly the result of rival *street-gang* hostility. (17RT 2049-2050, 2055.) Instead, drawing a parallel between this case and *People v. Champion and Ross* (1995) 9 Cal.4th 879 (*Champion*), respondent argues that the prison-gang evidence was evidence of appellant's *street gang*'s "culture and habit," a theory of admissibility not offered at trial. (RB 239.)

In *Champion*, the prosecution presented a wide array of gang evidence concerning the criminal street gang in which the defendants were members at the time of the charged crimes. (*Champion, supra*, 9 Cal.4th at pp. 919-921.) This Court found that the street gang evidence was properly admitted to explain cryptic post-crime statements made by the defendants; to connect the defendants to the car in which the police found property stolen during two of the murders; to link the defendants to one another as well as to a third gang member identified as a participant in one of the murders; and to demonstrate the defendant's relationship with another gang member who was the son of one of the victims. (*Id.* at pp. 922-925.)

Here, unlike the evidence in *Champion*, the prosecution made no showing that the U.B.N. *prison* gang had anything to do with the charged offenses, or was somehow linked to the victims or their families. To the contrary, the prosecutor's sole theory regarding gangs in this case was that

the shootings were the result of appellant protecting his alleged *street* gang's territory. There was no evidentiary foundation laid linking "culture and habit" evidence regarding the U.B.N. prison gang to appellant's alleged street gang. (AOB 267-274; see *People v. Williams* (2008) 167 Cal.App.4th 983 [evidence of the defendant's membership in the Peckerwood Soldiers prison gang was improperly admitted in case involving the Small Town Peckerwood street gang, absent some showing of collaborative activities or shared organizational structure].)

Finally, respondent theorizes that the expert testimony on prison gangs was relevant and admissible because appellant's alleged street gang (the East Side Bishops or 9 Deuce Bishops) and the U.B.N. prison gang both are purportedly "Blood gangs" with Blood gang members. (RB 239.) But the only evidence in the present record regarding the make-up and membership of the U.B.N. prison gang comes directly from the opinions of MacArthur and Wright. (See, e.g., 17RT 2046-2047; 20RT 2600; 40RT 5144-5146; 41RT 5375-5377.) As argued in the opening brief, neither MacArthur or Wright was shown to be a qualified expert competent to testify about *prison* gangs, a fact respondent does not contest. (AOB 262-266.) Moreover, the prosecutor presented no evidence linking the conduct of the U.B.N. prison gang members to street crime. Consequently, this aspect of respondent's argument fails as well.

As to the question of prejudice, respondent argues that the prison-gang evidence was only briefly mentioned, and that it was merely one part of "a mountain of virtually uncontested gang evidence." (RB 239-240.) This view of the record is skewed. The prosecutors at both trials took great pains to focus the jury's attention on the highly inflammatory U.B.N. prison-gang evidence. At both trials, the experts went through the red

U.B.N. album in painstaking detail, and then read, in their entirety, the “U.B.N. Warrior” and “Poison in the Blood Streme” poems, which contained highly inflammatory and irrelevant references to the U.B.N. prison gang, vengeance, rage and the elimination of enemies. (See, e.g., 17RT 2046, 2062-2067, 2125; 20RT 2600-2603; 40RT 5142-5144, 5167, 5171, 5177-5179.) And because those writings were attributed to appellant, it was as if appellant was personally expressing his thoughts and emotions directly to the jury.

Then, during closing argument, the prosecutors repeatedly drew the jury’s attention back to appellant’s prison-gang affiliation and his prison writings, reiterating at one point that appellant’s “main allegiance” was to the U.B.N. prison gang. (See, e.g., 23RT 2931, 2933, 2935, 2947, 2970, 3023; 42RT 5627.) This is so notwithstanding the complete lack of evidence showing any connection between the U.B.N. prison gang and the charged offenses.

On this record, the admission of the irrelevant, highly inflammatory, and prejudicial prison-gang evidence and poetry rendered appellant’s trial fundamentally unfair and violated his due process rights. Respondent has not even attempted to show that the error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; *People v. Albarran* (2007) 149 Cal.App.4th 214, 230.) The improper admission of this bad-character evidence further violated appellant’s constitutionally-protected liberty interest in the correct application of state law. (U.S. Const., 5th and 14th Amends.; see *McKinney v. Rees, supra*, 993 F.2d at pp. 1385-1386.)

But even if the error here were only an error under the state rules of evidence, it must be deemed prejudicial. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) In a close case like this one – where identification and

motive were the only contested issues, and where appellant's first jury did not reach a verdict on several of the charges – it is reasonably probable that the damning fact that appellant had been in a prison gang, and that he had expressed the highly inflammatory sentiments contained in the prison poems, tipped the balance against appellant.

Finally, the most prejudicial aspect of the erroneous admission of the prison-gang evidence occurred at appellant's second trial, where the jury went on to decide the question of penalty. Because the trial court admitted the prison-gang evidence at the guilt-innocence trial, the jury was free to consider at the penalty phase the otherwise inadmissible prison gang evidence when determining whether to sentence appellant to life in prison or death. This denied appellant his due process right to a fair trial, and undermined the heightened reliability that the Eighth and Fourteenth Amendments require for conviction of a capital offense. And respondent has not met its burden of showing how the admission of this evidence was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

Appellant was constitutionally-entitled to a penalty phase trial free of irrelevant and inflammatory evidence untethered to appropriate sentencing factors. In fact, appellant's penalty phase trial was riddled with irrelevant and inadmissible evidence. (See AOB 318-379.) The evidence that appellant had been in a prison gang during a prior incarceration – a fact completely unconnected to the current charged offenses, and not an otherwise relevant aggravating factor for the jury's consideration – denied him his state and federal rights to due process, and to a reliable and individualized penalty determination under the Eighth and Fourteenth Amendments. (*Gregg v. Georgia* (1976) 428 U.S. 153, 192 [evidence in aggravation must be "particularly relevant to the sentencing decision"]; see

Lockett v. Ohio (1978) 438 U.S. 586, at pp. 603-605 (plurality opinion.)
Accordingly, reversal of appellant's convictions and death sentence is required.

* * *

XI

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE TRIAL COURT'S DENIAL OF HIS SEVERANCE MOTION

At appellant's second guilt-innocence trial, the court erred by refusing to sever the unresolved count charging appellant with the assault with a deadly weapon on Linda Jones (Count 4) from the unresolved counts charging appellant with the murder of Noel Jesus Sanchez and the attempted murder of Ernest Johnson (Counts 1 & 6, respectively). Appellant maintains that the trial court applied the wrong standard in deciding appellant's severance motion, and that severance was required under the correct standard. (AOB 278-318.) Respondent disagrees. (RB 240-252.)

A. The Trial Court Failed To Apply The Correct Standard To Evaluate Appellant's Severance Motion

Respondent first claims that the trial court applied the correct standard in deciding appellant's severance motion. Respondent begins by correctly noting that the trial court was ultimately aware that the governing statute, Penal Code section 954, gave it discretion to sever the counts.²⁸ But then respondent asserts that "the record clearly shows the trial court considered *the appropriate factors* regarding severance." (RB 246, emphasis supplied.) Respondent also asserts that the court "carefully" reviewed the charges "and the impact of Linda Jones's testimony," and

²⁸ The trial court initially said "... that there isn't any authority that I'm aware of that would allow the court or cause the court to sever out Count 4 in this complaint --". (30RT 3465.) Only after appellant mentioned Evidence Code section 352 and Penal Code section 954 did the trial court agree that it had the discretion to sever count 4. (*Ibid.*)

“carefully” limited that testimony to prohibit any mention of the fact of appellant’s prior murder and attempted murder conviction. (*Ibid.*) This view of the proceedings is not supported by the record.

