IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSEPH ANTHONY BARRETT, Defendant and Appellant.	No. S124131 (Imperial County Sup. Ct. No. CF5733)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Imperial

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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, subargument 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.

I.
THE TRIAL COURT'S REFUSAL TO EXCUSE ALL EMPLOYEES OF THE DEPARTMENT OF CORRECTIONS AS PROSPECTIVE JURORS DEPRIVED APPELLANT OF AN IMPARTIAL JURY AND DUE PROCESS

Appellant has argued that he was deprived of his right to an impartial jury under the federal and state constitutions, as well as under California statutory law. This deprivation resulted from the trial court's erroneous belief that it could only excuse prospective jurors for *actual* bias, as established on a case-by-case basis. The court did not understand that the well-established doctrine of *implied* bias required it to presume bias under extraordinary conditions, and thus never considered whether those conditions were present in appellant's case. As a result of the lower court's misapplication of the law, a correctional officer, from a family of long-time employees of the Department of Corrections (CDC), served on appellant's jury. This juror was impliedly biased by virtue of the prominent role her employer and colleagues played in this case, as well as by the specialized knowledge that such an employee would have about every aspect of an in-prison homicide. (AOB:91-137.)

Respondent argues that the trial court properly denied appellant's repeated requests to excuse all CDC employees because Juror 12 was not impliedly biased. Respondent further argues that appellant's opportunity to raise this issue on appeal was forfeited. (RB:38-51.) Finally, respondent dismisses appellant's claim that his due process rights were also infringed by the trial court's error. (RB:51, fn. 20.) None of these arguments have merit.

A. Appellant Was Deprived of an Impartial Jury.

Respondent contends that this case is governed solely by Code of Civil Procedure section 229, and that it exclusively sets forth the nature of implied bias that applies to trials in the state of California. (RB:48.) Respondent quotes *People v. Ledesma* (2006) 39 Cal.4th 641, 669-670, in which this Court said "Under California law, a juror may be excused for 'implied bias' only for one of the reasons listed in Code of Civil Procedure section 229, 'and for no other.'" Of course appellant argued that CDC employees were impliedly biased under section 229. (See AOB:127-132.) But in any event, *Ledesma* does not say that Sixth Amendment jurisprudence is inapplicable in California. In *Ledesma*, the Court considered, but rejected, the defendant's claim that notwithstanding Code of Civil Procedure section 229, he was denied an impartial jury under the Sixth Amendment because of implied bias. (39 Cal.4th at p. 670.)

"The doctrine of implied or presumed bias has been recognized from our country's earliest days . . . ." (*Conaway v. Polk* (4th Cir. 2006) 453 F.3d 567, 586.) This rule is "so deeply embedded in the fabric of due process that everyone takes it for granted." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 984.)[1] Citing *Clark v. United States* (1933) 289 U.S. 1, the *Dyer* court stated: "The Court there understood – as every court that has dealt with the question has understood – that prejudice must sometimes be inferred from the juror's relationships, conduct or life experiences, without

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[1] Respondent argues that the federal authorities cited by appellant are not binding on this Court. (RB:48.) Decisions of the lower federal courts applying the United States Supreme Court's doctrine on implied bias should be persuasive to the Court, however. (See *People v. Camacho* (2000) 23 Cal.4th 824, 843 [decisions of lower federal courts are "'persuasive and entitled to great weight.'"].)

a finding of actual bias." (151 F.3d at p. 984.)

Respondent nonetheless complains that the United States Supreme Court "has set forth no particular test to determine implied bias." (RB:48.) Appellant disagrees. The test is an objective one: it asks whether the relationship between the prospective juror and the litigation is such that it is highly unlikely that the average person could remain impartial. (See, e.g., *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1112 ["prejudice is to be presumed where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances"]; *Conaway v. Polk*, *supra*, 453 F.3d at p. 587, fn. 21 [same]; *Hunley v. Godinez* (7th Cir. 1992) 975 F.2d 316, 319 ["courts have been inclined to presume bias in 'extreme' situations where the prospective juror is connected to the litigation at issue in such a way that is highly unlikely that he or she could act impartially during deliberations"]; *United States v. Torres* (2nd Cir. 1997) 128 F.3d 38, 45 ["the issue is whether an average person in the position of the juror in controversy would be prejudiced"]; *United States v. Cerrato-Reyes* (10th Cir. 1999) 176 F.3d 1253, 1260-1261, abrogated on other grounds by *United States v. Duncan* (10th Cir. 2001) 242 F.3d 940 [same]; *United States v. Mitchell* (3rd Cir. 2012) 690 F.3d 137, 142 [same].)[2]

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[2] In fact, federal courts have found the high court's pronouncements on the doctrine to be sufficiently unambiguous to constitute "clearly established federal law" as determined by the Supreme Court under the Antiterrorism and Effective Death Penalty Act (AEDPA). (See, e.g., *Brooks v. Dretke* (5th Cir. 2006) 444 F.3d 328, 329 ["We maintain that the doctrine of implied bias is 'clearly established Federal law as determined by the Supreme Court.'"]; *Conaway v. Polk*, *supra*, 453 F.3d at p. 588 ["the (continued...)

Respondent further claims that Juror 12 was not impliedly biased under the federal constitution because there was "no potential here for the type of 'emotional involvement'" that the cases cited by appellant found to be grounds for finding such partiality. Respondent emphasizes that Juror 12 did not work at the prison in which Richmond was killed, did not know the circumstances of his death or any witnesses to be called at trial, and did not know appellant or evince prejudice toward him. (RB:49.)

Respondent is conflating actual bias with implied bias. If Juror 12 had personally known appellant, the circumstances of the charged offense, or the witnesses, she likely would have been excused for *actual* bias as many of her fellow CDC employees were. (See, e.g., AOB:95-98.) Certainly if Juror 12 had acknowledged prejudice against appellant she would not have sat in judgment of him. But the bias in this case did not arise from Juror 12's conscious feelings towards appellant. Rather, it must be presumed as a matter of law because an average person in Juror 12's circumstances would have been unlikely to remain impartial. Bias is imputed when the juror's connection to the case is one step removed from personal knowledge but close enough that an average person – even with good intentions – would be unlikely to overcome it. "That men will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally is a fundamental fact of human character." (*United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71-72.) Social science has empirically proved the truth of this observation. (See, e.g., Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L.Rev.

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[2](...continued)
implied bias principle constitutes clearly established federal law as determined by the Supreme Court"].)

1124, 1126 ["researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects."]; Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias* (2012) 44 Conn. L.Rev. 827, 830 [implicit bias "affects the most important functions of jurors: evaluation of witnesses and evidence, evaluation of behavior, recall of facts, and judgment of guilt."].)

Juror 12's employer, the CDC, played an outsized role in this case. Correctional staff investigated Richmond's death and initiated appellant's prosecution by identifying him as the suspect and referring the case to the District Attorney's Office. The Department directly managed litigation throughout the case involving whether appellant should be shackled during trial, where he should be housed and the conditions of his legal visiting. Although the CDC did not supply the prosecuting attorney, it was a critical part of the prosecution team from beginning to end. (See, e.g., AOB:99-101.) Any CDC employee would have had to think twice before voting to acquit an inmate such as appellant or to convict him of a lesser offense, in the face of the Department's extensive involvement in the prosecution.

In addition, an overwhelming number of CDC employees were witnesses in both phases of trial. Of the witnesses called in the state's guilt phase case-in-chief, 21 of 26 were Department employees. Thirty-one of the penalty phase witnesses were. Moreover, some of them would testify that appellant had assaulted or attempted to assault them. (See AOB:108, fn. 54.) It must be presumed that a correctional officer, who depends on fellow staff for her very life, would be unable to remain impartial when it comes to judging the veracity and accuracy of testimony from so many colleagues. To vote favorably for appellant would have necessarily entailed the rejection of the testimony of numerous correctional staff, a betrayal

which could well leave the juror a pariah among her colleagues.

The other side of this coin is the unlikelihood that a CDC employee could remain impartial when assessing the testimony of inmate witnesses. The voir dire in this case made clear that prison staff had reason to fear assault from inmates. (AOB:111-112; see, e.g., *U.S. v. Allsup*, *supra*, 566 F.2d 68 [bank tellers have reason to fear violence from robbers so tellers working at different branch of the bank that was robbed were impliedly biased].) Several inmates testified in this case, including, of course, appellant. And, the prosecution presented evidence at both phases of trial that appellant had assaulted or attempted to assault his jailers.

Although Juror 12 did not work at Calipatria or know appellant or other witnesses, these circumstances do not change the conclusion that bias should be presumed here as a matter of law. Much like the bank tellers in *United States v. Allsup*, *supra*, employees of Centinela prison would – for all the reasons explained above – be substantially similar to employees of its sister prison Calipatria. Any juror employed by the CDC, particularly within the same county, would be constantly wrestling with their self interest and concern for the possible consequences of a verdict that was anything other than pro-prosecution.

Further, a CDC employee, like Juror 12, would likely have had specialized knowledge of, and opinions about, many facts at issue in the guilt phase, including whether inmates were likely to save kites or write incriminating admissions in them, whether inmates lie for each other or against each other, the physical properties of the cells and everything in them, whether talking through vents was feasible, whether fishing was common and whether large items such as knives were able to be fished, whether inmates in a neighboring cell could hear a fight or assault or an

inmate yelling for help, whether staff would be able to hear the same, whether a cell mattress could easily be used as a shield, and what kinds of items could be flushed down a cell toilet.

The rare circumstances which support a legal determination of implied bias are present here. The fact that correctional officers are not categorically exempt from serving on juries under the Code of Civil Procedure is irrelevant. (See RB:46-47.) Appellant is not arguing that CDC staff should *always* be excused from jury duty, but rather that when an in-prison homicide is charged, the facts may be such that bias must be presumed. That is the case here.

As appellant has demonstrated, the record shows that the trial court did not understand the doctrine of implied bias and therefore did not consider whether the circumstances of appellant's case demanded a presumption of partiality. (AOB:113-116.) Respondent does not address this portion of appellant's claim. Indeed respondent claims that *this* Court need not decide whether all CDC employees were impliedly biased because only Juror 12 actually served. (RB:46, citing *People v. Avila* (2006) 38 Cal.4th 491, 538-539.) Appellant's case is unlike *Avila*, however, because it raises a claim of implied bias that applies equally to a large group of prospective jurors. But in any event, respondent does not dispute that if the Court finds that Juror 12 was impliedly biased, appellant is entitled to a new trial.

Appellant has also argued that CDC employees should have been found impliedly biased under California Code of Civil Procedure section 229. Appellant relied on *People v. Terry* (1994) 30 Cal.App.4th 97, which held that employment by the prosecuting agency created implied bias under section 229. (AOB:127-132.) Respondent addressed this argument in a

footnote, arguing that *Terry* is distinguishable because in appellant's case Juror 12 did not work for the agency prosecuting appellant. (RB:49, fn. 19.) But although the CDC was not the "prosecuting agency" in the strictest sense, it was an integral part of the prosecution team. (See *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315, 1317 [prosecution team includes both investigative and prosecutorial agencies and CDC clearly was an investigatory agency in appellant's case].)

B. The Issue Has Not Been Forfeited.

Respondent says appellant has forfeited his ability to challenge the partiality of Juror 12 on appeal because he failed to exhaust his peremptory challenges and express dissatisfaction with the jury after it was selected. (RB:42-45.) Respondent acknowledges that appellant argued that what is now invoked as a forfeiture rule "actually arose as a factor in prejudice assessment . . . ." (RB:43; see AOB:120-125.) Yet respondent does not actually contradict this argument; appellant stands by it.

Appellant also asserted that the unique facts of his case present an exception to the forfeiture rule. (RB:43; AOB:125-127.) Respondent disagrees, claiming that appellant had "several options" when he was faced with one impliedly biased juror in the jury box, seven similarly biased prospective jurors left in the dwindling venire, and only six challenges left. (RB:44.) Respondent claims that appellant could have continued to use his remaining peremptories to remove as many of the remaining CDC personnel as possible and, if still dissatisfied, ask the trial court for additional challenges. (RB:44.) First, even if appellant had used all his remaining peremptories against CDC jurors, he could not strike all of them. Second, the trial court had already made it abundantly clear that it would not excuse for cause any jurors who were not *actually* biased. Trial counsel

therefore had no reason to believe the court would afford him additional peremptory challenges if he used all of his remaining challenges to strike CDC jurors.

In short, appellant had used *half* of the fourteen peremptory challenges he exercised in an effort to mitigate the effects of the trial court's failure to understand and apply the doctrine of implied bias. Respondent's position that appellant should have rolled the dice and used his remaining challenges in the hopes of ending up with a jury free of corrections personnel is simply unreasonable.

In *Dyer v. Calderon*, *supra*, 151 F.3d 970, 985, Judge Kozinski emphatically stated: "No opinion in the two centuries of the Republic . . . has suggested that a criminal defendant might lawfully be convicted by a jury tainted by implied bias." Appellant was tried by such a jury.

C. Appellant's Due Process Rights Were Also Violated.

Appellant also argued that his due process rights were violated because the trial court's misunderstanding of implied bias undermined his ability to intelligently exercise his peremptory challenges. (AOB:132-137.) In a footnote, respondent contends this claim should be "summarily rejected" because the trial court did not err in denying the defense motion to exclude all CDC employees from the jury pool. (RB:51, fn. 20.)

Appellant has already explained why the trial court's ruling on appellant's motion was erroneous. This Court has reaffirmed the essential role peremptory challenges play in guaranteeing a defendant's right to a fair trial. In *In re Boyette* (2013) 56 Cal.4th 866, the Court said:

> [T]he peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury. . . . The denial of the right to reasonably exercise a peremptory challenge, be it by

> either the trial court or a juror through concealing material facts, is not a mere matter of procedure, but the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction.

(56 Cal.4th at p. 889, internal quotation marks and italics omitted.)

Appellant was deprived of his ability to intelligently use this vital safeguard to select an impartial jury by the trial court's failure to understand that bias could be, and in appellant's case should have been, imputed by law. His conviction and sentence should be reversed.

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II.

THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S *WHEELER* MOTION DENIED HIM OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS

The parties agree that this appeal presents a stage three case under *Batson v. Kentucky* (1986) 476 U.S. 79. (See RB:56; AOB:146.) Thus, the question for this Court is whether appellant has proved, by a preponderance of the evidence, that the removal of prospective juror Lisa B. (hereafter L.B.) was substantially motivated by discriminatory intent. (See AOB:140, 146, citing *Johnson v. California* (2005) 545 U.S. 162, 170-171; *Snyder v. Louisiana* (2008) 552 U.S. 472, 485.) The critical question is the persuasiveness of the prosecutor's justification for the peremptory challenge. (AOB:146, citing *Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339.)

A. The Prosecutor's Failure to Question L.B. About Her Views on Judging Others Is Indicative of Pretext.

As explained in the opening brief, the totality of the circumstances indicates that the prosecutor's stated reason for dismissing L.B was pretextual. (AOB:147-153.) To justify his strike of the prospective juror, the prosecutor claimed that he was concerned about her questionnaire responses to questions 59 and 68, which reflected some ambivalence about judging others. (AOB:145; 46RT:5626.) Yet he did not bother to ask L.B. about these views during either individual or general voir dire. His failure to do so smacked of pretense. (See AOB:153, citing *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1192; *Miller-El, supra*, 545 U.S. at p. 244.)

Respondent argues that it is understandable that the prosecutor did not ask L.B. about her responses to questions 59 and 68 during individual questioning because the issue they addressed was outside the scope of death

qualification. (RB:57.) Although acknowledging that the parties frequently strayed beyond the confines of *Hovey* voir dire,[3] respondent asserts that this occurred only in later proceedings and not during the first day of questioning when L.B. was called. (RB:57-58.)

Respondent's argument must be rejected. The record shows that questions asked of prospective jurors on the first day of individual voir dire (October 9, 2003) covered a gamut of issues.[4] More importantly, however, asking L.B. about her views on judging others *was* within the scope of death qualification. Respondent avers that the only relevant inquiry during *Hovey* proceedings is to determine a prospective juror's views about the death penalty in the abstract, and whether she or he would vote for life without the possibility of parole (LWOP) regardless of the evidence because of opposition to capital punishment. (RB:57.) Respondent then

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[3] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

[4] For example, Claudia A. was asked by the prosecutor whether she could follow the beyond-a-reasonable-doubt instruction. (28RT:3013-3014.) Alberto A. was asked if his belief that a defendant should testify in his own behalf would impact the death penalty decision. (28RT:3022-3023.) Juror 8, whose questionnaire indicated that she was strongly in favor of the death penalty, was questioned about her qualms about actually imposing it herself. (28RT:3030-3036.) Marcos A. was asked whether being a CDC employee and CCPOA union member would affect his death penalty decision-making. (28RT:3043-3045.) Raul A. was asked about his belief that appellant was guilty. (28RT:3055-3056.) Allen A. was asked whether he would have trouble being fair in light of his work at the prison and the fact he knew so many of the witnesses. (28RT:3066-3069.) Saul A. was asked whether his experience as a correctional officer would influence his decision-making in the case. (28:RT:3073-3075.) Maghen B. was questioned about her experience as a witness in her former husband's murder trial. (28RT 3105-3106.) The prosecutor asked about Marcela B.'s potential hardship. (28 RT 3112-3114.) Clynton J. was asked about his belief that inmates lie. (28 RT 3118-3119.)

reasons that "A prospective juror's views on judging others is [] not part of a *Hovey* inquiry." (RB:57.)

In arguing that the scope of *Hovey* voir dire is very narrow, respondent relies on language in *People v. Davenport* (1995) 11 Cal.4th 1171, 1203, which in turn quotes *People v. Clark* (1990) 50 Cal.3d 583, 597, stating that the purpose of *Hovey* proceedings is solely to discern automatic life jurors. (RB:57.) This same language was cited by respondent in *People v. Cash* (2002) 28 Cal.4th 703 in arguing that the trial court did not err in precluding defendant from asking prospective jurors whether they would automatically vote for the death penalty in a case involving more than one murder. In *Cash*, the Court rejected such a narrow view:

> Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. . . .

(28 Cal.4th at pp. 721-722.)

While emphasizing that "[q]ualification to serve on a capital jury is not limited to determining whether the person zealously opposes or supports the death penalty in every case," this Court has declared: "At bottom, capital jurors must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular

case." (*People v. DePriest* (2007) 42 Cal.4th 1, 20.) Here, L.B.'s beliefs about passing judgment were indisputably related to her ability to follow the law, weigh sentencing factors, and choose the appropriate penalty in appellant's case. The prosecutor should have inquired about her responses to questions 59 and 68 during *Hovey* voir dire if he sincerely harbored concerns about her ability to serve.

In this case, the prosecutor not only failed to explore L.B.'s views on judging others in *Hovey* proceedings but also during general voir dire. (See AOB:143-144; 46RT:5616-5618.) Respondent suggests that the prosecutor's failure to question L.B. about her responses on questions 59 and 68 during general voir dire was not indicative of pretext but rather reflected the limited time the parties had for such questioning. (See RB:58, 62.) Although the time for general voir dire was not unlimited, the prosecutor chose to question L.B. about her written response to a question about self-defense. (AOB:144; 46RT:5617-5618.) If the prosecutor's professed intention to challenge L.B. for cause based on her answers to questions 59 and 68 was sincere, he would have asked her about her views on judging others rather than on self-defense.

B. Comparative Juror Analysis Supports Appellant's Claim.

Appellant has shown that although L.B. was struck allegedly because she expressed in her questionnaire some concern about imposing judgment, others who did so as well were permitted to serve. Specifically, Jurors 8 and 12, and Alternate Juror 4, expressed similar qualms but were not challenged by the prosecutor. (See AOB:153-158.)

Respondent disagrees, claiming that these jurors had "significant distinctions" from L.B. (RB:60.) According to respondent, Juror 8 expressed "some reluctance about imposing the death penalty," but "no

reservation about rendering judgment on someone." (RB:60.) Respondent claims that Juror 12 gave no indication she would have difficulty in judging someone. (RB:60-61.) Although acknowledging similarities between L.B. and Jurors 8 and 12, respondent contends that L.B. was the only one of them to express reservation about judging others. (RB:61.)

Respondent is incorrect. Although Juror 8 indicated on her questionnaire that she supported the death penalty, during *Hovey* voir dire she also said "I don't know if I could actually bring myself to decide a person's life or death." (28RT:3030.) Thus, her qualms were not about capital punishment but rather about her ability personally to impose the judgment on another. Similarly, Juror 12 expressed reservations about rendering judgment when she stated in her questionnaire that, although neutral on the death penalty, "I always wondered if this was my place to make such a permanent decision." (See AOB:154; 29CT:8037, 8038.) Again, her reservations were not based on any abstract opposition to capital punishment but rather on her own doubts about whether she herself could impose such a judgment on another human being. These jurors were thus materially similar to L.B., in that they were not opposed to the death penalty as a punishment but wondered if they personally could render a judgment of death.[5]

Of course as to L.B., the record is truncated because the prosecutor did not choose to inquire into whether any hesitancy to judge others would

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[5] Appellant further noted that Alternate Juror 4 was comparable to L.B. (AOB:156, fn. 87.) As with Jurors 8 and 12, respondent asserts that Alternate Juror 4 had no qualms about judging others. (RB:61, fn. 26.) Appellant believes that, as with Jurors 8 and No. 12, the record supports his characterization regarding the alternate.

impair her ability to bring back a sentence of death in an appropriate case. But to the extent she was asked, L.B. firmly declared that she could make the necessary decision. When defense counsel asked whether she would automatically vote for LWOP, L.B. responded, "No, no. I mean, you have to know the full circumstances behind any situation so I can't honestly sit here and say in the future I would vote one way or the other. No, I can't say that." (28RT:3091.) Nothing in this response suggested that L.B. would be unable to bring back either a death or life verdict because of a preference not to be the one responsible for such a decision.

Moreover, like Jurors 8 and 12, L.B.'s initial doubts were nuanced, not categorical. When asked in question 68 whether she had religious or moral feelings that would make it difficult or impossible to sit in judgment of another, L.B. wrote: "Not quite sure. Have not been able to define my own thoughts regarding being able to pass judgment. I know that I wouldn't like to be responsible in that position." (7CT:1836.) When asked about her feeling on jury service, L.B. gave a qualified answer: ". . . I would not like the responsibility to have to do that to another person. I have never had to serve on a jury before so this is my unbiased opinion as I see it now." (7CT:1833.) But certainly her later verbal response during *Hovey* voir dire that she would consider all of the circumstances before voting one way or the other gave the prosecutor no reason to believe that she was less desirable as a juror than Jurors 8 and 12.

C. Substantial Evidence Does Not Support the Trial Court's Ruling.

In his opening brief, appellant argued that the trial court failed to make a sincere and reasoned evaluation of the prosecutor's justification for exercising a peremptory challenge against L.B., and that the denial of

appellant's *Wheeler* motion was not supported by substantial evidence. (AOB:158-159; *People v. Wheeler* (1978) 22 Cal.3d. 258.)

Respondent argues otherwise, maintaining that "because the prosecutor's reason for striking L.B. was not 'inherently implausible,' and was, in fact, based on accepted trial strategy, and was supported by the record, the trial court's finding is entitled to deference." (RB:62.) Respondent is wrong, however, because to the extent that the trial court engaged in *any* analysis of the issue before accepting the prosecutor's justification, that analysis was flawed. As set forth in the opening brief, defense counsel challenged the prosecutor's purported reason for striking L.B. as pretextual because the prosecutor did not raise it during *Hovey* proceedings. (AOB:145-146; 46RT:5627.) By mistakenly concluding that this professed concern about L.B. could not have been raised during death qualification, the trial court failed to consider all of the relevant circumstances in determining whether the prosecutor's justification was discriminatory. The court's decision is therefore entitled to no deference.

Finally, appellant's case bears some significant similarities to the *Crittenden* case, in which the Ninth Circuit Court of Appeals recently affirmed the district court's determination that the prosecutor's peremptory strike of the single African-American prospective juror to be seated in the box was substantially motivated by race. (*Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998.) In *Crittenden*, the prosecutor had challenged prospective juror Casey for cause because she generally opposed the death penalty. However, she had also said her beliefs would not prevent her from following the law and voting for death in the appropriate case. The challenge was denied and the prosecutor later used a peremptory challenge to remove her. The federal district court found purposeful discrimination,

emphasizing that the peremptory challenge against Ms. Casey could not be explained by her death penalty views or other race-neutral factors and that she was very similar to two seated white jurors who also expressed unfavorable views of capital punishment. The court further found that the prosecutor's meritless for-cause challenge of Casey was additional evidence of racial motivation. (*Id.* at pp. 1012-1018.) In appellant's case, similar factors lead to the conclusion that L.B.'s excusal was racially motivated. L.B. had no race-neutral qualities that would explain her removal, and she was very similar to Jurors 8 and 12 – except for her race. (See AOB:153-156.) The prosecutor's professed intention to challenge L.B. for cause was further evidence of discrimination since her unequivocal *Hovey* voir dire responses made it clear that a challenge would be meritless. (See AOB:145.) In appellant's case, as in *Crittenden*, these circumstances compel a finding of purposeful discrimination. Accordingly, appellant's conviction and sentences should be reversed.

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III.

THE PROSECUTOR'S ETHICAL MISCONDUCT DENIED APPELLANT OF A FAIR TRIAL AND OTHER CONSTITUTIONAL RIGHTS

The opening brief demonstrates that the prosecutor improperly engaged appellant in a conversation in front of a reporter in the courtroom during a break in the guilt phase. This contact occurred when defense counsel was not present and led to the publication of an acknowledgment from appellant that he had committed a prior murder, an offense that the defense had assiduously sought to keep out of the guilt phase proceedings. The misconduct violated ethical rules as well as appellant's state and federal constitutional rights. (AOB:160-177.)

Respondent does not dispute appellant's contention that the prosecutor's ex parte communication with him violated rules 2-100 and 5-120 of the California Rules of Professional Conduct. (AOB:168-174; see generally RB:62-68.) Rather, respondent contends that the prosecutor's actions did not constitute a due process violation and, in any event, were nonprejudicial. (RB:62-69.) Respondent's argument is not persuasive, for the reasons set forth below.

In arguing that appellant's due process rights were not violated, respondent relies on *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252. (RB:67-68.) Citing *Rochin v. California* (1952) 342 U.S. 165, 168, the *Morrow* court explained that "[t]he power of a court to dismiss a criminal case for outrageous conduct arises from the due process clause of the United States Constitution." (30 Cal.App.4th at p. 1259.) In *Morrow*, the prosecutor had an investigator listen in for a few minutes on a conversation between the defendant and his attorney in the courtroom

holding area. (30 Cal.App.4th at p. 1255.) The reviewing court found that Morrow's right to due process had been infringed, stating: "[t]he eavesdropping occurred inside a courtroom and was orchestrated by the prosecutor, an officer of the court." (*Id.* at p. 1260.)

Respondent argues that the misconduct in appellant's case is "far removed" from the egregious behavior in *Morrow*. (RB:68.) It is not, however. Hours before the improper conversation occurred, defense counsel had expressed concern that articles were being published with inflammatory and prejudicial information relating to the case; he emphasized reports that appellant had attacked a sleeping man, as he was alleged to have done in the capital case. (AOB:162; 49RT:5956.) Despite this concern, the prosecutor confronted appellant later that day with details of the prior killing in front of a journalist reporting on the case. The prosecutor's provocative statement, sure to elicit a response, was made inside the courtroom during a break in the proceedings when defense counsel were not present and appellant had no ability to leave the room because he was shackled to the floor. The prosecutor also knew that the trial court had issued a "gag" order that prohibited the parties from discussing the case with the press. (See AOB:160-168.) This misconduct is of a piece with that committed in *Morrow*.

Morrow also supports appellant's argument that the misconduct in his case violated other constitutional rights as well. In *Morrow*, the appellate court emphasized that the eavesdropping violated the defendant's Fifth Amendment privilege against self-incrimination, Sixth Amendment right to counsel, and corresponding rights under the California Constitution, in addition to his due process rights. (30 Cal.App.4th at p. 1259.) In appellant's case, the prosecutor's engagement with him while his attorneys

were absent, and the resulting elicitation of a damaging statement, violated his Fifth and Sixth Amendment rights. (See, e.g., *Miranda v. Arizona* (1966) 384 U.S. 436 [5th Amend.]; *Maine v. Moulton* (1985) 474 U.S. 159 [6th Amend.]; *United States v. Morrison* (1981) 449 U.S. 361 [6th Amend.]; *United States v. Danielson* (9th Cir. 2003) 325 F.3d 1054 [6th Amend.].)