The “appropriate factors” the trial court was supposed to consider with regard to appellant’s severance motion were set out in *Williams v. Superior Court* (1984) 36 Cal.3d 441 (*Williams*). In *Williams*, this Court held that in exercising its discretion a trial court must consider (1) whether the evidence pertinent to one case would have been admissible in the other; and (2) the prejudicial effect of joinder. (*Id.* at p. 448.) Under the second prong of the *Williams* test the trial court must consider (a) the lack of cross-admissibility of evidence between the two counts; (b) whether the joined charges are highly inflammatory; (c) the relative strength of the cases; and (d) whether the charge sought to be severed carries the death penalty. (*Id.* at p. 452.)

Here, when appellant brought the *Williams* case to the trial court’s attention, the court rejected it, stating: “I’m very familiar with the *Williams* case. Although it hasn’t been overruled, it’s been eroded a very great deal. *So this is not a Williams situation.*” (30RT 3466, emphasis supplied.) The record shows only that the court considered one factor before it denied appellant’s severance motion: judicial economy. (30RT 3465.)²⁹

The trial court was wrong in neglecting this Court’s precedent. But the court also failed to recognize that the facts and allegations in this case very much presented a “*Williams* situation.” For example, like the present

²⁹ When appellant asked the court not to rely solely on judicial economy, the court stated it was just “one of the . . . bases that the court has to consider in granting a motion to sever. (30RT 3467.) The court did not identify which other “bases” it might have been considering.

case, *Williams* involved two homicides committed at different times and at different locations. (*Williams, supra*, 36 Cal.3d at p. 445.) Like the present case, the first homicide in *Williams* occurred while the defendant stood by a building and shot a rival gang member, while the second homicide occurred when the defendant shot a rival gang member from a car. (*Ibid.*) Like the present case, the prosecutor's theory in *Williams* was that the shootings were committed to protect gang territory. (*Ibid.*) And just like the present case, in *Williams* different guns were used at each shooting. (*Ibid.*)

Notwithstanding these remarkable similarities and the fact that *Williams* was at the time – and continues to remain – controlling authority, the record here does not show that the trial court applied the appropriate factors articulated in *Williams*. Nor does the record support a finding that the trial court “carefully considered” what impact the murder of Benson Jones, and the shooting of Benjamin Jones, would have at a retrial on the unrelated charges on which the first jury could not reach a verdict. Rather, the record supports only a finding that trial court *declined* to apply the legally applicable factors, and by doing so abused its discretion. At a minimum, its rejection of this Court's controlling authority makes its ruling on appellant's severance motion unworthy of this Court's deference.

B. The Trial Court Abused Its Discretion By Allowing Appellant To Be Jointly Tried For The Linda Jones Assault And The Sanchez Homicide

1. Cross-admissibility

Appellant argues that the evidence related to the assault on Linda Jones at Walter's Market (Count 4) was not cross-admissible with the drive-by killing of Noel Sanchez (Count 1) and shooting at Ernest Johnson (Count 6). The charged assault was factually unrelated to the other shootings.

There were no common or distinctive marks shared between the events at Walter's Market, and the charged drive-by shootings at Sanchez and Johnson. And the unresolved assault charge on Linda Jones (Count 4) included the underlying evidence that appellant had shot and killed Linda's brother, Benson Jones, and attempted to kill Benjamin Jones; that evidence would have been inadmissible under Evidence Code section 1101 at separate trials on Counts 1 and 6. (AOB 300-306.)

Respondent appears to concede that the assault on Linda Jones at Walter's Market and the two drive-by shootings did not have "common marks" or an evidentiary connection sufficient to support cross-admissibility. (RB 247-248.) However, respondent contends that the trial court's discretion under Penal Code section 954 to join charges is broader than its discretion to admit evidence under Evidence Code section 1101. Relying on *People v. Soper* (2009) 45 Cal.4th 759 (*Soper*) and *People v. Zambrano* (2007) 41 Cal.4th 1082 (*Zambrano*),³⁰ respondent makes the astounding claim that "the mere fact" of the shooting at Benson, Benjamin and Linda Jones gave rise to an inference that appellant also shot at Noel Sanchez from a car, making the two sets of offenses relevant to one another on the issue of identity (that it was *appellant* who did all the shooting) and motive (gang enmity). (RB 246-248.)

This expansive and novel argument for cross-admissibility was not made by the prosecutor below. The prosecutor argued only that Linda Jones's testimony about the shooting of her brothers was admissible as to the motive and the identity of the person *who shot at her* in the unresolved

³⁰ Disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22.

assault case (Count 4), not as to the motive and identity of who shot at Noel Sanchez (Count 5) in the unresolved homicide case. (30RT 2462-2463.) Nevertheless, respondent is wrong on the merits.

The offense appellant sought to sever from the unresolved homicide charge (Count 5) was the unresolved assault with a deadly weapon on Linda Jones (Count 4). As to the assault charge, the prosecutor made no argument and presented no evidence that Linda Jones was in a street gang and that appellant shot at her due to gang enmity. There was nothing about “the mere fact” of the alleged shooting at Linda Jones that demonstrated cross-admissibility. It was the other already adjudicated offenses (the murder of Benson Jones and attempted murder of Benjamin Jones) that Linda Jones observed prior to the charged assault on her that were based on gang conflict. Nothing in *Soper* and *Zambrano* supports admission of the facts underlying those other adjudicated offenses without a showing of admissibility under Evidence Code section 1101. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1315-1316; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 400.)

It is true that the similarity required to show intent through other crimes evidence is less than that required to show identity. But this does not mean that only the barest factual similarity will suffice. As this Court has explained, the difference between factual similarity for intent and that for identity “is a difference of degree rather than of kind.” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) For evidence of a different crime to be admissible on the issue of intent, the offense must still share sufficient “factual similarities” with the charged offense to demonstrate that the perpetrator harbored the same requisite intent. (*Soper, supra*, 45 Cal.4th at pp. 778-779; *People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

In *Soper*, this Court found that the “factual similarity” standard was met because in each case, the victim was a homeless man, killed by a single blow to the head as he slept at his camp, with similar weapons that were found by the perpetrator and then discarded at the scene. These kinds of “common mark” similarities established an intent to kill and indicated that the homicides were premeditated. (*Soper, supra*, 45 Cal.4th at p. 779, fn. 15.) The similarities that justified joinder in *Soper* contrast with the disparate facts between the two cases at issue here: the events surrounding the verbal exchange and fatal confrontation at Walter’s Market, and the alleged shooting at Noel Sanchez from a car. Thus respondent’s reliance on *Soper* is misplaced.

Similarly misplaced is respondent’s reliance on *Zambrano*. There, the defendant brutally bludgeoned a married couple in their home, believing they were behind threats to disclose his extramarital affair. (*Zambrano, supra*, 41 Cal.4th at pp. 1093-1094.) The defendant first told a colleague about the threats, and then later confessed to the same colleague that he had bludgeoned the couple in retaliation for making the threats. (*Id.* at pp. 1094-1095.) The colleague ultimately went to the police with this information and gave a statement that led to the defendant’s arrest. (*Id.* at p. 1096.) Shortly after the defendant was released on bail, the colleague was murdered. (*Id.* at pp. 1096-1097.)

Prior to trial, the defendant unsuccessfully sought to sever the charges stemming from the bludgeoning counts from the murder charge. On appeal, this Court concluded that the trial court did not abuse its discretion. Because the bludgeoning case was inextricably linked to the murder charge – including that the murder victim was killed because he was a witness in the bludgeoning case, and the prosecution had charged a

witness-killing special circumstance – this Court found that the evidence of the bludgeoning would have been clearly cross-admissible in a separate trial of the murder charge in order to prove defendant’s motive for the murder, and to help establish the special circumstance that the murder was committed to eliminate the victim as a witness in the bludgeoning case. (*Zambrano, supra*, 41 Cal.4th at pp. 1129-1130.)

By contrast, the assault on Linda Jones at Walter’s Market on May 18 was not factually connected with the other unresolved charges (the May 10 drive-by killing of Noel Sanchez, or the alleged May 20 shooting at Ernest Johnson). Indeed, the prosecutor never suggested a factual link between the offenses. Instead, respondent exaggerates *Zambrano*’s holding by suggesting that a similar alleged *motive* between two cases may make the offenses cross-admissible to prove identity, even when the offenses have no factual relationship. But *Zambrano* does not stand for that proposition, and respondent’s reasoning fails because Evidence Code section 1101 and this Court’s decisions make inadmissible the *facts* of other crimes unless those *facts* are shown to be relevant to prove motive, identity or intent, not the other way around. (See *People v. Harris* (2013) 57 Cal.4th 804, 841 [greatest degree of factual similarity is required for evidence of other misconduct to be relevant to prove identity].)

Respondent and appellant agree that the cross-admissibility or lack thereof is not the sine qua non of joint trials. (AOB 300; RB 248; see *People v. Geier* (2007) 41 Cal.4th 555, 575.) But whether the evidence is cross-admissible is a key consideration in determining whether it was proper to join them for trial. (See *People v. Memro* (1995) 11 Cal.4th 786, 850.) Because the evidence at issue here was not cross-admissible, the trial court was required to carefully consider each of the *Williams* factors to

determine whether the prejudice resulting from the admission of the unrelated offenses outweighed the benefits of joinder. As noted above, the court rejected *Williams* and did not engage in the careful analysis required by that decision. Consequently, the court failed to recognize that severance of the unresolved assault charge (Count 4) from the unresolved murder and attempted murder counts (Counts 1 & 6) was required under the unique facts of this case.

2. Inflammatory Evidence

Respondent does not argue that the evidence concerning the assault on Linda Jones – which included the emotionally charged testimony about the murder of her brother, Benson, and the attempted murder of her brother, Benjamin – was not inflammatory. (RB 248-249.) Instead, respondent first asserts that the fact that the jury acquitted appellant of the attempted murder of Ernest Johnson “is fatal” to appellant’s claim of undue prejudice. It is not. The jury’s acquittal on the Johnson charge *despite* the highly inflammatory nature of the uncharged murder speaks to the weakness of the prosecution’s case on that count, and specifically the problems with Johnson’s credibility. (39RT 4891-4948.)

Next, respondent argues that all of the unresolved counts involved assaultive conduct, and that appellant failed to show that any of the charges were more inflammatory than the others. (RB 249.) A fair review of the record shows otherwise.

The testimony concerning the events at Walter’s Market was aimed not just at proving an assault on Linda Jones, but it also told the jury that appellant was a prior murderer. (AOB 306-307.) Indeed, the evidence on the assault charge included the highly emotional testimony of Linda Jones, who recounted watching from a distance as her brother Benson was shot in

the chest and then fell to his knees. Linda explained seeing her other brother (Benjamin) gunned down just before the shooter returned to Benson to shoot him a final time, as he sat slumped on the ground. All of this occurred while Linda was screaming and shouting for help. (AOB 285-293.)

It is simply unreasonable to discount this testimony of a prior killing and attempted murder as merely “assaultive behavior.” This is particularly so when contrasted against the rather generic testimony of the other charged offenses.

Respondent also complains that “appellant improperly relies on the prosecutor’s arguments to the jury in arguing that the trial court abused its discretion in denying his motion to sever.” (RB 249.) This assertion is specious. As appellant observed in his opening brief, the trial court’s decision whether to sever counts is reviewed in light of the record before the court at the time of the ruling. (AOB 295.) But a component of appellant’s claim is that joinder actually resulted in “gross unfairness” at trial, amounting to a denial of due process. (AOB 315-317.) The prosecutor’s argument to the jury and the evidence presented at the second guilt-innocence trial must be considered to evaluate that portion of appellant’s claim. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 129-130.)

3. The Relative Strength Of The Cases

Next, respondent contends that both sets of counts were supported by strong evidence, and there was no spillover effect. (RB 250.) It claims that appellant did not argue the “strong case/weak case” theory below, and that it should be rejected now for that reason. Respondent is wrong.

At the hearing on his motion appellant specifically stated, “. . . And I

think severance is in accord here. *And that way we wouldn't have to worry about any spill-over effect* of [Linda Jones's] testimony to the members of the jury on the Sanchez killing and the Ernest Johnson attempted homicide." (29RT 3356-3357, emphasis supplied.) Moreover, appellant made a clear and unambiguous severance motion. At that point it was incumbent on the trial court to evaluate the *Williams* factors for potential prejudice, one of which required the trial court to consider the relative strength of the cases. (*Williams, supra*, 36 Cal.3d at p. 452.) Indeed, appellant urged the trial court to apply the *Williams* case, but the court denigrated the case, stating that its authority had been eroded and that the present case did not present a "*Williams* situation." (30RT 3466.) On this record, respondent cannot reasonably fault appellant for the trial court's failure to consider this (and any other) *Williams* factor.

Turning to the merits, this is not merely a strong case/weak case issue, as respondent argues. Rather the problem here is that the evidence on all the unresolved counts was weak, a fact demonstrated by the first jury's inability to resolve those counts. This across-the-board weakness created a substantial risk that the jury would convict on the three separate incidents based upon the spillover effect of the aggregate evidence. And that risk was greatly heightened by the fact that the evidence underlying the assault on Linda Jones was the stronger evidence of the already *resolved* murder and attempted murder counts.

Viewed from the vantage point of the trial court at the time that it ruled on the motion to sever, there was a clear and substantial risk that evidence of the resolved Benson Jones murder and the Benjamin Jones attempted murder would have a spillover effect and bolster the prosecution's relatively weak case implicating appellant in the Sanchez

homicide. For these reasons, a fair analysis of the relative strength of the unresolved counts and the risk of a spillover effect demonstrated a need for severance over joinder.

Refusing to acknowledge that there was a risk of a spillover effect at the second trial due to the first jury's conclusion that appellant was a murderer, respondent claims that the key difference between the first and second trials was Florentino Melendez's changed testimony. Melendez was with Noel Sanchez when Sanchez was killed. At the first trial, Melendez did not identify appellant from the witness stand, but at the retrial Melendez identified appellant and claimed he did not do so at the first trial for fear of gang reprisal. (RB 250.)

Respondent's analysis on this point must be rejected for several reasons. At the hearing on appellant's severance motion, the prosecutor did not mention that Melendez's testimony would change in a manner that would strengthen the state's case, and the portions of the record on which respondent now relies were not before the trial court at the time it considered the motion. Thus, it is improper to rely on Melendez's second-trial testimony in assessing the propriety of the trial court's pre-trial ruling on appellant's severance motion. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.)

Additionally, respondent's representations about Melendez's changed testimony at the second trial are exaggerated and misleading. Respondent argues that Melendez gave "powerful identification evidence" at the second trial, and that the change in his testimony was "reasonably explained" by the fact that at the first trial Melendez did not identify appellant from the stand because he feared reprisal from his "fellow gang members," while at the second trial he was a "former gang member." (RB

250.) But Melendez actually testified that he had disassociated himself from his former gang years earlier, not between the first and second trial. He also testified at the second trial that he still feared gang reprisals, and he did not disavow his prior testimony that his memory was addled by years of PCP use. (35RT 4330-4331, 4337.) Also, the homicide detective who investigated the Sanchez killing testified at the second trial that Melendez did not positively identify appellant as the shooter two weeks after the shooting. (37RT 4649-4655.) All this is to say that the evidence about Melendez's identification changed little, and his "explanation" for the change – that he *continued* to fear gang reprisals – made no sense.

On the record before the trial court at the time it denied appellant's motion, the court knew that joinder of the assault charge on Linda Jones with the charged Sanchez homicide would result in the admission of the damning propensity evidence that appellant was a convicted prior murderer. For this reason, it would be unreasonable to conclude that there was no substantial risk of a spillover effect at the second trial as a result of joinder.

4. The Charges Included A Capital Offense

Respondent does not contest the fact that the Sanchez murder charge made this a capital case on the prosecution's multiple-murder theory. Rather, respondent argues that joining the assault on Linda Jones with the other counts did not result in capital charges, and that the special circumstance allegation was bifurcated from the retrial on the unresolved counts. (RB 251.) Respondent is correct, but its argument is beside the point. Because this was a capital case, the trial court was required to "analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court*,

supra, 36 Cal.3d at p. 454.) The trial court failed to do so (AOB 309-310), and respondent does not show otherwise.