A defendant's right to counsel must be rigorously guarded. *Moulton* makes clear that the prosecutor has "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." (*Maine v. Moulton*, *supra*, 474 U.S. at p. 171.) In *Moulton*, the co-defendant met with the defendant ostensibly to discuss trial strategy for their pending charges while wearing a monitoring device for the police. This "knowing exploitation by the State of an opportunity to confront the accused without counsel being present" violated Moulton's Sixth Amendment protection. (*Id.* at p. 176.) In appellant's case, the prosecutor knowingly exploited an opportunity to confront appellant, by making a provocative statement to him when his counsel were not present.

Respondent further relies on *Barber v. Municipal Court* (1979) 24 Cal.3d 742, and *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, to argue that the misconduct in this case was not outrageous. (RB:67-68.) But these cases actually support appellant's claim. In *Barber*, an undercover police officer participated in defense attorney-client meetings. Emphasizing that dismissal of charges was warranted regardless of whether the officer had gleaned confidential information, the Court stated:

> Whether or not the prosecution has directly gained any confidential information which may be subject to suppression, the prosecution in this case has been aided by its agent's

conduct. Petitioners have been prejudiced in their ability to prepare their defense. They no longer feel they can freely, candidly, and with complete confidence discuss their case with their attorney. . . . This lack of cooperation, which resulted solely from the intrusion by law enforcement officers in the attorney-client relationship, has resulted in counsel's inability to prepare adequately for trial. . . .

(24 Cal.3d at p. 756.)

In *Boulas*, the defendant hired an investigator without his counsel's knowledge to contact law enforcement about a deal. The police, at the prosecutor's direction, encouraged Boulas to fire his attorney and hire a lawyer acceptable to the district attorney. (188 Cal.App.3d at pp. 425-428.) The appellate court determined that this conduct violated the defendant's right to counsel. It concluded that the prosecution had improperly interfered with Boulas's relationship with his attorney, despite the fact that it was the defendant himself who had approached the police. (*Id.* at pp. 429-430.) It stated:

Our focus in the present case is upon the intentional interference by governmental agents with Boulas's attorney-client relationship. The fact that Boulas and [his investigator] initiated the contact with the authorities is irrelevant to our analysis.

(188 Cal.App.3d at p. 426, fn. 2.)[6]

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[6] Of course appellant does not agree with respondent's claim that he initiated the contact with prosecutor Robinson. Because the trial court denied defense counsel's request to present testimony concerning the

(continued...)

As in *Barber* and *Boulas*, the prosecutor's conduct in this case infringed upon the attorney-client relationship. The prosecutor's communication with appellant outside the presence of his attorneys violated rule 2-100, which as appellant has explained was written to safeguard the attorney-client relationship. (AOB:168-169.) Significantly, this communication was not harmless banter. Rather, the prosecutor made a provocative statement, which garnered a damaging response, in the courtroom while appellant was chained to the floor. Moreover, the prosecutor chose to engage with appellant in front of a journalist reporting on the case for a newspaper. This misconduct intruded upon appellant's right to counsel no less than that in the cases cited by respondent.

The recently-decided *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, also supports appellant's claim that the misconduct committed in his case infringed on his relationship with counsel. In *Velasco-Palacios*, defense counsel was given a transcript of the defendant's interrogation which contained two lines inserted by the prosecutor that made it appear as though he was acknowledging guilt. Nine days later, the prosecutor admitted what he had done, claiming it was a joke. As a result of this conduct and the ensuing litigation, the public defender replaced the attorney representing the defendant with another lawyer in the office. The trial court found that the prosecutor's actions, even if done in jest, constituted outrageous conduct that diluted the protections afforded by the right to counsel and dismissed the charges against the defendant. (*Id.* at pp. 442-444.) The reviewing court upheld the trial court's ruling, finding that

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[6](...continued)
circumstances of the encounter, the record is inconclusive on this fact.

the misconduct directly interfered with the attorney-client relationship. (*Id.* at pp. 446-447.) The trial court was correct, the appellate court stated, in finding that the prosecutor's actions "were outrageous and conscience shocking in a constitutional sense." (*Id.* at p. 447.)

Similarly, in appellant's case the prosecutor's misconduct interfered with the attorney-client relationship and thereby diluted the protections afforded by the right to counsel. Immediately before the challenged conduct occurred in this case, defense counsel remarked on the inflammatory and prejudicial nature of the press relating to the homicide of Mr. Jackson. He further indicated that the defense would contest the media depiction of the killing. (AOB:162; 49RT:5956.) The prosecutor's elicitation of an uncounseled admission by appellant negatively impacted the attorney-client relationship because it limited defense counsel's ability to challenge the circumstances of Jackson's death.

Although respondent does not seek to justify the prosecutor's conduct in this case, she argues that it did not prejudice appellant. (RB:69-69.) *People v. Velasco-Palacios*, *supra*, reaffirms that it is the state's burden to prove that there is no substantial threat of prejudice and that sanctions are unnecessary:

> A defendant's right to counsel is guaranteed by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) In *United States v. Morrison* [*supra*, 449 U.S. at p. 365], the United States Supreme Court held the dismissal of criminal charges is an appropriate sanction when government misconduct results in "demonstrable prejudice or substantial threat thereof" to a defendant's right to counsel. Similarly, California case law supports dismissal as a remedy

> for sufficiently outrageous government misconduct. (See *Morrow v. Superior Court* [*supra*, 30 Cal.App.4th 1252]; *Boulas v. Superior Court* [*supra*, 188 Cal.App.3d 422; *People v. Moore* (1976) 57 Cal.App.3d 437].) "Where it appears that the state has engaged in misconduct, the burden falls upon the People to prove, by a preponderance of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the misconduct. [Citations.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 967 [].)

(235 Cal.App.4th at pp. 444-445.)

Respondent argues that because the exchange between the prosecutor and appellant occurred outside of the jury's presence, there was no prejudice. (RB:68-69.) The trial court took a similar view of the matter. (See AOB:166-167; 57RT:7393.) However, in all of the cases discussed above, the misconduct also took place outside the jury's presence. The trial court's failure to realize that harm may result even when the jurors did not witness the misconduct reflected a fundamental misunderstanding of the law. As a result, its determination that appellant was not prejudiced is not entitled to deference on appeal. (See, e.g., *People v. Brim* (2011) 193 Cal.App.4th 989, 991 [trial court abuses its discretion where it fails to follow applicable law].)

Here respondent cannot prove that there was not a substantial threat of prejudice. The court in *Boulas* recognized that "It is not always easy to compute the effect of governmental tampering with the attorney-client relationship." (188 Cal.App.3d at p. 431.) Thus, courts have found misconduct prejudicial and dismissed charges although the prosecutor's interference with the relationship between a defendant and his lawyer did

not result in receipt of confidential or strategic information. (See, e.g., *Barber v. Municipal Court*, *supra*, 24 Cal.3d at p. 756; *Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1258.) There may be prejudice even when the prosecutor is removed from the case (*Morrow*, *supra*, 30 Cal.App.4th at p. 1256) and where the interference does not deprive defendant of a competent attorney (*Boulas*, *supra*, 188 Cal.App.3d at p. 430) or counsel of choice (*Velasco-Palacios*, *supra*, 235 Cal.App.4th at p. 448). Further, the exclusion of any information obtained as a result of the misconduct may not be a sufficient remedy. (*Boulas*, *supra*, 188 Cal.App.3d at p. 434.) The question is whether the interference has eroded trust between counsel and client or the defense has been prejudiced in its ability to prepare a defense. (*Barber v. Municipal Court*, *supra*, 24 Cal.3d at p. 756; *Velasco-Palacios*, *supra*, 235 Cal.App.4th at p. 448.)

In this case, the prosecutor's conduct both negatively impacted the relationship between appellant and his counsel and impaired the preparation of his defense. The record demonstrates that appellant had difficulty trusting the legal system, of which his attorneys were a part. (See 82RT:9827-9828.) He felt that the attorneys on both sides were engaging in "legal manipulations," although he appreciated that defense counsel were motivated by a desire to save his life. (82RT:9827-9828.) The prosecutor's manipulation of appellant in this instance undoubtedly exacerbated his negative perception of the criminal justice system, which included his own lawyers. Further, it likely acted as a wedge between counsel and client: while counsel was trying to keep certain information away from the jurors, appellant had been goaded into making an admission to the prosecutor, thereby eroding trust on both sides. (See AOB:476; 82RT:9865; see also *Velasco-Palacios*, *supra*, 235 Cal.App.4th at p. 448.)

The misconduct also hindered preparation of the defense. Appellant's attorney stated early on that they planned on disputing the circumstances of the Jackson prior homicide. (See AOB:162; 49RT:5956.) Indeed, counsel sought to keep out evidence of the confession appellant made to this offense years earlier when he was a teenager. (46CT:12959-12962.)[7] This of course gave the prosecutor an incentive to bait appellant into a fresh admission that would tie defense counsel's hands.

Finally as to prejudice, this Court should not discount the possibility that one or more of the jurors saw the report of appellant's statement about the prior homicide. (See AOB:175-176.) Although the jurors denied to the trial court that they had read the article, such denials are no guarantee that they did not. Empirical evidence tells us that, under questioning by a court, jurors tend to say what they believe the judge wants to hear, rather than "what they truly [think] or [feel] about an issue." (Jones, *Judge-Versus-Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor* (1987) 11 Law & Hum. Behav. 131, 143; see also Balach, et al., *The Socialization of Jurors: The Voir Dire As A Rite Of Passage* (1976) 4 J. Crim. Just. 271, 278 [in a study of over 2,000 actual voir dire responses, researchers found only two instances in which a juror failed to give the response expected].) The jurors in appellant's case knew that to admit they had read the paper was a violation of their oath. Under these circumstances, it is naive to expect that they were all candid in their reply to Judge Zimmerman.

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[7] As argued elsewhere in this brief, there is reason to question the reliability of this confession including the lack of evidence that *Miranda* warnings were properly administered to appellant and the fact that appellant was only sixteen years old at the time. (See Arg. XVI.)

As to remedy in this case, respondent asserts that dismissal of all charges was not warranted under the present circumstances. (RB:68.) However, appellant advanced a variety of appropriate remedies at trial. (See AOB:166, 177.) These included, as an alternative to dismissing all charges, striking all of the death penalty allegations, striking the prior murder special circumstance, and disqualifying prosecutor Robinson and/or the Imperial County District Attorney's Office. (AOB:166; 45CT:12668-12669; 57RT:7395.) As appellant has stated, the sanctions appropriate for such misconduct are sui generis and may be tailored to the particular harm caused. (AOB:171, citing *Morrow*, *supra*, 30 Cal.App.4th at p. 1263, fn. 4.)

If this Court concludes that dismissing all charges is not necessary, appellant asserts that striking the prior murder special circumstance is a particularly appropriate sanction here. This remedy would provide a powerful deterrent to prosecutors engaging in such conduct in the future. Several courts have emphasized the appropriateness of fashioning consequences that will deter future misconduct. In *Velasco-Palacios*, *supra*, the court of appeal recognized that such sanctions not only vindicate the rights of a criminal defendant but also "serve[] as a potent deterrent to government misconduct." (235 Cal.App.4th at p. 451; see also *Barber*, *supra*, 24 Cal.3d at p. 759 [merely excluding evidence obtained by misconduct is "inadequate since there would be no incentive for state agents to refrain from such violations"]; *Morrow*, *supra*, 30 Cal.App.4th at p.1263 [despite previous warnings against misconduct, "some prosecutors do not seem to be listening"].) In addition to the deterrent value, striking the prior murder special circumstance is a fair and measured response to the misconduct committed in this case because it was directly related to the

validity of this allegation. The prosecutor's conduct limited defense options in challenging the prior murder evidence; appellant's proposed remedy would preclude the state from benefitting from its own wrongdoing.

The misconduct here calls for a meaningful response. In addition to the incident in front of the reporter, the prosecutor engaged in provocative behavior throughout the trial, goading appellant during his testimony at both phases of trial as well as during argument. (See AOB:306-309; 469-477.) Dismissing the prior murder special circumstance and preventing the state from introducing evidence of it in a penalty retrial would both remedy the violation of appellant's constitutional rights and would deter future misbehavior.

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IV.

THE TRIAL COURT'S ERRONEOUS APPLICATION OF EVIDENCE CODE SECTION 1103(B), WHICH PERMITTED THE PROSECUTOR TO ADDUCE MULTIPLE INSTANCES OF WEAPONS POSSESSION AND ASSAULT TO PROVE APPELLANT HAD A VIOLENT CHARACTER, PREJUDICIALLY VIOLATED HIS STATUTORY AND CONSTITUTIONAL RIGHTS

In this case, appellant testified about his personal knowledge of Thomas Richmond's Ad Seg rules violations in order to illuminate his (appellant's) own state of mind. This evidence was critical because it tended to disprove the state's theory of motive, which was that appellant killed Richmond because he knew that his cellmate had cooperated with prison authorities. The testimony supported the defense contention that appellant thought Richmond was a "good wood" and therefore trusted him. It was not offered to prove that appellant believed Richmond was likely to attack him because he had a violent character.

The prosecutor, who did not succeed in getting evidence of appellant's in-prison misconduct admitted directly, finally convinced the judge to switch gears in the middle of appellant's testimony. The trial court indicated that irrespective of the defense purpose in eliciting appellant's personal knowledge of Richmond's in-prison misconduct, the evidence had the effect of showing Richmond's propensity for violence. The court rejected repeated requests by the defense to give the jury a limiting instruction explaining that the evidence could not be used to find that Richmond had a violent character. The prosecutor was then allowed, pursuant to Evidence Code section 1103, subdivision (b) (hereafter section 1103(b)), to cross-examine appellant about eleven incidents of assault and weapons possession occurring both before and after Richmond's death.

The trial court's ruling constituted a fundamental misapplication of section 1103 which violated appellant's statutory and constitutional rights and severely prejudiced him. (AOB:178-235.)