5. The Benefits Of Joinder Were Minimal

Appellant has argued that the trial court was required but failed to weigh the potential prejudice against the benefits of joinder. (AOB 310-311; *People v. Bean* (1988) 46 Cal.3d 919, 936.) Had the court done so, it would have concluded that a joint trial would not have yielded any substantial benefits because the cases involved no common percipient witnesses. (*People v. Smallwood* (1986) 42 Cal.3d 415, 430.) Respondent does not argue otherwise. (RB 251.)

Moreover, the trial court ordered the multiple-murder special circumstance allegation to be bifurcated in an effort to prevent the jury from learning of appellant's prior murder *conviction* during the retrial of the unresolved counts. This protection was illusory, however, because the jury heard the underlying facts of the prior murder, and were questioned during voir dire on the subject of multiple murder. Instead, the trial court should have had the jury consider the special circumstance allegation with the unresolved assault charge because both involved evidence about the shooting at Walters' Market for which appellant was convicted of murder. Taking that step would have had the real prophylactic effect that appellant requested and the trial court sought.

6. Reversal Is Required

For the reasons stated above and in appellant's opening brief, the trial court abused its discretion and reversal is required. (AOB 311-315.)

C. The Trial Court's Failure To Sever The Charges Made Appellant's Trial Fundamentally Unfair

Even assuming the trial court's denial of appellant's severance

motion was correct when made, this Court must reverse the judgment because joinder made his trial unfair and denied him due process. (AOB 315-317.) Respondent disagrees, arguing first that appellant forfeited this claim because he “did not argue any constitutional grounds during the hearing on his motion,” and by failing to press for a ruling on the due process aspect of his request for severance. (RB 251.)

Respondent misapprehends the nature of the constitutional claim. This Court has explained that even where a trial court’s ruling as to severance was correct when made, reversal of the judgment is required when “joinder actually resulted in ‘gross unfairness’ amounting to a denial of due process.” (*People v. Mendoza* (2000) 24 Cal.4th 130, 162, quoting *People v. Arias*, *supra*, 13 Cal.4th at p. 127.) This claim requires the reviewing court to look at the record of the whole trial to determine whether the court’s pre-trial ruling on the severance motion – while abstractly correct when it was made – resulted in a denial of due process. Appellant cannot be faulted for not arguing at the hearing on his severance motion that his trial – which had not yet happened – was actually rendered unfair.

As to the merits of appellant’s claim, respondent repeats its argument that the evidence was cross-admissible so appellant’s trial could not have been unfair; that the trial court did not err in denying the severance motion; and claims appellant has not met his burden of proving “gross unfairness.” (RB 252.) Respondent is wrong. The prejudicial effect of consolidation is the spillover effect of the already resolved murder and attempted murder that rendered the trial fundamentally unfair as to the unresolved homicide count. (AOB 316-317.) Appellant detailed in his opening brief how the joinder of the assault charge made the murder of Benson Jones and the attempted murder of his brother Benjamin the focus of the prosecutor’s

case. (AOB 285-293.) Respondent chooses not to address these facts.

But for the spillover effect of the highly charged and emotional evidence of the unrelated murder and attempted murder of Benson and Benjamin Jones respectively, appellant's jury would not have returned a guilty verdict on the Sanchez homicide charges. For that reason, this Court cannot be confident that the joinder of the charges did not result in "gross unfairness" amounting to a denial of due process. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162; *People v. Arias, supra*, 13 Cal.4th at p. 127; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084; U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, §§ 15, 16.) Reversal is required.

* * *

XII

APPELLANT WAS DENIED A FAIR PENALTY DETERMINATION WHEN THE COURT ERRONEOUSLY ADMITTED A SERIES OF NON-CRIMINAL AND NON-VIOLENT JAIL INCIDENTS AS FACTOR (B) EVIDENCE

Appellant was denied a fair penalty trial because the trial court allowed the prosecutor to present an array of inadmissible evidence at the penalty phase. (AOB 318-378.) That evidence included a graffitied out-of-order sign found on a copy machine in the jail library, which the prosecution claimed constituted a threat to kill various unnamed law enforcement officials and anybody who stood in appellant's way (AOB 320-356); pseudo-psychological opinion testimony that claimed that appellant's incarceration transformed him from a mere threat to rival gang members to a killer of all law-abiding citizens (AOB 347-356); and testimony about appellant's future dangerousness, to wit, that appellant would escape from custody if not executed (AOB 356-375). None of this evidence was admissible under section 190.3, factor (b) (hereafter "factor (b)"), and its admission and use by the prosecutor denied appellant a constitutionally reliable and fair penalty determination.

A. Evidence Of An Alleged Threat To Kill Unnamed Law Enforcement Officials

1. The Issue Is Preserved For This Court's Review

Respondent first claims that appellant did not make a timely specific objection to the admission of the graffitied sign as improper aggravating evidence. (RB 256-261.) It complains that appellant's specific objections to the evidence did not arise until after the evidence had been presented to the jury. (RB 58-59.) Respondent is wrong. Appellant repeatedly and

throughout his trial argued that the jail incidents, including the graffitied out-of-order sign, were inadmissible because they did not violate a specific Penal Code provision. (AOB 320-328.)

What happened here is somewhat unusual because the trial court did not initially understand that only prior *crimes* that included force or violence were admissible under factor (b). This is so notwithstanding appellant's repeated pleas that the court review the case law and require the prosecutor to identify specific penal code sections attendant to each alleged piece of aggravating evidence prior to determining its admissibility. (AOB 324-325.)

Even after the trial court had reviewed the cases that appellant brought to its attention, it refused to reconsider its ruling on the admissibility of the jail rule violations. (AOB 325-326.) At a hearing *prior* to the start of the penalty trial, appellant stated: "Your honor, I believe 190.3 also specifically states that these issues that the prosecution has elicited – introduced as an aggravating factor must violate some penal statute." (47RRT 5879-5880.) But the trial court disagreed: "And the wording of [factor (b)] has been upheld, and it does not require Ms. Hunter at this point to call – to indicate any particular penal statute." (47RT 5880.) Consequently, all the evidence regarding appellant's alleged misconduct in jail poured into appellant's penalty trial without any threshold showing that any of it constituted a crime of force or violence under factor (b). (AOB 325-326.)

Only after the evidence had been presented to the jury did the court acknowledge that it had failed to conduct the appropriate analysis regarding the admissibility of the evidence. (AOB 325-327.) The court agreed to reconsider its prior ruling that all of all the county jail incidents, including

the graffitied out-of-order sign, were proper aggravating evidence. (AOB 327, fn. 125.)

But even after the court acknowledged that only crimes were admissible under factor (b), the prosecutor still failed to identify a proper basis of admissibility. The prosecutor stated: “. . . And further, that the ‘out of order’ sign is a – an express threat of force and violence and the people should be allowed to argue that also.” (52RT 6414-6415.) Appellant immediately responded that the prosecutor again had failed to identify a penal statute justifying admission of the evidence. Appellant stated: “. . . I think we’re leaving out a major issue of [] section 190.3, that these force and violence – or this implied or express threat of force and violence has to violate a penal code, your honor. [¶] And – and the issue that the judge has tentatively made a ruling on do not violate any penal code statute dealing with force or violence or the threat – I mean the implied or express threat to use force and violence. And that the major issue that I kept bringing up, your honor. Since I believe that would be the – since the 19th [of October, 1994,]³¹ when we were called back to court.” (52RT 6415.)

The court then went through each jail incident and provided its own basis for admissibility, ruling that the graffitied out-of-order sign would be admitted as a violation of section 76. (AOB 327.) The trial court acknowledged that appellant had objected to the admission of the out-of-order sign: “There was an objection to the receipt of People’s 29 based upon Mr. Bankston’s previous arguments. I am receiving the original of the “out of order” sign, People’s 29, in evidence.” (52RT 6469.)

³¹ The jury did not begin hearing evidence in the penalty trial until October 20, 1994.