Respondent asserts that any time evidence of a victim's violent conduct is adduced, for whatever purpose, 1103(b) is triggered. (RB:69-89.) This construction of section 1103 is contrary to the plain language of the statute as well as to its legislative history.

A. The Trial Court Erred Because the Defense Did Not Introduce Character Evidence That Could Be Rebutted Under Evidence Code Section 1103, Subdivision (a).

1. This Case Presents a Narrow Question of Law.

Appellant and respondent agree on several important points relating to whether the trial court erroneously admitted evidence of appellant's past misconduct. First, it is undisputed that Evidence Code section 1103 does not prevent litigants from using evidence of past misconduct for non-character purposes. Respondent acknowledges that "enactment of Evidence Code section 1103 did not eliminate a defendant's ability [to] introduce evidence of a victim's past solely to establish the defendant's state of mind. . . ." (RB:75.) Second, the parties largely seem to agree that the defense sought to use evidence of Richmond's prior conduct only to prove appellant's state of mind. In the body of the reply brief, respondent does not assert that appellant actually put forward the evidence in order to demonstrate Richmond's propensity for violence. (See RB:74-77.)[8] Third, there is agreement that the jury was never instructed that it could consider

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[8] Respondent alludes to such an argument in a footnote, during a discussion of the jury instructions relating to this evidence. As appellant discusses *post*, the portions of the record cited therein do not support respondent's assertion. (See fn. 10, *post*.)

the evidence introduced for the purpose of determining whether Richmond had a violent nature and was therefore acting in conformity with that nature on the night of his death. (See generally RB:81-87.)

Instead, the disagreement between the parties is focused on what "opens the door" to evidence of a defendant's prior violent conduct under subdivision (b) of section 1103. Respondent argues that 1103(b) was triggered *despite* the fact that the defense did not adduce evidence of past acts by Richmond to prove his propensity for violence. Respondent states: "[N]otwithstanding Barrett's attempt to use the evidence of Richmond's prior violent acts to show his state of mind, the evidence was plainly probative of the victim's propensity for violence under Evidence Code section 1103." (RB:77.) Respondent contends that "there is no separate right to introduce such evidence *unencumbered* by the provision of Evidence Code section 1103 permitting the prosecution to offer similar evidence in rebuttal." (RB:75-76.) The question presented here – whether section 1103(b) is triggered by the use of a victim's misconduct to prove something other than disposition or propensity – is a legal one. This Court reviews questions of law de novo. (*People v. Louis* (1986) 42 Cal.3d 969, 986.)

2. The Plain Language and Legislative History of Section 1103 Support Appellant's Claim That Subdivision (b) Is Triggered Only When the Defendant Presents Evidence of the Victim's Character.

The plain language of section 1103 makes clear that subdivision (b) applies only when a defendant has presented evidence of the putative victim's violent character to prove that he acted in conformity with that character. (See AOB:197.) This common-sense understanding arises from

considering Evidence Code sections 1101 and 1103 in conjunction with each other, as well as 1103(b)'s incorporation of that section's subdivision (a).

Evidence Code section 1101, subdivision (a) generally prohibits the use of character evidence to prove conduct on a particular occasion. Section 1103 is an exception to section 1101(a). (Evid. Code, § 1101, subd. (a); see also *People v. Bryant* (2014) 60 Cal.4th 335, 406.) Section 1103, subdivision (a)(1), permits the admission of evidence of the victim's character, notwithstanding section 1101, if it is "[o]ffered by the defendant to prove conduct of the victim in conformity with" that character. If the defendant chooses to adduce evidence of the victim's character for violence under subdivision (a) of section 1103, however, subdivision (b) then permits the prosecution to rebut that evidence with violent acts committed by the defendant to prove his violent character:

> In a criminal action, evidence of the defendant's character for violence or trait of violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant *under paragraph (1) of subdivision (a)* . . . .

(Evid. Code, § 1103, subd. (b), italics added.)

Section 1103, subdivision (b)'s reference back to subdivision (a)(1) makes it abundantly clear that (b) applies only when a defendant has used

evidence of the victim's prior violence to prove that he (the victim) acted in conformity with his violent character at the time of the charged offense. Respondent does not explain how the plain language of section 1103 can be read any other way. (See generally RB:74-77.)

Appellant's reading of section 1103, subdivision (b) is also supported by its legislative history. As previously noted, the provision was added in 1991. (AOB:196, citing *People v. Fuiava* (2012) 53 Cal.4th 622, 696.) Although the history of this area of California law is a bit convoluted, the purpose of subdivision (b), as demonstrated below, was to allow the prosecution to counter evidence of a supposed victim's propensity for violence with evidence of the same propensity in the defendant.

Under common law in California, a defendant could use reputation evidence to establish a victim's character for purposes of proving that the victim acted in conformity with that character. But he generally could not adduce evidence of specific instances of the victim's past conduct to prove that character. (Dep. Att. Gen. Eugene Kaster, mem. to Senior Asst. Att. Gen. Allen Sumner re 1990 Proposed Leg.-Victim's Violent Character, Sept. 6, 1989, pp. 1-2 [hereafter Kaster mem.].) An exception to this rule existed where a defendant claimed self-defense. Then, specific acts of violence by the victim were admissible if they "were known to the defendant and the evidence tended to prove the defendant's fear." (*Id.*, at p. 2, fn. 2, emphasis in original.) Also admissible were violent acts or threats directed toward the defendant himself. (*Ibid.*)

In 1965, the Evidence Code was adopted. Section 1103 changed existing law by permitting the introduction of specific instances of the victim's prior conduct to establish his character when his propensity to act in conformity with it was at issue. (Kaster mem., *supra*, at pp. 1-2.) In

cases where self-defense was advanced, that meant that violent acts unknown to the defendant and not directed at him could be adduced as tending to prove that the alleged victim was the aggressor in conformity with his violent character. (See, *ibid.*)

In 1990, then-Assemblyman Quackenbush introduced Assembly Bill 2615 (AB 2615). This legislation was motivated by a concern that the broad ability of a criminal defendant claiming self-defense to present evidence of specific instances of past conduct to prove a victim's violent propensity was hindering drug-related murder prosecutions in which both the victim and the defendant had histories of violence. (Sen. Com. on Judiciary, Rep. on Assem. Bill No. 2615 (1989-1990 Reg. Sess.) as amended April 19, 1990, pp. 1-2 [hereafter Judiciary Rep.].) The original form of AB 2615 read much like today's section 1103, and included subdivision (b). (See Legis. Counsel's Dig., Assem. Bill No. 2615 (1989-1990 Reg. Sess.) p. 2.) AB 2615 was ultimately amended, however, to delete proposed subdivision (b) and instead to prevent a defendant from using specific instances of a victim's prior conduct to prove character. As enacted, it permitted the use of only opinion or reputation evidence "when character evidence is offered by the defendant to prove conduct of the victim conforming to that character evidence . . . ." (Judiciary Rep., *supra*, p. 2.)

Shortly after AB 2615 was enacted, revised Evidence Code section 1103 was invoked to prevent a battered woman charged with killing her boyfriend from proving up his many prior instances of violence. This unintended consequence prompted Assemblyman Quackenbush to introduce Assembly Bill 263 (AB 263), which was signed into law in 1991. AB 263 restored the ability of a defendant to introduce evidence of specific

instances of the victim's past conduct in order to prove his character, but it also added subdivision (b). (Off. of Crim. Justice Planning, Enrolled Bill Rep. on Assem. Bill No. 263 (1990-1991 Reg. Sess.) Mar. 6, 1991, pp. 1-2.)

In sum, AB 263 was aimed at leveling the playing field when a defendant tried to convince a jury that the victim's prior violent conduct tended to prove he was the aggressor during the charged offense. Nothing in this history suggests that the legislation was intended to apply to evidence of a victim's misconduct when that evidence was offered to prove something *other* than propensity.

3. Evidence of a Person's Prior Misconduct Is Not Character Evidence Unless It Is Offered to Establish His Conduct on a Particular Occasion.

In essence respondent is arguing that evidence of prior misdeeds or crimes is character evidence regardless of the purpose for which it was admitted. This reflects a fundamental misunderstanding of the nature of character evidence.

"Character evidence" has been defined as "evidence offered solely to prove a person acted in conformity with a trait of character on a given occasion." (2 McCormick, Evidence (7th ed. 2013) Character and Habit, § 186, p. 1014 [hereafter McCormick].) Evidence pertaining to character is generally inadmissible not simply "because it reveals a person's character" but because

> it is part of a particular mode of reasoning – a chain of inferences that employs the evidence to establish that the person (1) is more inclined to think or act in a given way than is typical, and (2) is therefore more likely to have acted or thought that way on a particular occasion. Because the

> character-evidence rule is directed at reasoning based on inferred behavioral dispositions or propensities, it can be described as a "propensity rule" that only curtails the admission of "propensity evidence."

(McCormick, *supra*, at pp. 1015-1016.)

The California Evidence Code patently differentiates between the use of other crimes evidence to prove character or propensity and its use to prove a relevant fact *other* than character. Subdivision (a) of Evidence Code section 1101 prohibits the use of character evidence when offered to prove a person's conduct on a specified occasion. (*People v. Bryant, supra*, 60 Cal.4th at pp. 405-406 ["Section 1101(a) prohibits the admission of character evidence if offered to prove conduct in conformity with that character trait, sometimes described as a propensity to act in a certain way. [Fn.] (See Cal. Law Revision Com. Com., 29B pt. 3B West's Ann. Evid. Code (2009 ed.) foll. § 1101, p. 221.)"].) Indeed, the comment to section 1101 leaves no doubt on this point, stating: "Section 1101 is concerned with evidence of a person's character (*i.e.*, his propensity or disposition to engage in a certain type of conduct) that is offered as a basis for an inference that he behaved in conformity with that character on a particular occasion." (Cal. Law Revision Com. com., 29B pt. 3B West's Ann. Evid. Code (2009 ed.) foll. § 1101, p. 221 [hereafter Comment].) Section 1103 is also concerned with proving conduct based on character. It permits a defendant "to use evidence of specific acts of the victim of the crime to prove the victim's character as circumstantial evidence of his conduct." (Cal. Law Revision Com. com., 29B pt. 3B West's Ann. Evid. Code (2009 ed) foll. § 1102, p. 311.)

In contrast, section 1101, subdivision (b), permits the use of prior

crimes or misdeeds evidence to prove a fact *other* than the person's disposition to commit such acts. (*People v. Bryant*, *supra*, 60 Cal.4th at p. 406.) Again the Comment to section 1101 is instructive. It says:

> *Evidence of misconduct to show fact other than character.* Section 1101 does not prohibit the admission of evidence of misconduct when it is offered as evidence of some other fact in issue, such as motive, common scheme or plan, preparation, intent, knowledge, identity, or absence or mistake or accident. Subdivision (b) of Section 1101 makes this clear.
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> . . .

(Comment, *supra*, at p. 222.)

Respondent's reading of section 1103 would undermine the express language of section 1101, subdivision (b). Section 1101(b) states that prior crimes evidence is admissible to prove facts other than disposition. But as respondent construes it, any evidence of violent conduct is treated as if admitted to prove disposition. This would turn section 1101(b) into an exception to 1101(a), which it is not. (See *People v. Bryant*, *supra*, 60 Cal.4th at p. 406 ["Section 1101(b) is not an exception to section 1101(a). Section 1101(a) prohibits use of character to prove conduct. Section 1101(b) provides for the admission of uncharged acts when relevant to prove some other disputed fact. The true exceptions to section 1101(a) are set out in Evidence Code sections 1102, 1103, 1108, and 1109 . . . ."].)

In short, whether evidence of an individual's previous misdeeds is character evidence, and thus opens the door to section 1103(b) evidence, depends on *why* it was introduced. The record in this case makes clear that appellant was not trying to persuade the jury that he reasonably, or unreasonably but sincerely, believed that Richmond was going to assault

him because Richmond had previously gassed an officer or taken a knife to the yard. It was the evidence of unshared kites and reception of the unwrapped knife, when combined with evidence that Richmond came off his bunk in an unusual manner in the middle of the night holding the knife, that convinced appellant he was under attack. The evidence of Richmond's in-custody misconduct was instead offered solely to rebut the state's theory of motive. The prosecution asserted that appellant killed his cellmate because appellant believed Richmond was a "snitch." Appellant testified about his personal knowledge of Richmond's rules violations to show that appellant did not have reason to believe Richmond was cooperating with prison authorities but rather that he was in good standing with his peers. (See AOB:181-191.)

It follows that if evidence of Richmond's in-custody misbehavior was not admitted to establish his propensity toward violent conduct, then evidence to establish appellant's propensity for violence was not *rebuttal* evidence. In this case, evidence tending to show that appellant had a propensity to act violently in no way rebutted the evidence he presented to show he had reason to believe Richmond was a "good wood."

In rejecting appellant's argument, respondent faults appellant for not citing cases directly on point. (RB:76.) As explained in the opening brief, there are few cases addressing the parameters of Evidence Code section 1103. (AOB:197.) The cases appellant has discussed, however, demonstrate the importance of examining *why* evidence of the victim's violence has been introduced by the defendant. (See AOB:197-199.) This is consistent with the plain language of section 1103 and the statute's legislative history as set forth above.

In asserting that the purpose for which the evidence was introduced

is not relevant to the application of section 1103, respondent makes the same error as did the court below. The trial court concluded that notwithstanding the reason appellant adduced the evidence, it had the "effect" of tending to prove Richmond's propensity for violence. (58RT:7553-7554.) As appellant has shown, this reasoning is founded upon a misunderstanding of the relevant statute. Accordingly, the lower court's ruling constituted an abuse of discretion. (See *People v. Superior Court (Brim)* (2011) 193 Cal.App.4th 989, 991 [trial court abuses its discretion where it fails to follow the applicable law].)

4. The Cases Upon Which Respondent Relies Are Distinguishable.

To support her interpretation of section 1103, respondent relies on *People v. Clark* (1982) 130 Cal.App.3d 371, and *People v. Walton* (1996) 42 Cal.App.4th 1004, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 900. (RB:76.) However, *Clark* and *Walton* are distinguishable, primarily because in both cases the evidence of the victims's propensity for violence was introduced to prove that they acted in conformity with their violent characters at the time of the charged offenses.