Because the court misapprehended the law at the outset, appellant made the only objection that he could prior to the admission of the evidence: The incidents were inadmissible because they did not constitute crimes involving threats of force or violence. The court ultimately ruled to the contrary with regard to the out-of-order sign. But at each stage, appellant's objections were as specific as they could be under the circumstances, giving the court fair and ample opportunity to rule correctly. (See *People v. Williams* (1999) 21 Cal.4th 335, 346.) For these reasons, the claim is preserved for this Court's review.

Respondent also attempts to fault appellant for allegedly "agreeing" with the court during the *guilt-innocence trial* that the evidence would be admissible at a subsequent penalty trial. In support of this assertion, respondent selectively represents portions of the record in which appellant responded affirmatively to compound statements made by the trial court. (RB 258.) But a fair review of appellant's objections at the guilt-innocence trial tells a different story.

The issue of the admissibility of the out-of-order sign first arose at a hearing during the second guilt-innocence trial. (39RT 4868-4883.) When the prosecutor stated that she intended to call an officer from the county jail, appellant requested an Evidence Code section 402 hearing, stating: "I'm under the impression that it only goes to penalty phase, like incidents in the jail." (39RT 4868.) The prosecutor stated that the officer would testify that it was appellant who graffitied the sign, to which appellant again responded that the issue was one for a penalty-phase one: "Yes, your honor. This is an incident report that occurred at jail. *This violated no penal statutes that I could think of.* But this is regarding an incident report that the court ordered be provided to her, as I was disciplined in the county jail." (39RT 4869,

emphasis supplied.) Appellant added that the jail incidents were “*things to be added to the amended statement of aggravation in the event that we make it to a penalty trial,*” and that the issue should not be brought up in the people’s guilt case. (39RT 4870, emphasis supplied.)

After the prosecutor argued that the evidence was admissible as to identity and motive, appellant responded that the graffiti was highly inflammatory, and its use would violate his First Amendment rights. (39RT 4871-4875, 4877-4878.) The trial court partially agreed, ruling that the most inflammatory portions of the sign were not admissible. The court added, however: “And by the way, it is not a First Amendment issue, Mr. Bankston. And I’m specifically finding that your right to free expression under the First Amendment is not violated by introduction of that piece of paper.” (39RT 4878-4880.)

Thus, by the close of the first hearing regarding the graffitied sign, appellant had made it clear that in his view the admissibility of the evidence was a question for the penalty phase; the graffiti was protected speech; and the jail incidents, including the graffiti, violated no penal code statute. At a second and third hearing on the admissibility of the sign, the trial court sustained appellant’s further objections. And at each of those hearings, the trial court observed that the sign would be admissible at a subsequent penalty trial. (40RT 5101-5164 [second hearing]; 41RT 5292-5305, 5390-5404 [third hearing]³².)

³² In the second full paragraph on page 322 of appellant’s opening brief, counsel for appellant made two references to the third hearing as taking place in Volume 40 of the Reporter’s Transcript. The third hearing can be found in two parts, both in Volume 41, as cited in the text above. In addition, in the second full citation in that paragraph, counsel transposed the
(continued...)

On this record of repeated objections to the admissibility of all the jail incidents at the guilt-innocence trial, respondent's forfeiture argument must be rejected. Appellant clearly objected to the evidence on proper grounds prior to its admission at the penalty phase. The court acknowledged appellant's repeated objections, but nonetheless deemed the evidence admissible as a threat in violation of section 76. (52RT 6469.) Any additional effort on appellant's part to renew his objections yet again would have been futile and counterproductive. (*People v. Morris* (1991) 53 Cal.3d 152, 189, disapproved of on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824; see *People v. Hill* (1998) 17 Cal.4th 800, 821.)

But even if this Court were to conclude that appellant somehow failed to object sufficiently to the admission of the graffitied out-of-order sign, this Court should still review the trial court's ultimate ruling that the evidence met the threshold requirements for admissibility under factor (b). Under this Court's holdings, that question was a purely legal one. (*People v. Alcala* (1992) 4 Cal.4th 742, 787 [preliminary facts as prerequisites for admission are questions of law for the court, not jury]; see Evid. Code §§ 310, 405.) Indeed, this Court has held that whether proffered acts involve force or violence, or an actual threat thereof, is a legal matter. (*People v. Howard* (2008) 42 Cal.4th 1000, 1027-1028.) As such, this Court retains discretion to review the court's penalty-phase ruling. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) And because of the need for heightened reliability in death penalty cases (*People v. Horton* (1995) 11 Cal.4th 1068,

³² (...continued)
second page number. The correct citation to appellant's third guilt-innocent phase objection should be 41RT 5302-5303. Counsel for appellant regrets these typographical errors.

1138), this Court should not allow appellant to be sent to his death without considering whether the jury's penalty determination may have been based upon the erroneous admission of aggravating evidence.

**2. The Alleged Threat Was Improperly
Admitted As Factor (B) Evidence**

The trial court ruled that the inflammatory portion of the graffitied sign was admissible under factor (b) because it constituted a criminal threat in violation of section 76. The graffiti at issue here included the crossed-out words "sheriff," "judge," "DA," and "anybody," along with the letter "k" written next to each word and the word "killa!" written underneath. (2CT Supp.II 405 [Peo. Exh. 29].) Appellant maintains that the graffiti did not constitute a criminal threat because (1) there was no evidence of a specific intent that the statement be taken as a threat; (2) there was no evidence of a fear engendered in anyone allegedly threatened; (3) there was no direct communication of the alleged threat to a victim; and (4) there was no evidence of a specific intent to deter an official from performing his duty. (AOB 328-339.)

Respondent disagrees, arguing that the trial court reasonably could have concluded that appellant specifically intended that the writing be taken as a threat by some unidentified judge. (RB 261-266.)³³ Respondent also claims that there was no requirement at the time of appellant's penalty trial that a criminal threat under section 76 cause any particular person to reasonably fear for his or her safety, arguing that "required element" was

³³ Respondent concedes that the graffitied sign was not admissible under sections 69 and 71, which were the only bases of admissibility offered by the prosecutor at trial. (RB 264, fn. 47.) Because elements (3) and (4) described in the preceding paragraph have to do with section 69 and 71, appellant will not address them in this reply.

not “codified” into section 76 until 1995, a year after appellant’s trial. (RB 263-264.) These contentions are interrelated, and both lack merit.

The underlying problem with respondent’s position is that, in its view, section 76 did not require evidence that an identifiable victim – a “target victim” – was threatened prior to 1995. This position is simply wrong and is fatal to the arguments that flow from it.

At the time of appellant’s trial, section 76 punished (1) a threat of death or bodily harm made to specific elected or appointed officials, including the Governor, a judge, or that judge’s immediate family members; with (2) the specific intent that the statement be taken as a threat; and (3) the apparent ability to carry out the threat. As explained in *People v. Gudger* (1994) 29 Cal.App.4th 310 (*Gudger*) – a case that was decided prior to the start of appellant’s penalty trial – section 76 required proof that the criminal threat was “so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.” (*Gudger, supra*, 29 Cal.App.4th at p. 321, quoting *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027 (*Kelner*), emphasis supplied.)

Respondent is correct that in 1995, the Legislature amended section 76. But that amendment did not add a new target-victim “element” to the statute. Nor did it add a new requirement that the victim fear for his or her safety. Rather, the 1995 amendment added a section of definitions to clarify the *existing* meaning of the statute, including a definition of the term “threat,” to ensure that the statute would not be applied to protected speech. Some additional discussion on this point may be helpful.

At the time of appellant’s trial, section 76 did not expressly define the term “threat.” However, what constituted a punishable “threat” was

defined in section 646.9,³⁴ and set out in section 422 (added by Stats. 1988, ch. 1256, § 4, pp. 4184-4185, as amended by Stats. 1989, ch. 1135, § 1, pp. 4195-4196), the latter of which is a general statute that punishes criminal threats beyond those made against government officials.