People v. Clark did not involve the admission of the *defendant's* prior violent conduct under 1103(b). Indeed, this case was decided almost a decade before subdivision (b) was adopted. In *Clark*, the question was whether under section 1103, as it then read, the state could offer evidence of the victim's good character to rebut evidence presented by the defendant of the victim's violent character. There, it was uncontested that the victim had initiated the fatal encounter and that the defendant was entitled to defend himself. The issue was whether Clark used unnecessary force, however, when he shot the unarmed victim. (130 Cal.App.3d at pp. 380-381.) To

convince the jury he was justified in using deadly force, the defendant "directed his case at establishing the violent character of the victim." (*Id.* at p. 384.) In light of this evidence, the trial court permitted the prosecution to present in rebuttal testimony from an acquaintance of the victim that he was friendly and considerate. (*Id.* at p. 383.) The court of appeal found that this evidence was proper rebuttal, under Evidence Code section 1103, subdivision (a)(2), stating: "Where a defendant has introduced character evidence to prove a victim's conduct then the prosecution may introduce such evidence to rebut the evidence introduced by the defendant." (*Id.* at p. 384.)

In *Clark*, the defense asserted that the evidence of the victim's past behavior was not introduced to show his violent character but rather to demonstrate defendant Clark's personal knowledge of the victim. The appellate court rejected this claim, however, because the victim's prior violent behavior was introduced for the purpose of proving his conduct at the time he was shot by the defendant. (130 Cal.App.3d at p. 384.) In other words, the reason evidence of the victim's prior violent conduct was relevant was because it tended to establish he was so violent that Clark was justified in using deadly force against him even though he was unarmed.

Appellant's case is very different from *Clark*. Although defendant Clark claimed that the evidence of the victim's prior violence was relevant to his (Clark's) state of mind rather than to the victim's propensity for violence, in *Clark* these factors were one and the same. Clark's claim that he feared lethal violence was based on a belief that because the victim had acted violently toward him in the past, he would act violently at the time of their deadly encounter in conformity with his violent character. In contrast, appellant did *not* use evidence of his cellmate's prior in-prison misconduct

to prove that Richmond was acting in conformity with a violent disposition on April 9th. Appellant relied on other evidence to explain why he believed his cellmate was launching an attack on him that night, including Richmond's uncustomary failure to share writings from other inmates, his receipt of a knife ready for immediate use, and ultimately his descent from the top bunk in an unorthodox manner with the knife in hand. Here, the evidence of Richmond's past behavior was relevant for a reason completely unrelated to any propensity for violence. It was relevant to rebut the state's claim that appellant killed Richmond because he knew Richmond was an informant. This is because Richmond's rules violations tended to establish, in appellant's mind, that he was a person who had the best interests of the white inmates at heart rather than someone who would turn in weapons to prison staff.

People v. Walton, *supra*, is similarly distinguishable. On appeal, Walton claimed that he had not offered the victim's prior violent conduct to prove that the victim had acted violently at the time of the charged offense. (42 Cal.App.4th at pp. 1014-1015.) But it appears there was no showing that such evidence was otherwise relevant. In fact, it was offered to support Walton's claim that the victim initiated the confrontation, because he was a violent person.[9] Again, appellant's case is different because the evidence of Richmond's prison rules violations was used by the defense to establish a fact that had nothing to do with Richmond's propensity for violence.

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[9] Although *Walton* involved the application of subdivision (b) of Evidence Code section 1103, it relied exclusively on *Clark*, which did not. Yet there is no recognition of this difference in *Walton*; in fact there is little meaningful analysis of section 1103(b) at all. Perhaps that is because the reviewing court in *Walton* found that the claim was forfeited by the defendant's failure to raise the issue at trial. (42 Cal.App.4th at p. 1015.)

There is another critical fact that distinguishes both *Clark* and *Walton* from this case. In those cases, there was no indication that the defendants sought any kind of ruling on the relevance of the prior violence evidence before adducing it. Apparently neither Clark nor Walton went forward with a good-faith belief that the use of their victims' prior violent acts would not open the door to rebuttal evidence under section 1103. In contrast, appellant carefully sought to limit the defense case so as not to trigger 1103(b). Before the defense began presenting evidence concerning Richmond's past conduct, it requested a ruling from the trial court that such evidence was relevant to rebutting the state's theory of motive and did not make section 1103(b) applicable. Initially, the trial court signaled agreement with this position. Accordingly, the defense presented a limited snapshot of Richmond's past misconduct as it related to appellant's belief that his cellmate was a trustworthy inmate, rather than a broad picture of Richmond's character for violence. (See AOB:181-191.) When the trial court abruptly changed course and found that section 1103(b) was applicable, the defense was severely damaged. (See AOB:210-213.)

B. The Trial Court Erred in Failing to Conduct an Adequate Section 352 Analysis.

As appellant has explained, the trial court did not adequately weigh the probative value of the section 1103(b) evidence against its prejudicial value as required by Evidence Code section 352. (AOB:205-209.)

Respondent argues, however, that the trial court "explicitly and implicitly found that Evidence Code section 1103, subdivision (b), evidence satisfied Evidence Code section 352." (RB:77-80.) The trial court did neither. Respondent relies on remarks Judge Zimmerman made about excluding evidence of the prior homicide under section 352. (RB:78;

59RT:7553.) But this was prior to the court's final ruling on the section 1103(b) issue. (See 59RT:7644.) Moreover, it hardly qualifies as the kind of closely reasoned analysis of each incident that was required. (See AOB:207.) And, when defense counsel later asked for a section 352 ruling "on each item of evidence [the prosecutor] intends to bring in," neither the prosecutor nor the trial court responded that such a determination had already been made. (59RT:7645.) Instead, the trial judge said, "I will just have to make a call as you go." (59RT:7646.) The trial court did not weigh the probative value of each incident against its prejudicial value as it was introduced, however. Instead, it merely concluded after evidence of eleven separate acts had been adduced that any more would be cumulative. (59RT:7669-7671.)

As appellant has explained, the evidence was marginally probative and highly prejudicial. (AOB:207-209.) Respondent contends that the evidence was "highly probative because it showed Barrett's violent character." (RB:79.) But the other crimes evidence was neither material nor necessary under the facts of this case because appellant never claimed he was not violent. (See AOB:208.) Respondent also argues that "Barrett's prior conduct was no more inflammatory than the current charges . . . ." (RB:80.) Appellant has already explained why this claim is incorrect. (See AOB:208-209.) In sum, respondent has succinctly stated the relevant inquiry:

> Evidence is substantially more prejudicial than probative if it "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome'" (*People v. Waidlaw* (2000) 22 Cal.4th 690, 724) and "uniquely tends to evoke an emotional bias against the defendant" without regard to

relevance. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 650.)

(RB:77-78.)

This is precisely what occurred in appellant's case. The copious evidence of appellant's violent misdeeds prior to and after Richmond's death intolerably skewed the guilt phase determination, aroused an emotional bias against appellant, and resulted in an unreliable conviction and sentence.

C. Appellant's Constitutional Rights Were Violated.

Appellant also argued that the trial court's erroneous admission of the section 1103(b) evidence violated several of his constitutional rights, including his right to due process and his privilege against self-incrimination. (AOB:209-216.) In a footnote, respondent disagrees. (RB:80-81, fn. 34.)

As to the due process claim, respondent rejects appellant's argument that the trial court deprived him of a fundamentally fair trial. Respondent states that "any failure by Barrett or his counsel to anticipate the consequences of introducing evidence of Richmond's prior acts of violence does not transform the trial court's adherence to the Evidence Code into a due process violation." (RB:80, fn. 34.) That is not appellant's argument, of course. The due process violation in this case arose from the trial court's misapplication of section 1103, compounded by the unfairness caused by the court's reversal of position on this issue after the defense had begun presenting its case. The court's error put the defense at an extreme disadvantage and created a substantial disparity between the parties in direct contradiction of the statute's intent. (AOB:210-213.)

Respondent also dismisses appellant's claim that his privilege

against self-incrimination under both the federal and state constitutions was violated when the prosecutor was permitted to elicit the prior crimes evidence from appellant himself on cross-examination rather than by establishing them via independent evidence. (RB:80-81, fn. 34.) This Court has made clear that a criminal defendant does not waive his privilege against self-incrimination entirely by taking the witness stand:

> "A defendant who elects to testify does not give up his Fifth Amendment rights nor his corresponding California privilege against self-incrimination (Cal. Const., art. I, § 15) except as to matters within the scope of relevant cross-examination." (*People v. Tealer* (1975) 48 Cal.App.3d 598, 604 . . . .)

(*People v. Wilson* (2008) 44 Cal.4th 758, 799.)

The United States Supreme Court similarly recognizes that the breadth of a defendant's waiver of his Fifth Amendment rights "is determined by the scope of relevant cross-examination." (*Brown v. United States* (1958) 356 U.S. 148, 154-155.) Although an accused who testifies is subject to impeachment like other witnesses, it is error for the prosecutor to go beyond the scope of direct examination and compel the defendant "to furnish original evidence against himself." (*Fitzpatrick v. United States* (1900) 178 U.S. 304, 316.) In appellant's case, the prosecutor did exactly that. (See AOB:215.) Even if it is assumed for the sake of argument that the defense opened the door to evidence of appellant's violent character under Evidence Code section 1103(b), this evidence was rebuttal evidence, not impeachment, since appellant did not attempt to establish his own non-violent character in his direct testimony.

Respondent's only response to appellant's self-incrimination claim is to try to distinguish *People v. Sims* (1958) 165 Cal.App.2d 108, cited by

appellant, because it did not involve the elicitation of testimony under Evidence Code section 1103. This fact does not meaningfully distinguish *Sims*, however. The essential holding in *Sims* is that it violates a defendant's privilege against self-incrimination when the state uses cross-examination to attack the defense if it involves a matter not part of the defendant's direct testimony; the prosecution must establish such matters with affirmative evidence. (AOB:214-216.) In this case, the trial court erred in permitting the prosecution to use cross-examination rather than third party witnesses to establish appellant's custodial offenses.

D. The Trial Court Erroneously Instructed the Jury on the Section 1103(b) Evidence.

In the opening brief, appellant explained how the trial court committed several errors when it instructed the jury on the evidence admitted pursuant to Evidence Code section 1103(b). This included giving CALJIC 2.50, an instruction relevant to evidence admitted pursuant to section 1101(b) rather than 1103(b), and giving confusing instructions on the preponderance standard. (AOB:216-227.) Respondent acknowledges that CALJIC 2.50 is an instruction for section 1101(b) evidence, not 1103(b) evidence. But respondent maintains that giving the instruction was not problematic. Respondent further argues that any other error was harmless. (RB:81-87.) This argument is flawed, however.

First, respondent claims that the 1103(b) evidence was *implicitly* admitted under 1101(b) as well. (RB:83.) This contention is unfounded. Prior to trial, the court *explicitly* ruled that prior crimes evidence would not be admitted pursuant to section 1101(b) in the prosecutor's case-in-chief. (45RT:5446-5448.) Accordingly, the prosecutor presented no such evidence during that phase of trial. Despite this state of affairs, respondent

suggests that the trial court *sub silencio* reversed this ruling. Yet respondent cites no authority for the proposition that a trial court may change or expand the legal basis upon which evidence has been admitted *after* the close of evidence (see 66RT:8527 [both sides rested on Jan. 6, 2003]), without any request by either party, indeed without any notice to the parties, and without any explicit ruling. This claim is extraordinary and must be rejected.

Second, respondent claims that the trial court appropriately instructed on the evidence as it was admitted under section 1103(b). According to respondent, CALJIC No. 2.50 properly informed the jury as to the limited purposes for which the jury could use evidence of appellant's "other crimes." (RB:85.) Appellant agrees that the instruction permitted the jury to consider the other crimes evidence as evidence of appellant's character for violence. It said nothing about Richmond, however. A proper instruction would at a minimum have to apply to both the purported victim and to the defendant, as did the one given by the trial court in *People v. Fuiava* (2012) 53 Cal.4th 622, 694-695. (See AOB:221-222.)

Respondent rejoins that appellant's "argument is untenable because the very basis of Barrett's claim of trial court error is that he did *not* elicit evidence of Richmond's prior acts of violence to demonstrate that Richmond initiated the struggle due to his violent nature." (RB:84.) Of course appellant contends that he did not put Richmond's character for violence at issue.[10] The point, however, is that once the trial court

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[10] In a footnote, respondent suggests that defense counsel's argument to the jury "further belies Barrett's claim on appeal that the defense elicited evidence of Richmond's prior violent acts *only* to show Barrett's state of mind in thinking Richmond was [a] 'good wood' and not to demonstrate

(continued...)

concluded appellant inadvertently opened the door to evidence of his own violent character, the court was obligated to explain to the jury that it could consider evidence relating to Richmond's misdeeds as evidence of his violent character. The court's failure to instruct consistently with the evidentiary ruling it had made was unfair to appellant.

Third, respondent asserts that the trial court's failure to give a special defense instruction or CALJIC No. 2.50.1 distinguishing the preponderance standard from the beyond-a-reasonable-doubt standard was harmless in light of the court's improvised oral instructions. (RB:85-87.) According to respondent, "a jury is presumed to have understood and applied all instructions," citing *People v. Mills* (2010) 48 Cal.4th 158, 200-201. (RB:87.) *Mills* is indeed instructive. There, the Court states that when oral and written instructions conflict, it is presumed that the jury follows the written instructions. (48 Cal.4th at pp. 200-201.) As appellant has explained, the written instructions were inadequate. (See AOB:224-227.)

E. The Errors Were Not Harmless.

Appellant has argued that the trial court's misconstruction of Evidence Code section 1103, subdivision (b), and the concomitant errors were not harmless under either *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818. Appellant emphasized, inter

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[10](...continued)
that Richmond had a violent nature." (RB:84, fn. 36.) But the passages respondent cites do not support this claim. Arguing that Richmond was not a "rube" and that he may have had a motive for assaulting appellant is not the same as arguing that his prior in-prison misconduct tended to prove that he assaulted appellant in conformity with his violent character. Moreover, even if it could be so construed, such argument would be understandable after the trial court's ruling against the defense on the section 1103(b) issue.

alia, that the defense evidence was compelling, the state's evidence was weak, and the jury did not easily reach a verdict. (AOB:227-235.)

Respondent first argues that harmless error review under *Chapman* is not required because the admission of the other crimes evidence did not offend the federal constitution. (RB:88.) Although respondent cites *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, for this proposition, *Jammal* in fact recognizes that a state law error which renders a trial fundamentally unfair violates the federal constitution's due process clause. The federal court simply concluded that Jammal's trial was not fundamentally unfair. (*Id.* at p. 919.)

Appellant has demonstrated that the trial court's erroneous construction of Evidence Code section 1103, subdivision (b), rendered his trial fundamentally unfair because it resulted in the admission of a huge quantity of highly prejudicial evidence that was marginally relevant to the question of appellant's mental state at the time of Richmond's death. And as has been explained, his Fifth Amendment rights were also violated.

Respondent further asserts that the jury's lengthy deliberations, questions and requests for testimony readbacks were "reflective of a jury carefully doing its job," rather than of a close case. (RB:88.) Respondent cites *People v. Carpenter* (1997) 15 Cal.4th 312, 422, in support of this claim, which in turn cites *People v. Cooper* (1991) 53 Cal.3d 771, 837. (RB:88.) Neither case helps respondent. In *Cooper* and *Carpenter*, this Court explained that such deliberations may not signal a close case in a lengthy trial with complex evidence and issues. (*Cooper*, *supra*, 53 Cal.4th at p. 837; *Carpenter*, *supra*, 15 Cal.4th at p. 422.)

Appellant's guilt phase trial was not like those in *Cooper* and *Carpenter*; it involved only one homicide and no question as to who

committed it. The jury's determination boiled down to appellant's mental state at the time of the killing. Given the circumstances of this case, the length of deliberations, the jurors' desire to rehear testimony from several witnesses including appellant, to watch the cell video again and their inquiry about the letter found in the contraband watch cell strongly supports an inference that the guilt phase evidence was closely balanced.

Respondent further asserts that any error was harmless in light of the "overwhelming evidence of Barrett's guilt . . . ." (RB:89.) Respondent fails, however, to set forth this overwhelming evidence. In fact, the state's case-in-chief was so weak as to be insufficient. (See Arg. VI.) In essence the guilt verdict rested on the incredible and biased testimony of three inmate informants presented in rebuttal. (See Arg. VII.) Under these circumstances, the inflammatory other crimes evidence undeniably had an impact.

Respondent also insists that the erroneously admitted evidence "did not fundamentally change the nature of the information available to the jury" because it knew appellant had a violent nature. (RB:88.) The critical issue is that while the jury knew that all of the inmates involved in the case had committed some violence, it heard extensive, incident-specific testimony *only* about appellant. Despite the fact that the jurors already generally knew that appellant had engaged in violence, this considerable evidence prejudiced them, both because much of it was similar to the charged offense and because it had continued right up to the time of trial. (AOB:227-235.)

Further, appellant's credibility with the jury was paramount in this case. The eleven other violent acts committed in prison both before and after Richmond's death likely led the jury to doubt appellant's version of

events and conclude instead that he had acted in conformity with his violent character. (AOB:230-232; see, e.g., *People v. Memory* (2010) 182 Cal.App.4th 835, 863-864 [erroneous admission of evidence that defendants were members of a violent motorcycle gang was prejudicial because it damaged their credibility and showed a propensity for violence].)

Even if the prejudice is measured under the *Watson* standard, there is at least a reasonable chance, and more than an abstract possibility, that a result more favorable to appellant would have occurred without the error. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

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V.

THE TRIAL COURT ERRED WHEN IT REFUSED TO STRIKE TESTIMONY THAT RICHMOND TURNED IN WEAPONS AND THE DEFENSE TESTIMONY RESPONSIVE TO THAT EVIDENCE

Appellant has contended that the trial court prejudicially erred when it refused to strike testimony by correctional officers that Thomas Richmond had voluntarily given them inmate-manufactured weapons. The prosecution had adduced this evidence in an effort to convince the jury that appellant killed his cellmate because Richmond was a "rat." However, because the state failed to establish that appellant knew of Richmond's actions – a necessary foundational fact – the evidence was not relevant and should have been stricken. Appellant further asserted that his testimony about Richmond's in-prison misconduct should have been stricken as well since it was only introduced to counter the prosecution's motive evidence. Finally, appellant's compelled testimony about his own acts of prison misconduct, which the trial court permitted in light of this other evidence, should have been stricken. (AOB:236-242.)[11]

Respondent seems to agree with appellant that the evidence of Richmond's relinquishment of weapons was relevant only if the prosecution could establish the preliminary fact that appellant knew Richmond had given them up. Respondent finds it sufficient, however, that evidence to support this preliminary fact was adduced in the state's rebuttal case. Respondent also asserts that any error was harmless. (RB:89-94.) These arguments are not persuasive, for the reasons that follow.

Respondent disagrees with appellant's contention that the trial

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[11] See also AOB:Arg. IV.

court's determination of whether the prosecutor had adequately established the necessary preliminary fact of appellant's knowledge should have been based on the evidence before the court at the time the motions to strike were made. (RB:93; AOB:240-241.) Respondent agues that *People v. Rundle* (2008) 43 Cal.4th 76, cited by appellant, "does not preclude evidence of a preliminary fact being adduced at some point in the trial after the motion is made." (RB:93.) In *Rundle*, the Court stated "we evaluate the trial court's exclusion of the proffered evidence based upon the evidence before the court when it made its decision." (43 Cal.4th at p. 132.) Respondent argues that this language means only that evidence establishing a necessary preliminary fact cannot come from outside of the record. (RB:93.) But the Court's reliance on *Rundle* in *People v. Fuiava* (2012) 53 Cal.4th 622, demonstrates that respondent's interpretation is not correct. In *Fuiava*, the defendant argued that the trial court erred in denying a defense request for a continuance. On appeal, Fuiava relied on events which occurred during trial but after the continuance was denied as proof that counsel was unprepared to go forward. (53 Cal.4th at pp. 650-651.) In rejecting this claim, the Court in *Fuiava* stated that "review of the trial court's ruling on a motion is 'based upon the evidence before the court when it made its decision.'" (*Id.* at p. 651, quoting *People v. Rundle*, *supra*, 43 Cal.4th at p. 132.) *Fuiava* clearly supports appellant's assertion that this Court must assess the trial court's denial of his motion to strike based on the record extant when the motion was made.

Respondent also claims that "Barrett apparently overlooks the fact that the trial court did not rule on the motions to strike at the time the motions were made, but rather deferred its decision until all of the evidence was in." (RT:93.) Respondent misreads the record. When appellant *first*

moved to strike the testimony of correctional officers Borem and Longcor, the trial court did not defer a ruling but rather denied the motion outright. (59RT:7642; see also AOB:237.) At that time, the prosecution had not introduced any evidence to suggest that appellant knew of Richmond's relinquishment of the knives. Thus, the ruling was erroneous.

Moreover, appellant contends it was improper for the trial court to defer a ruling on his *second* motion to strike the testimony. It is true that appellant has found no case that expressly states the trial court may not defer a ruling on whether the prosecution has sufficiently established a preliminary fact until the rebuttal evidence is received. (See RB:93 ["Barrett sets forth no support for his argument that such a preliminary fact cannot be established, and a relevance determination made, during the prosecution's rebuttal."].) But that is not surprising, as "proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime." (*People v. Carter* (1957) 48 Cal.2d 737, 753; see also AOB:240, 268.) In light of this long-established rule, it would be illogical for a court to defer ruling on a motion to strike to see if the prosecutor could prove a material part of his or her case on rebuttal.

Appellant has also asserted that the trial court's erroneous rulings on the two motions to strike deprived him of due process under the federal constitution. (AOB:241-242.) Respondent does not separately and specifically address appellant's federal claim (see generally RB:89-94), and thus apparently agrees that if the trial court did rule erroneously, appellant's federal rights were violated as well as his state rights.

As to the issue of prejudice, respondent argues that "any error was harmless under either the *Watson* or *Chapman* standards." (RB:94.)

Respondent avers that because the jury heard from three inmates that Richmond was a "rat," there was "overwhelming evidence" on this issue apart from the testimony of the correctional officers. (RB:94.) But a close look at what these inmate informants actually said demonstrates that the testimony of officers Longcor and Borem was not superfluous.

Inmates Robert Wilson and James Magee both testified that appellant told them Richmond was a "rat" but neither mentioned anything about turning in weapons. (See AOB:51, 60.) By contrast, inmate Michael Hill claimed that appellant said Richmond had given up two weapons, allegedly in order to get sent to Ad Seg and avoid a debt. (AOB:54; 63RT:8056-8057.) However, Hill asserted that this was a story appellant had concocted. (AOB:57; 63RT:8055.) Testimony from the correctional officers that Richmond had actually surrendered two knives provided an aura of veracity to the claims of the inmate informants that did not otherwise exist. And, as appellant has explained, if the informant testimony had been rejected by the jury, the prosecution would have been left with very little. (See AOB:277-279.)

Moreover, respondent fails to recognize the full impact of the trial court's error. Had the trial court correctly granted the defense motion to strike the testimony of Longcor and Borem, appellant's testimony about Richmond's in-custody misconduct and the extensive cross-examination about his violent acts in prison would also have been stricken. (AOB:237.) Respondent does not respond to this part of appellant's argument.

Thus the prosecution cannot demonstrate beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the guilt verdict. (*Chapman v. California, supra*, 386 U.S. 18.) There is a reasonable probability that a more favorable outcome would have resulted

in absence of the testimony from Longcor and Borem. (*People v. Watson*, *supra*, 46 Cal.2d 818.) Such probability "'does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.'. . ." (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.) There is more than an abstract possibility that, absent the trial court's erroneous rulings, appellant's jury would have delivered a more favorable outcome in either the guilt or penalty phases.

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VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ACQUIT PURSUANT TO PENAL CODE SECTION 1118.1

As appellant has shown, the evidence presented in the prosecutor's case-in-chief was legally insufficient to sustain a conviction of murder in the first degree and the lying-in-wait special circumstance. The trial court therefore erred in denying appellant's motion to acquit pursuant to Penal Code section 1118.1. (AOB:243-265; see also Arg. VII.)

Respondent argues that the jury could have reasonably found both premeditation and deliberation and lying in wait from the evidence presented by the prosecution. (RB:94-105.) These claims are not persuasive.

A. There Was Insufficient Evidence of Premeditation and Deliberation.

A motion for acquittal must be granted unless the record "contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (AOB:246-247, quoting *People v. Lewis* (2008) 43 Cal.4th 415, 507; see also *People v. Hajek* (2014) 58 Cal.4th 1144, 1182-1183.)

Although premeditation and deliberation may be established by circumstantial evidence, the existence of this element must not be based on conjecture. This point was recently emphasized by the court of appeal in *People v. Boatman* (2013) 221 Cal.App.4th 1253, which quoted *People v. Anderson* (1968) 70 Cal.2d 15, 24:

> "Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate

> between first and second degree murder, [a reviewing court] must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation] or whether it 'leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.'"

(221 Cal.App.4th at p. 1265, italics in *Anderson*.)

In determining whether there is sufficient evidence of premeditation and deliberation, an appellate court looks for the categories of evidence discussed in *People v. Anderson*, including planning activity, motive and the manner of killing. (70 Cal.2d at p. 27; see AOB:248.) In appellant's opening brief, he argued that the case-in-chief at most established an unjustified homicide, but it was devoid of planning or motive evidence. Further, the manner-of-killing evidence did not establish premeditation and deliberation. (AOB:249-257.)

Respondent concedes the prosecution's "'motive' evidence . . . did not establish that Barrett knew Richmond was a 'rat' . . . ." (RB:99.) Respondent relies instead on the purported evidence of planning, the manner of killing, and appellant's behavior and demeanor after the killing. (RB:98-102.)

Respondent starts by asserting that the jury could reasonably have seen the time and effort taken to cut the knife from the desk in cell 146 as evidence of planning. (RB:98-99.) This is, in fact, what the trial court relied upon in denying appellant's motion to acquit. (57RT:7391; see AOB:245.) As explained below, however, to reasonably infer that it would

have taken considerable effort to create the weapon is not the same as reasonably inferring that the knife's manufacture constituted evidence that appellant planned Richmond's death.

It is true that a verdict may not be reversed "'simply because the circumstances might also reasonably be reconciled with a contrary finding.' . . ." (*People v. Hajek, supra*, 58 Cal.4th at p. 1183.) But viewing the evidence in the light most favorable to the state does not magically convert a possibility into a reasonable inference or deduction. In *Hajek*, this Court reiterated that a reviewing court presumes true only those facts that the trier of fact "could *reasonably deduce* from the evidence." (*Ibid.*, italics added.) In *People v. Boatman, supra*, the reviewing court defined an inference as a "'conclusion reached by considering other facts and deducing a logical consequence from them.'" (221 Cal.App.4th at p. 1265, quoting Black's Law Dict. (8th ed. 2004) p. 793, col. 2.) Expanding on this definition, the court explained:

> "[T]o constitute an inference, the conclusion must to some degree reasonably and logically follow from the preliminary facts. If, upon proof of the preliminary facts, the conclusion is mere guesswork, then we refer to it by such words as speculation, conjecture, surmise, suspicion, and the like; and it cannot rise to the dignity of an inference."

(221 Cal.App. 4th at pp. 1265-1266, quoting *People v. Massie* (2006) 142 Cal.App.4th 365, 374.)

Years ago another court of appeal similarly observed: "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of

fact." (*People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837; see also *People v. Hajek, supra*, 58 Cal.4th 1144, 1263 (dis. opn. of Kennard, J.) and cases cited therein [jury's finding of guilt may not be based on a mere possibility]; *People v. Velazquez* (2011) 201 Cal.App.4th 219, 231 ["A reasonable inference may not be based on suspicion, surmise, conjecture, or guess work. It must logically flow from other facts established in the action" (internal quotation marks and citations omitted)].)

As *People v. Anderson, supra*, explains, planning activity is "facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the [charged] killing . . . ." (70 Cal.2d at pp. 26-27, italics in original.) In this case, the evidence presented created a reasonable inference that the knife was cut from the desk in the cell and that doing so must have taken some time and effort. Whether appellant was the one who manufactured the knife, however, was a much less reasonable inference. For example, evidence that Richmond had weapons in his general population cell that he did not make but which had been hidden in his mattress prior to his arrival there (AOB:11-13) demonstrated that it was unreasonable to assume that an inmate in possession of a weapon had necessarily created it himself.