Section 422 had been amended in 1988, after this Court ruled that it was unconstitutionally vague and threatened to punish protected speech. (*People v. Mirmirani* (1981) 30 Cal.3d 375, 381-388 (*Mirmirani*).) In so finding, this Court relied on *Watts v. United States* (1969) 394 U.S. 705, 708 (*Watts*), which cautioned that only “true threats” are criminally punishable without contravening First Amendment protections. This Court also noted that *Kelner* held that “a threat can be penalized only if ‘on its face and in the circumstances in which it is made (it) is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution. . . .’” (*Mirmirani, supra*, at p. 388, fn. 10.) The Legislature then repealed and replaced section 422, adding the exact language from *Kelner* to protect the redrafted statute’s constitutional viability.

In 1994, section 76 was subjected to a similar constitutional challenge. In *Gudger*, the defendant was convicted of threatening to shoot the judge who was handling a matter in which the defendant was a party. On appeal, the defendant claimed that section 76 was unconstitutionally

³⁴ Section 646.9 defined “credible threat” as follows: “For the purposes of this section, ‘credible threat’ means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.”

overbroad because, like section 422 prior to its 1988 amendment, the statute punished protected speech and conduct that were not “true threats.” In the defendant’s view, section 76 failed to require threats to convey an actual fear due to an immediate prospect of the execution of the threat. (*Gudger, supra*, 29 Cal.App.4th at p. 316.)

The Court of Appeal disagreed, observing that a statute punishing threats must be viewed with consideration of protected speech. The appellate court found that the terms of section 76 protected First Amendment concerns because it expressed the notion that the threats proscribed are like those punished in section 422: “Thus, section 76, while not a verbatim duplication of the unconditional language of the *Kelner* decision, adequately expresses the notion that the threats proscribed are only those ‘so unequivocal, unconditional, immediate and specific *as to the person threatened*, as to convey a gravity of purpose and imminent prospect of execution.’ [Citation omitted.] Accordingly, section 76 is not constitutionally overbroad, and appellant’s attack on the statute is without merit.” (*Gudger, supra*, 29 Cal.App.4th at p. 321, emphasis supplied.)

A year after the *Gudger* decision, the Legislature added to section 76 an explicit definition of the term “threat,” which was taken from section 646.9 and was consistent with section 422 (based on *Kelner*). The amendment did not add new elements, such as requiring an actual target victim for the first time, or that the victim of the threat fear for his or her safety. Rather, the amendment merely made explicit in section 76 that which *Gudger* held was already adequately represented in its text of the statute: that the statute only punishes those threats so immediate and specific to the person threatened (an actual victim) that the threat conveyed to the victim a gravity of purpose that the threat would be imminently acted

on (a fear). (*Gudger, supra*, 29 Cal.App.4th at p. 321.)

Moreover, *Gudger*'s reading of section 76 as being in accord with the dictates of *Kelner* – and therefore, the 1988 amended version of section 422, and section 646.9 – seems particularly correct given the long-standing rule of statutory construction that similar statutes be construed in light of one another, and that when statutes are *in pari materia* similar phrases appearing in each should be given like meanings. (*People v. Lamas* (2007) 42 Cal.4th 516, 525.) Indeed, it is “ordinarily presume[d] that statutory language, once judicially construed, will be given a like interpretation in a latter statute on the same or analogous subject.” (*People v. Nelson* (2011) 200 Cal.App.4th 1083, 1099, citation and internal punctuation omitted.) Because section 76, section 422 and section 646.9 all deal with punishing threats, and because section 76 had been judicially construed to ensure that only “true threats” were criminalized, one must conclude that at the time of appellant’s penalty trial, section 76 punished only the “true threats” as defined in section 646.9 and the post-amended section 422.

Further, appellant is aware of no California court that sustained a prosecution under section 76 without an identified target victim. And respondent identifies none.

But even assuming for the purpose of argument that the pre-amended section 76 could be violated with no evidence of a target victim, there still remains insufficient evidence that appellant *specifically intended* the graffiti to be taken as a threat to an unnamed judge. Respondent ignores the testimony of prosecution witness Sergeant John Baylis, who testified that he found the graffitied out-of-order sign on the broken copier, showed it to appellant and said, “Nice art work.” (39RT 4890.) According to Baylis, appellant responded that he was “just expressing himself.” (*Ibid.*)

Rather, in support of its argument, respondent points to Deputy MacArthur's opinion testimony as to what the author might have meant by the graffiti. (RB 262.) But neither MacArthur nor anyone else testified that the graffiti was specifically intended to be a threat, rather than just plain graffiti, a piece of "art work" (albeit offensive artwork), or an expression of frustration that the jail library copy machine was out-of-order. Nor did MacArthur identify any potential victim at whom the writings were specifically directed as a threat. Rather, on the question of "mental state," MacArthur provided only improper pseudo-psychological speculation that the writer of the graffiti had been affected by the criminal justice system in such a manner that his mentality had "graduated" from just a Crip killer to an "anybody killer." (49RT 6110-6111; see AOB 347-352.)

In addition, the arguments respondent now makes regarding the specific intent requirement of the alleged criminal threat in the graffiti were made and rejected in *In re Ryan D.* (2002) 100 Cal.App.4th 854, which respondent fails to acknowledge, much less address. (AOB 331-334.)

Respondent also argues, for the first time, that assuming the inflammatory portion of the graffitied out-of-order sign was not properly admitted under factor (b), it was nevertheless admissible under section 190.3, subdivision (a) (hereafter "factor (a)"). (RB 265-266.) Respondent relies on a formulation of the general rule that "[i]f challenged evidence is admissible on any ground – not just those stated by the parties or the court – there is no error." (RB 265.) But the general rule and the two cases on which respondent relies, *People v. Zapien* (1993) 4 Cal.4th 929 and *People v. Smithey* (1999) 20 Cal.4th 936, are inapposite. Both cases address evidentiary errors at the guilt-innocence trial, where the erroneous theory of admissibility did not alter how the parties might address the evidence before

the jury. That is not the case here, where the jury was told that the evidence was aggravating only if they found that appellant committed the alleged “criminal act.” (52RT 6545-6551.)

Because the prosecutor did not offer this evidence under factor (a) at trial, appellant had no reason or opportunity to show that the graffiti had nothing to do with the circumstances of the crimes, and consequently, argue that the jury should give the evidence no weight in their life-death calculation. Accordingly, respondent’s claim is forfeited and this Court should not consider it. (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1240 [after prevailing in the trial court on an erroneous theory for admission of evidence, the State forfeited the right to argue on appeal that the evidence was admissible on different theory that the defendant did not have reason or opportunity to address below].)

Even assuming respondent’s argument is not forfeited, the graffiti was inadmissible under factor (a). This Court has held that factor (a) evidence is that which surrounds the crime materially, morally, or logically. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) The graffiti at issue here had nothing whatsoever to do with that which surrounded the crime(s) for which appellant had been convicted. The graffiti was made while appellant was in custody in February 1994, nearly *three years* after the charged offenses occurred. (39RT 4888-4889.) The inflammatory portion of the sign did not refer to the charged offenses, nor did it refer to the victims or the impact that the homicides might have had on the victim’s family members.

Because the graffiti evidence was so factually unrelated to the underlying capital crimes, it is no surprise respondent cites no comparable authority for its admissibility under factor (a). And a survey of the this

Court's recent decisions on the admissibility of circumstances-of-the-crime evidence at the penalty phase illustrates by contrast why the evidence at issue here was *not* factor (a) evidence. (See, e.g., *People v. McKinzie* (2012) 54 Cal.4th 1302, 1360 [autopsy photographs admissible at penalty phase because they showed the manner in which the victim died, and the callousness and cruelty of defendant's acts]; *People v. Hamilton* (2009) 45 Cal.4th 863, 939-941 [a saw, butcher knife, and rope found in van after the defendant's arrest were relevant at penalty phase because, inter alia, the tools bore marked similarities to the weapons thought to have been used to murder victim]; *People v. Gay* (2008) 42 Cal.4th 1195, 1217-1223 [evidence that defendant did not fire any of the shots that killed police officer was admissible at defendant's death penalty retrial to show circumstances of offense].)