Even if it is assumed, however, that appellant manufactured the knife, this conclusion does not reasonably support an inference that he did so for the purpose of killing Richmond. The evidence was silent as to *why* appellant made the weapon. The fact that weapons were ubiquitous in Calipatria prison (see AOB:250, fn. 126) suggests that they are not always

made with an intent to kill one's cellmate.[12] Moreover, appellant could not have fashioned the knife without Richmond's knowledge. If it can reasonably be assumed that a prisoner who is making a knife is planning to kill his cellmate, then Richmond would have taken action to protect himself from appellant. In fact, Richmond's previous relinquishment of weapons demonstrated that he was not adverse to getting help from prison staff when he needed it. Accordingly, the jury could only have *speculated* that appellant made the knife with a plan to use it on Thomas Richmond.

Appellant's argument that the knife-making without more does not reasonably support an inference of planning is bolstered by the *Anderson* Court's discussion of two cases in which the planning evidence was negligible. In *People v. Granados* (1957) 49 Cal.2d 490, the defendant lived with his 13-year-old victim, her mother, and brother. He took the girl and her brother to an office, sent the boy on an errand, and returned home with the girl where he killed her. The Court in *Anderson* found the evidence ambiguous as to planning because it supported various inferences:

> [T]he only evidence of (1) defendant's behavior prior to the killing which could be described as 'planning' activity related to a killing purpose was defendant's sending the victim's brother on an errand and apparently returning home alone with the decedent. Such evidence is highly ambiguous in terms of the various inferences it could support as to defendant's purpose in so behaving.

(*People v. Anderson*, *supra*, 70 Cal.2d at p. 31.) Similarly, in the instant

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[12] In the penalty phase, CDC personnel would explain that in-prison weapons were used for both offensive and defensive purposes. (See AOB:74; 76RT:9163.)

case, the knife-making is highly ambiguous as it supported multiple inferences concerning appellant's intent.

The *Anderson* Court also pointed to *People v. Craig* (1957) 49 Cal.2d 313, as an example of inadequate planning evidence. In *Craig*, the defendant encountered the victim on the street after he left a bar. Earlier he had expressed his interest in finding a woman with whom to have sex. The victim's body was found the next morning, with her clothing ripped open and legs spread apart. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 32-33.) Although the evidence in *Craig* supported an inference that the defendant was "looking for a girl with whom to engage in sexual intercourse," it did not lead to a reasonable inference that he had planned to kill her. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 33.) The *Anderson* Court explained: "Although such conduct may be described as 'purposeful' behavior, it has no bearing as to an *intention to kill* his victim. (*Ibid.*, italics in *Anderson.*) In appellant's case, even if he purposefully cut the knife from the cell desk, that behavior without more did not have any bearing on his intention to kill Richmond.

In short, "[t]hat an event *could* have happened . . . does not by itself support a deduction or inference that it did happen. . . . Jurors should not be invited to build narrative theories of a capital crime on speculation." (*People v. Moore* (2011) 51 Cal.4th 386, 406, italics in original.) Here, the scant facts surrounding the manufacture of the knife do not support a reasonable inference or deduction that appellant engaged in activity prior to Richmond's killing that was "directed toward, and explicable as intended to result in" his murder. (*Anderson*, *supra*, 70 Cal.2d at pp. 26-27.)

Respondent also relies on the manner-of-killing evidence in asserting that the trial court properly denied appellant's motion to acquit. However,

as respondent acknowledges, the brutality of a homicide cannot without more support a finding of premeditation and deliberation. (RB:100.) Indeed, the Court has made this point very clearly:

> The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random "explosion" of violence as with calculated murder.

(*People v. Alcala* (1984) 36 Cal.3d 604, 626, citing *People v. Anderson*, *supra*, 70 Cal.2d at pp. 24-25; *People v. Robertson* (1982) 33 Cal.3d 21, 48; and *People v. Smith* (1973) 33 Cal.App.3d 51, 64, overruled on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324.)

Respondent nonetheless argues that "this Court has held that brutality can be indicative of calculated violence *in context*, particularly where, as here, the brutality itself contradicts the defendant's version of events, and other evidence, such as the planning activity here, also supports a theory of premeditation for criminal purposes." (RB:100, italics in original.) Respondent cites *People v. Turner* (1990) 50 Cal.3d 668, 688-689, fn. 4, and *People v. Hughes* (2002) 27 Cal.4th 287, 371, but neither case supports this argument. (See RB:100.) Rather, a comparison of *Turner* and *Hughes* with the instant case serves to highlight the inadequacy of the case-in-chief against appellant.

In *People v. Turner*, this Court found sufficient evidence that the defendant had intended to steal from the victim before killing him. This included evidence, inter alia, that the defendant was armed when he arrived at the victim's home, forced his way inside, and cut the phone lines. (50 Cal.3d at pp. 688-689.) There was no such planning evidence in the instant

case, as appellant and Richmond in essence lived in the same "home" and the knife was already inside it. In *Turner*, the Court also found that the physical evidence did not support the defendant's claim that the victim initiated the struggle between them. (*Ibid.*) However, in this case appellant's motion to acquit was made prior to the presentation of the defense case and the case-in-chief included no evidence relating appellant's version of what had occurred. Thus, whether or not "the brutality [of the killing] contradicts the defendant's version of events" (RB:100) is not an issue here.

In *People v. Hughes*, this Court found that evidence of planning and the manner of killing was sufficient to support the jury's finding of premeditation and deliberation. But again, the facts were materially different from appellant's case. In *Hughes*, the defendant brought a knife to the victim's apartment. (27 Cal.4th at p. 371.) As already explained, there was no such planning evidence in appellant's case. As to manner of killing, in *Hughes* the defendant stabbed the victim over a period of time and when those wounds did not kill her, he strangled her to death with suspenders and his hands. (*Id.* at p. 371.) In contrast, Richmond probably died within minutes of his injuries. (52RT:6606.) In fact, nothing about the manner of killing in this case provided sufficient evidence from which the jury could have rationally concluded, at the time the prosecutor concluded his case, that appellant killed with preexisting reflection rather than on unconsidered or rash impulse.

Also as to the manner-of-killing evidence, respondent further claims that the multiple serious injuries to Richmond, when coupled with the lack of injury to appellant and the relative order of the cell when Richmond's body was found, indicate that appellant had killed according to a

preconceived plan. (RB:100-101.) That is not correct. The officer who documented the cell found blood all over – with the notable exception of the top bunk where Richmond slept. (See AOB:20-22.) The medical examiner saw several wounds on Richmond's body but could say nothing about what he was doing when the assault began. The doctor could not say who initiated the struggle or whether Richmond had a weapon at the time. (See AOB:28.) Under these circumstances, evidence that the cell was not in total disarray and that appellant was not bleeding supports a finding of, at most, second degree murder.

Significantly, the court in *People v. Boatman*, *supra*, recently recognized that "Even when manner of killing evidence is strong, cases in which findings of premeditation and deliberation are upheld typically involve planning and motive evidence as well." (221 Cal.App.4th at p. 1268, discussing cases.) The *Boatman* court went on to observe that "[c]ases that have found sufficient evidence of premeditation and deliberation in the absence of planning or motive evidence are those in which '[t]he manner of killing clearly suggests as execution-style murder.'" (221 Cal.App.4th at p. 1269, quoting *People v. Hawkins* (1995) 10 Cal.4th 920, 956, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

The prosecution did not clearly establish an execution-style murder. The facts that there was no blood on the upper bunk where Richmond slept, that there was blood spattered most everywhere else in the cell, and that Richmond had numerous wounds tend to suggest a struggle. But ultimately the manner-of-killing evidence in the case-in-chief was ambiguous at best. It was simply too slight and equivocal for the jury to reasonably infer that the manner of killing here "was the result of 'a pre-existing reflection' and

'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation] . . . ." (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27.)

Finally as to premeditation and deliberation, respondent emphasizes evidence relating to appellant's demeanor *after* Richmond's body was discovered. (RB:101-102.) The only case respondent cites for the proposition that such evidence is relevant to the issue of premeditation and deliberation is *People v. Perez* (1992) 2 Cal.4th 1117, 1128, which is readily distinguishable from appellant's case. (See RB:101.) In *Perez*, there was planning activity and manner-of-killing evidence which supported the jury's finding of premeditation and deliberation. (2 Cal.4th at pp. 1126-1128.) As appellant has explained, neither type of evidence supported a premeditation finding in this case. In *Perez*, the Court also noted that the defendant's conduct after the homicide seemed inconsistent with a rash, impulsive killing. There, the defendant remained in the victim's home after her death and ransacked it. (*Id.* at p. 1128.) This hardly equates with appellant's case, in which the demeanor evidence relied upon by respondent occurred hours after Richmond's death. This is especially true when the same witnesses who claimed appellant was calm also admitted that in prison inmates often mask their feelings so as not to appear vulnerable to others. (See 50RT:6260; 54RT:7060, 7063-7064; AOB:17-19.)

In sum, as stated in *People v. Boatman*, *supra*, 221 Cal.App.4th at p. 1270, "the mere fact that a defendant has time to consider his actions is, without more, insufficient to support an inference that the defendant *actually* premeditated and deliberated. . . . [T]here must be some evidence that the defendant actually engaged in such reflection . . . ." In this case, there was no evidence that appellant *actually* engaged in the kind of

reflection needed to establish more than intent to kill. The case-in-chief failed to provide solid, credible evidence that supports a finding of premeditation and deliberation beyond a reasonable doubt.

B. There Was Insufficient Evidence to Support the Lying-In-Wait Special Circumstance.

Respondent also disagrees that there was insufficient evidence to support the lying-in-wait special circumstance. (RB:102-105.) Specifically, respondent claims that "the jury could find that Barrett concealed his purpose by holding his knife in a place where Richmond could not see it, watched and waited a substantial period of time for an opportune time to act by waiting until Richmond fell asleep, and immediately thereafter launched a surprise attack on Richmond from underneath him . . . ." (RB:104.) This is all speculation, however.

Even when viewed most favorably for the state, the evidence presented in the case-in-chief does not support a *reasonable* inference that appellant killed while lying in wait. As fully explained in the opening brief, the evidence did not permit an inference that appellant concealed his purpose, watched and waited for an opportune time to act and attacked Richmond by surprise from a position of advantage. (See AOB:258-263.) In fact, the evidence tends to disprove respondent's proposed scenario since *none* of Richmond's blood was found in his bunk. And, as discussed above, the knife could not have been made without Richmond's knowledge.

The ambiguous evidence was susceptible to various inferences and failed to provide the kind of solid, credible evidence from which the jury could find beyond a reasonable doubt that appellant had killed while lying in wait.

C. Federal Constitutional Error and Prejudice.

In his opening brief, appellant also asserted that the trial court's erroneous denial of the section 1118.1 motion violated his federal due process rights. (AOB:263-264.) Respondent has not responded specifically to this claim, however. (See generally RB:94-105.)

Finally, appellant contended that the trial court's error prejudiced him. (AOB:264-265.) Again, respondent has chosen not to respond to this argument. (See generally RB:94-105.)

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VII.

THE INTRODUCTION OF IMPROPER AND EXTREMELY PREJUDICIAL REBUTTAL EVIDENCE DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL

In the state's rebuttal case, the prosecutor called two inmate informants who claimed that appellant had told them, prior to Richmond's death, that he was planning to kill his cellmate because he was a "rat." A third informant claimed that appellant made a similarly incriminating statement to him subsequent to Richmond's death. Appellant argued, in his opening brief, that he was deprived of a fair trial by the prosecutor's decision to hold back these witnesses for rebuttal, in violation of Penal Code section 1093, rather than to present them during the case-in-chief. (AOB:266-279.)

Respondent argues (1) that appellant has forfeited this claim, (2) that the informants were properly called as rebuttal witnesses, and (3) that any error was harmless. (RB:105-113.) None of these arguments withstands scrutiny.

Respondent first claims that appellant has forfeited his ability to raise this claim on appeal. (RB:106-107.) However, appellant's counsel preemptively objected to any attempt by the prosecutor to "sandbag" the defense on rebuttal. (AOB:266-267.) The defense filed an in limine motion entitled "Motion To Limit And Exclude Rebuttal Evidence By The Prosecution." (4CT:973.) It stated: "The prosecution should not be permitted to put on a 'bare bones' case in chief against the Defendant, wait to hear the defenses in evidence in this case, then introduce evidence of Defendant's guilt that could have been presented during the initial phase of the prosecution's case." (4CT:975-976; AOB:267.) It appears, however,

that the motion got lost in the press of business. It was noticed for May 6, 2003, but the motions date was repeatedly trailed. (4CT:971.)[13] Eventually, the trial court began hearing the numerous defense in limine motions on August 11, 2003. (12RT:2001.) The hearings lasted several days.[14] Although defense counsel did not withdraw the motion to limit rebuttal, it was never heard by the trial court.

Because trial counsel did not secure a ruling on the motion or reobject when the prosecution's rebuttal case began, respondent argues that appellant has failed to preserve the issue for appeal. Appellant has asserted, however, that a trial court's failure to rule on a motion does not always prevent a defendant from raising an issue on appeal, citing *People v. Briggs* (1962) 58 Cal.2d 385, 410, and *People v. Flores* (1979) 92 Cal.App.3d 461, 466-467, as examples. (AOB:276.) Respondent correctly notes that these cases are not identical to appellant's. (RB:107.) Nonetheless they show that when a defendant has raised an issue, the trial court bears some responsibility to respond.

In any event, the Court may reach the merits by finding that appellant's counsel performed deficiently in failing adequately to preserve the issue for appeal. (See AOB:276-277; see also, *People v. Crittenden* (1994) 9 Cal.4th 83, 146 [court addresses merits of a claim where trial counsel's failure to object raises specter of constitutionally inadequate representation]; *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650-1651

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[13] See May 6, 2003 (11RT:1669); May 13 (11RT:1672-1675); July 8 (11RT:1678); July 15 (11RT:1681-1684); August 5 (11RT:1687-1691).

[14] See August 15 (5CT:1257); August 20 (5CT:1260); August 25 (5CT:1265); August 28 (5CT:1283); September 4 (5CT:1286); September 8 (5CT:1289); and September 11, 2003 (5CT:1292).