Accordingly, this Court should reject respondent's claim that the inflammatory portion of the graffitied out-of-order sign evidence was admissible under factor (a).

3. The Graffiti Was Not A Punishable "True Threat"

Appellant maintains that the graffiti at issue here was not a "true threat," and therefore could not be criminally sanctioned without contravening the First Amendment. (*Watts, supra*, 394 U.S. at p. 708; *People v. Toledo* (2001) 26 Cal.4th 221, 227-229 (*Toledo*).) Because appellant could not be prosecuted for making the graffiti, the trial court erred when it admitted the evidence under factor (b). (AOB 339-347.)

Respondent argues that appellant forfeited this issue by failing to object to the admission of the evidence on First Amendment grounds. (RB 266-267.) Not so. Appellant objected to the admission of the evidence on

First Amendment grounds (39RT 4872-4875, 4877-4878), and the trial court specifically rejected his argument, ruling: “And by the way, it is not a First Amendment issue, Mr. Bankston. And I’m specifically finding that our right to free expression under the First Amendment is not violated by introduction of that piece of paper.” (39RT 4878-4880; see also 41RT 5393.)

It is true that these objections were made and litigated prior to the penalty phase. But the objections on First Amendment grounds were specific and provided the court a fair opportunity to rule correctly. The trial court’s repeated denial on that ground was clear and unequivocal, and no legal or factual circumstances changed to suggest that a *third* objection to the evidence on First Amendment grounds would yield a different result. Under these circumstances, appellant was justified in concluding that a mere repetition of the same objection in the same proceedings would serve no useful purpose. (*People v. Morris*, *supra*, 53 Cal.3d at p. 189, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824.)

Moreover, this Court has consistently held that issues like appellant’s First Amendment claim may be raised for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277 [“A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental constitutional rights. [Citations]”]; accord, *People v. Saunders* (1993) 5 Cal.4th 580, 592, 589 fn. 5; *People v. Valladoli* (1996) 13 Cal.4th 590, 606; *Hale v. Morgan*, *supra*, 22 Cal.3d 388, 394; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) Not to consider this claim on appeal would be contrary to this Court’s practices, and no party would be disadvantaged by ensuring that the First Amendment is afforded appropriate consideration. For all these reasons, the claim is cognizable.

As for the merits of appellant's claim, respondent does not contest that this Court conducts an independent review of a First Amendment issue. (*In re George T.* (2004) 33 Cal.4th 620, 643 (*George T.*)). Again, however, respondent fails to recognize that there was no specific target victim of the alleged threat in the graffiti. Indeed, all of the authority on which respondent relies, where a threat of violence was upheld as a "true threat," involved threats intended for a specific and particular victim or group of victims. (See RB 267-270, discussing *People v. Lowery* (2011) 52 Cal.4th 419, 421 [defendant threatened to kill a named man who had accused defendant and his wife of stealing \$250,000], *In re M.S.* (1995) 10 Cal.4th 698, 708-709 [minor convicted of threatening to kill a specific group of named victims], and citing *Toledo, supra*, 26 Cal.4th at pp. 224-225 [defendant made death threat to his wife], *United States v. Stewart* (9th Cir. 2005) 420 F.3d 1007, 1011 [defendant threatened to murder named judge], and *United States v. Martin* (10th Cir. 1998) 163 F.3d 1212, 1215-1216 [defendant convicted of threatening to murder a named narcotics detective].)³⁵

Respondent relies on *Virginia v. Black* (2003) 538 U.S. 343, where the high court made clear that only threats to particular people or groups are "true threats." The *Black* court stated: "'True threats' encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Id.* at p. 359, citation omitted, emphasis supplied.)

³⁵ Respondent also cites *United States v. Chase* (9th Cir. 2003) 340 F.3d 978, 980-981, where the defendant was convicted of threatening the lives of officers on their way to his home to execute a search warrant. That case, however, did not involve an issue regarding "true threats."

The high court added that while the threat need not actually be carried out, the prohibition protects individuals from the fear that the threatened violence will occur. (*Id.* at p. 360.) This type of “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” (*Ibid.*, emphasis supplied.) There is simply no such specific evidence of a threat to a particular individual here.

Respondent also appears to argue that only threats made as jokes or hyperbole are protected by the First Amendment. (RB 268-269.) While such speech may be protected, respondent provides no authority to support the view that *only* threats made hyperbolically or as jokes are not “true threats.” Rather, in *Toledo, supra*, 26 Cal.4th at pp. 227-228, this Court set out the factors to be considered when determining whether speech, writing or conduct constitutes a “true threat.” Those factors are applicable here (*George T., supra*, 33 Cal.4th at pp. 633-634), and appellant addressed them in detail in his opening brief (AOB 342-346). Respondent chose not to address the *Toledo* factors in any specific way, and appellant will not revisit them here.

For these reasons, respondent’s view that an allegedly threatening writing that actually threatens nobody in particular, and for which there is no evidence that anybody had a reasonable fear for his or her personal or family’s safety, is contrary to the decisions of the high court, this Court’s holdings in *George T.* and *Toledo*, and the Legislature’s definition of what constitutes a punishable threat. To accept respondent’s position would upset the balance that this Court has struck between alleged threats that are protected speech and punishable “true threats.”

4. Testimony That Appellant Was Transformed By His Prior Incarceration Was Improper

Appellant has argued that not only was the graffitied out-of-order sign and the testimony about it improperly admitted as factor (b) evidence, but the trial court further erred by permitting the prosecutor's gang expert, Deputy MacArthur, to use the graffiti as a basis on which to speculate about appellant's mental state. (AOB 347-352.) The error here was of two kinds. First, MacArthur was not qualified to provide expert opinion testimony about appellant's subjective mental state, much less opine that the criminal justice system had transformed him from a "Crip killer mentality" to a killer of "anybody." (49RT 6111-6112.) Second, it was error to allow MacArthur to provide what can only be regarded as evidence of future dangerousness, which is precisely how the prosecutor used MacArthur's speculative testimony in its argument.

Respondent does not address the merits of appellant's argument. Rather, it claims only that the issue is not cognizable. (RB 257.) Respondent is wrong. As discussed in detail above, appellant objected at every turn to the admission of the graffitied out-of-order sign, which provided the basis of MacArthur improper "expert" testimony. Then, when the street-gang expert was asked to opine about "the attitude" of the author of the graffiti, appellant objected again, this time on the grounds that MacArthur's opinion was improper speculation. (49RT 6110.) On this record, the issue is preserved for this Court's review.

5. Appellant Was Prejudiced

The admission of this highly inflammatory evidence prejudiced appellant, denied him due process and a fair penalty trial, and diminished the heightened standards in capital proceedings for reliability in the

determination that death is the appropriate punishment in a specific case. (AOB 352-356.) Respondent has not shown that the error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Rather, respondent attempts to diminish the improper penalty-phase evidence that flowed from the admission of the graffitied out-of-order sign by claiming that “the evidence at issue . . . consists of just *five words* written by appellant.” (RB 272, emphasis original.) One can understand this tactic for minimizing the true impact of this evidence, but it is simply not true and does a disservice to resolution of this issue.

In fact, those “just five words” were the sole subject of MacArthur’s “expert” testimony at the penalty phase, and were the basis of his opinion that appellant had been transformed by his incarceration from a “Crip killer mentality” to a killer of “anybody.” (49RT 6111.) During opening argument, the prosecutor began its discussion of factor (b) by focusing on the graffiti. Then in closing, it used MacArthur’s “anybody killer” view of appellant as the lynchpin of its highly prejudicial future dangerousness argument, claiming among other things that appellant would kill nurses, doctors, prison staff, visitors, and lawyers if not executed. (52RT 6517.)

Respondent also argues that the impact of the graffiti evidence “paled in comparison” to the impact of the Sanchez and Jones murders, as well as appellant’s altercations with other prisoners while in custody. But while the prison altercations certainly constituted aggravating evidence, the prosecutor used the graffiti evidence to allege and argue that appellant had “graduated” and was now a threat to “anybody,” not just other inmates. With regard to the potential impact of the graffiti evidence in comparison to the strength of evidence of the charged homicides, the trial court – which was in the best position to make an assessment – observed that the graffiti

evidence was so inflammatory that it would “overwhelm[]” the evidence of the homicides if admitted at trial, adding: “And I don’t think the case should turn on a piece of paper that the defendant wrote these things on.” (41RT 5393-5394.)

The trial court also said of the graffiti: “It involves a D.A. It involves the sheriff. Or members of the sheriff’s department. It involves a judge. Whether it’s this judge or not, I don’t know. And then the word ‘anybody’? I mean, that really is very, very, very inflammatory.” (41RT 5395.) The trial court was right, and respondent has failed to prove that the erroneous admission of this inflammatory and prejudicial evidence was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

B. Evidence That Appellant Might Escape From Prison

The trial court prejudicially erred by denying appellant’s motion for a mistrial after recognizing that it had erroneously admitted escape evidence stemming from the four alleged jailhouse rules violations. (AOB 356-375.) Appellant maintains that (1) the trial court failed to exercise its discretion in determining whether to grant appellant’s motion, obviating any deference normally due to a trial court’s ruling on a mistrial motion (AOB 365-368);³⁶ (2) a mistrial was required because the harm caused by the inadmissible escape evidence could not be cured (AOB 368-372); and (3) assuming the harm from the escape evidence could be cured, the instruction the trial court gave did not do so (AOB 372-375).

Respondent argues that the trial court did not abuse its discretion by denying appellant’s mistrial motion. (RB 280-281.) In a not-so-subtle

³⁶ Respondent does not address this portion of appellant’s argument, so no reply is necessary on this issue.

attempt to diminish the prejudice resulting from the error, respondent scrupulously avoids using the word “escape” in referring to the inadmissible evidence at issue here. Rather, it refers only to “four noncriminal acts,” and then claims that the prejudicial impact of those acts was minimal because they were neither violent nor criminal, and showed at most what the jury already knew: that appellant was not a model prisoner. (RB 280.)

But a fair reading of the record reveals that the evidence was offered to show much more than appellant was not a model prisoner. The evidence was presented to paint appellant as an escape risk who would kill anybody given the chance. Indeed, the prosecutor argued to the jury that the evidence showed that appellant posed a threat of escape. (47RT 5913, 5914.) Then, five deputy sheriffs took the stand to testify in detail about each incident. They variously told appellant’s jury that appellant was designated as a particularly dangerous inmate; that he was subject to special handling and handcuffing when moved from one place to another; that he was housed in a special security unit and wore a special wristband that identified him as a unique risk of escape; that he had gotten out of his handcuffs and possessed various types of contraband, including handcuff keys; and that the deputies feared him. (AOB 368-374.)

All this was presented as part of the prosecutor’s overarching theory that the jury had to vote for death in order to prevent appellant from escaping and killing again. And while the prosecution presented other aggravating evidence of appellant’s misconduct while in custody, *none* of that evidence suggested appellant was an escape risk. For these reasons and those stated in appellant’s opening brief, the error here was incurable, and the court’s failure to grant a mistrial denied appellant a constitutionally fair penalty determination.

Respondent contends that the trial court's admonishment to the jury cured any potential prejudice resulting from the erroneous admission of the escape evidence. (RB 280-281.) It also argues that appellant's claim fails because there is no indication that the jury did not understand the scope of the instruction, and it is presumed the jury obeyed it. (RB 281.) Appellant disagrees that any admonition could cure the harm for the reasons stated in his opening brief, and that issue is joined.

As to the scope of the admonition given, appellant has not argued that the jury would not have understood it. Rather, appellant contends that even assuming an admonition could have cured the harm, the scope of the admonition itself was deficient because it only addressed the alleged acts of misconduct and was silent as to the extensive accompanying testimony beyond the alleged acts offered to show that appellant was an escape risk. (AOB 372-375.) Respondent does not address this contention; consequently, it stands un rebutted.

**C. The Cumulative Effect Of The Court's Many
Errors Denied Appellant A Fair Penalty
Determination**

Appellant has argued that the cumulative effect of the trial court's penalty errors denied appellant a constitutionally fair and reliable determination that death was the appropriate punishment. (AOB 375-378.) Respondent disagrees, arguing only that there were no penalty phase errors to accumulate with the exception of the improperly admitted escape evidence, which the court told the jury to disregard. Respondent also claims appellant was not entitled to a perfect trial. (RB 282.) No reply to respondent's position is necessary as to these points; the issue is joined.

* * *

XIII

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

Appellant has argued that various features of California's capital sentencing scheme violate the United States Constitution. (AOB 379-396.) Appellant acknowledges that this Court has previously rejected each of these arguments, but urges reconsideration of those prior rulings. Nothing in respondent's brief requires any additional response. The issues are joined.

* * *

XIV

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant maintains that he did not receive a fair trial, and that reversal is required due to the cumulative effect of the errors that occurred at both the guilt and penalty phase proceedings. (AOB 397-399.) Respondent disagrees, arguing that there was no error, that any error was harmless, and the cumulative effect of any errors could not have affected the outcome. (RB 285.) Respondent is wrong. Appellant was unrepresented at his capital trial (Arguments I and II, *ante*), excluded from critical proceedings (Argument III, *ante*), and was not allowed to conduct meaningful jury voir dire, exercise his allocated peremptory challenges, and ensure his penalty-phase jurors were properly death-qualified (Arguments IV-VII, *ante*). The jurors heard a plethora of inadmissible and irrelevant evidence at both the guilt-innocence phase (Arguments VIII-XI, *ante*) and penalty phase (Argument XII, *ante*). Respondent has not proven that the combined effect of these errors was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

The judgment must be reversed.

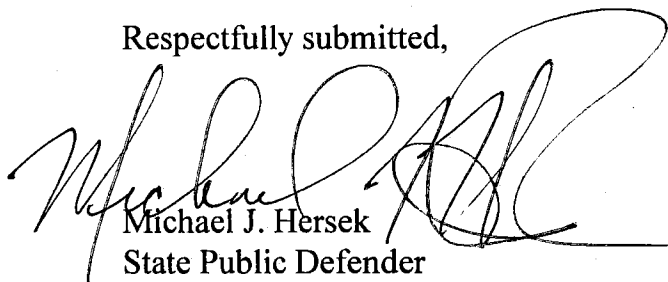
* * *

CONCLUSION

For all the reasons stated above, the entire judgment must be reversed. Should the entire judgment not be reversed, the sentence of death must be reversed.

DATED: June 20, 2014

Respectfully submitted,

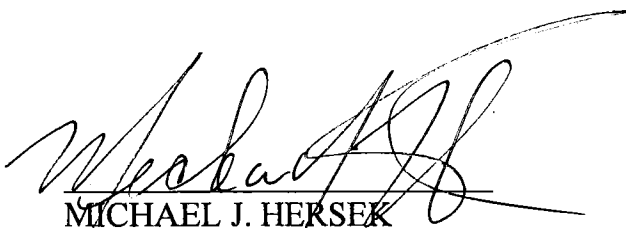


Michael J. Hersek
State Public Defender

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

I, Michael J. Hersek, am the State Public Defender assigned to represent appellant, Anthony G. Bankston, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 46,136 words in length, excluding the tables and certificates.

DATED: June 20, 2014


MICHAEL J. HERSEK
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Anthony G. Bankston*

Cal. Supreme Ct. No. S044739
(Los Angeles Co. Sup. Ct. No. VA007955)

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, CA 94607; and that on May 30, 2014, I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attn: Steve Mercer, D.A.G.
300 South Spring Street
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Maria Arvizo-Knight
Death Penalty Coordinator
Los Angeles County Superior Court
210 W. Temple Street, Room M-3
Los Angeles, CA 90012

Anthony Bankston, #D-02392
CSP-SQ
3-EB-49
San Quentin, CA 94974

Each said envelope was then, on June 20, 2014, sealed and deposited in the United States mail at Oakland, Alameda County, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on June 20, 2014, at Oakland, California.



DECLARANT