[where trial court never expressly resolved defendant's request for a limiting instruction and counsel failed to press for a ruling, appellate court considered whether counsel's deficient performance prejudiced defendant].) Significantly, respondent has not disputed appellant's assertion that there could be no tactical reason for counsel's conduct. (See, e.g., *People v. Trujeque* (2015) 61 Cal.4th 227, 249 [no possible tactical reason for counsel's failure to move to strike a prior conviction]; *People v. Centeno* (2014) 60 Cal.4th 659, 675-676 [no reasonable tactical purpose for defense counsel's failure to object to prosecutor's misstatement of reasonable doubt].) Thus, the question before this Court is whether the rebuttal was improper and, if so, whether it prejudiced appellant.

As to the merits of this claim, respondent acknowledges that "it is improper for the prosecution to deliberately withhold evidence that is appropriately part of its case-in-chief, in order to offer it after the defense rests its case and thus perhaps surprise the defense or unduly magnify the importance of the evidence." (RB108; see AOB:267-270.) In fact, this Court recently confirmed that "it is improper for a prosecutor to withhold 'crucial evidence properly belonging to the case-in-chief' [citations], and to present it in rebuttal to take unfair advantage of a defendant." (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 30.) But respondent argues that the informant testimony properly rebutted appellant's testimony that he did not know Richmond had given up weapons to prison staff. (RB:109-111.) This position is incorrect.

Appellant's purported statements that he had planned the killing and was motivated by his belief that Richmond was a "rat" was clearly evidence material to establishing critical elements of the charges against him. (AOB:270-274.) Respondent nonetheless asserts that the testimony of the

three informants "specifically contradicted defense evidence that was *not* implicit in Barrett's denial of guilt and claim of self-defense . . ." (RB:111.) Respondent continues, "While this Court has recognized that a defendant's initial denial of guilt implies a certain level of prosecutorial foresight, this Court has never required the prosecutor to anticipate every specific denial of evidence the defendant may make." (RB:111.) No such prescience was necessary here. From the beginning, this was a case about *why* appellant had stabbed his cellmate. The prosecutor made it clear early in the proceedings that the state's theory of the case was that appellant had killed Richmond because he believed his cellmate to be a "snitch" who had given up weapons and incriminated another inmate; in fact, the prosecutor advanced this theory in pretrial pleadings and opening argument. (See AOB:252-253.)

Respondent's assertion that the testimony was merely impeachment of appellant's testimony that he did not know Richmond gave up weapons is also undercut by the fact that the prosecutor argued that the hearsay statements of the informants were admissible *because* they were *admissions*, which are not – as explained in the opening brief – properly admitted as rebuttal. (63RT:7993-7994; 63RT:8056-8057; AOB:284-286; RB:114, 116, 120.)

Further, evidence that the prosecutor had at least two of these inmate informants ready to testify prior to the start of the defense case supports appellant's argument. As he began presenting his guilt phase evidence, the prosecutor signed orders to have several inmates, including Wilson and Hill, transported to court before the conclusion of his case-in-chief. (44CT:12568-12584.) There would have been no purpose in having them present then unless the prosecutor thought their testimony was admissible in

the state's case-in-chief.

Wilson and Hill were not called to testify in the case-in-chief, of course, and on December 15 the prosecutor rested. On that date, appellant's counsel announced they would start presenting evidence on December 18. (45CT:12660.) Before the defense presented its first witness, however, the prosecutor filed additional transportation orders, to have Wilson, Hill and Magee in court on December 22. (45CT:12678-12685.) This timing indicates that the prosecutor concluded the inmates' testimony would be useful to the state irrespective of the defense case. And it belies respondent's assertion that such testimony only became relevant after appellant testified that he did not know that Richmond had voluntarily handed over weapons to prison staff.

In fact, this chain of events suggests that the prosecutor's decision not to present the inmate witnesses until rebuttal was motivated by gamesmanship: If the prosecutor had called these dubious witnesses in his case-in-chief, the jury could have found them incredible, which would have damaged his case. By holding the witnesses back for rebuttal, their testimony about appellant's purported admissions had a greater impact, which diverted attention from their credibility problems. This is precisely the kind of maneuvering section 1093 was designed to prevent.

Appellant has contended that the prosecutor's conduct violated his federal constitutional right to due process, as well as his state law rights, and that his conviction must therefore be reversed unless the state can demonstrate that the error was harmless beyond a reasonable doubt, pursuant to *Chapman v. California* (1967) 386 U.S. 18, 24. (See AOB:274-275, 277.) Respondent does not respond to the claim of federal error but asserts in a footnote that the *Chapman* standard is inapplicable

because under California law "reversal of a judgment or decision by reason of the erroneous admission of evidence is proper only where there has been a miscarriage of justice." (RB:113, fn. 40.) Respondent misunderstands how the state constitution's miscarriage of justice provision meshes with the *Chapman* standard. When a federal constitutional error has been made, and the *Chapman* standard applies, nothing in the California Constitution changes that. (See *People v. Cahill* (1993) 5 Cal.4th 478, 509-510 [*Chapman* harmless error standard applied to erroneously admitted confession pursuant to *Arizona v. Fulminante* (1991) 499 U.S. 279].)

In any event, the error was also prejudicial under the *Watson* standard. To prevail, appellant need only show there is a reasonable chance that he would have obtained a more favorable result had the erroneous rebuttal testimony not been admitted. This does not mean more likely than not, but merely more than an abstract possibility. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

Respondent claims the prosecution's case-in-chief was "compelling." (RB:112.) The record says otherwise. Even *with* the incendiary informant testimony, the guilt phase presented a close case, with lengthy deliberations, jury questions and testimony readbacks. (See AOB:278, 228-229.) The improper rebuttal provided the only arguably substantial evidence to support premeditation and deliberation, as well as the lying-in-wait special circumstance. (See AOB:247–263.) Morever, had it been excluded, there is a reasonable chance, certainly more than an abstract possibility, that at least one juror would have been unwilling to convict appellant of murder in any degree and of the Penal Code section 4500 allegation. (See *Wilkins*, *supra*, 56 Cal.4th at p. 351.)

In arguing harmlessness, respondent points to the rebuttal testimony

of criminalist Elissa Mayo and prison employee Ray Vialpando. This evidence, respondent asserts, "tended to undercut the defense case that Barrett was suddenly attacked by a knife-wielding Richmond and was forced to defend himself with his knife." (RB:113.) But an examination of the record shows that the testimony of Mayo and Vialpando added little to the prosecution's case.

Mayo reviewed the evidence in this case, and formulated her conclusions about it, in 1996. At that time, she was a serologist, or someone who types blood. She did not analyze the evidence to determine whether Richmond might have had a weapon. She did not analyze all of the evidence gathered or even personally examine the scene of Richmond's death. When Mayo testified at appellant's trial in 2003, she disagreed with the defense forensic expert's conclusion that there was a second weapon in the cell. But Mayo did so without reexamining the physical evidence or even the video taken of the cell. She simply opined that the scene and evidence were so poorly processed by prison investigators that few conclusions could be drawn from it. (See AOB:61-64.) In short, Mayo's work paled in comparison to the careful analysis and well-supported conclusions offered by defense expert DiMeo.

Respondent's reliance on Vialpando's testimony is similarly misplaced. Respondent states that Vialpando "testified that Richmond had no behavior issues prior to going in to Ad Seg." (RB:113, citing 64RT:8272-8273.) Not so. Vialpando, who was a records analyst, did not purport to have any personal knowledge about Richmond's day-to-day behavior in the general population. He merely testified that Richmond had no 115's, or write-ups for misconduct, in his file from his time in Calipatria's general population. (See 64RT:8272-8273.) His testimony

does not meaningfully undercut appellant's claim of self-defense.

Appellant's convictions and sentences must be reversed.

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VIII.

MULTIPLE EVIDENTIARY ERRORS DURING EXAMINATION OF THE THREE INMATE WITNESSES PRESENTED BY THE PROSECUTION IN REBUTTAL DEPRIVED APPELLANT OF A FAIR TRIAL

In the opening brief, appellant demonstrated how a confluence of evidentiary errors during the testimony of the jailhouse informants in rebuttal combined to deprive him of a fair trial. (AOB:280-293.) Respondent claims that no errors were made, that appellant's opportunity to challenge some of them was forfeited, and that no harm resulted. (RB:114-124.) Each of these contentions must be rejected.

First, respondent asserts that the Secondary Evidence Rule does not apply because the state offered oral testimony about the conveniently unavailable kites. Respondent contends that as long as the kites were not destroyed with fraudulent intent, a verbal description of their contents was permissible. (RB:117-119.) Appellant agrees that the notes were not fraudulently destroyed, because, he avers, they never existed. The record demonstrates that both Hill and Wilson had reason to save any incriminating notes actually written by appellant – but neither did so. Prior to Richmond's death, Wilson, who was a member of the Nazi Lowrider prison gang, believed that appellant had sent someone to beat him up. (63RT:8001, 8037-803 .) Thus Wilson had a strong motive to preserve any document that could implicate appellant in murder. Similarly, it would have been highly beneficial to Hill, who made clear his desire to get appellant executed, to save such damaging evidence had it existed. (See AOB:53-58.)

As appellant has explained, the crux of this issue is that the informants failed with any reliability to show that the kites ever existed or

that either inmate could have authenticated them if they had. (AOB:281-284.) Appellant's case in similar in this regard to *People v. Lawley* (2002) 27 Cal.4th 102. (See AOB:282.) There, the defendant sought to elicit testimony from Mullin about a letter Seabourn showed him from the Aryan Brotherhood directing Seabourne to commit the murder for which the defendant had been charged. (27 Cal.4th at pp. 151-152.) This Court held that Mullin's oral testimony about the contents of the letter was properly excluded:

> [T]he proffered testimony regarding the unauthenticated letter, prepared under unknown circumstances, allegedly by an unidentified writer on behalf of the Aryan Brotherhood, was not shown to be sufficiently reliable to merit admission into evidence.

(27 Cal.4th at p. 154.) Similarly in appellant's case, no oral testimony about the alleged notes should have been permitted.

Second, although respondent concedes that the trial court erred in finding the statements of the jailhouse snitches to be admissible as declarations against interest, she asserts that they were admissible as prior inconsistent statements. (RB:119-122.) But as appellant demonstrated in the opening brief, they were not admissible under that theory either. The prosecutor did not offer them as prior inconsistent statements. Moreover, he failed to set the groundwork for admissibility by asking appellant during cross-examination whether he had made the alleged statements. (AOB:286-287.)

Respondent attempts to shift the fault from the prosecutor to the trial court, but this effort must be rejected. Respondent asserts it was "the trial court who, *without prompting by the prosecutor*, found that these statements

were declarations against penal interest." (RB:120, italics added.) Respondent then reasons that if the court had ruled correctly in the first instance, the prosecutor would have thought to offer them as prior inconsistent statements. (RB:120.) In fact, the record shows that it was the *prosecutor* who first argued that the statements were declarations against appellant's penal interest. During Wilson's testimony, after defense counsel objected on hearsay grounds, the prosecutor stated, "It's going to be a declaration against interest, I guarantee you." (63RT:7993.) The trial court accepted this theory of admissibility. (63RT:7993.) When Hill was questioned, the defense interposed a similar hearsay objection. Although the trial court ruled that the testimony was an admission against interest before the prosecutor spoke up, clearly it was understood that the state was proceeding on the same theory as with Wilson. (63RT:8057.)

Of course, even if the prosecutor *had* offered the evidence as prior inconsistent statements, the trial court would have had to reject the theory because the prosecutor had not confronted appellant with the supposed statements to deny or explain them. (See AOB:286-287.) Respondent nonetheless claims that this deficiency should be overlooked by the Court because appellant had not been unconditionally excused after his guilt phase testimony. (RB:122.) The record shows that, at the end of appellant's testimony, neither party asked that he be subject to recall. The trial court did not specifically excuse appellant unconditionally but neither did he declare him subject to being recalled as a witness. (59RT:7724.) The prosecutor's failure to indicate, at the time appellant's testimony ended, that he wanted a later opportunity to confront appellant with the incriminating statements should foreclose the state from arguing on appeal that the prosecution satisfied the foundational requirements clearly set forth in the

Evidence Code. (See, e.g., *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [prosecutor's lack of objection to trial court's failure to impose program fee forfeited any claim of error on appeal]; *People v. Botello* (2010) 183 Cal.App.4th 1014, 1029 [prosecution forfeited the right to rely on Penal Code section 12022.53(e)(1) for the first time on appeal].)

Respondent also claims that it was enough that appellant denied making the statements when he testified in rebuttal. (RB:122.) But once the trial court had erroneously permitted the testimony by Wilson, Hill and Magee, appellant had no choice but to deny it during the defense rebuttal case. It would be manifestly unfair to use the testimony he gave in an attempt to mitigate the damage of the erroneously admitted statements to justify the admission of those statements in the first instance.

Respondent cites *In re Miranda* (2008) 43 Cal.4th 541, 577, to support her argument. (RB:121.) *Miranda* has no applicability to appellant's case, however. There the issue was whether the prosecutor had violated *Brady v. Maryland* (1963) 373 U.S. 83, by failing to provide the defense with a letter that could have been used to impeach an inmate, Saucedo, who testified that defendant Miranda had killed a man named Hosey. The letter was written by Montez and stated that Saucedo had admitted he (Saucedo) killed Hosey. In post-conviction proceedings, respondent asserted that Montez's letter was not material within the meaning of *Brady* because it was hearsay and therefore could not have been admitted at the defendant's trial. This Court rejected that argument, explaining that if Saucedo had been asked about the contents of the letter during his testimony but denied making the inculpatory statements, then Montez's testimony to the contrary, as well as the letter, would have been admissible as a prior inconsistent statement. (43 Cal.4th at pp. 576-577.)

This Court's finding in *Miranda* that the Montez letter was material under *Brady* because it could have been used to impeach Saucedo does not support respondent's claim that testimony from Wilson, Hill and Magee was admissible as prior inconsistent statements at appellant's trial. To the extent that *Miranda* has any relevance to this case, it is as a cautionary tale against using jailhouse informants who are seeking to benefit from the lies they spin on the witness stand.

More applicable to the question of whether the informants' testimony here qualified as prior inconsistent statements are the cases cited by appellant. (AOB:286-287, citing *People v. McKinnon* (2011) 52 Cal.4th 610 and *People v. Alexander* (2010) 49 Cal.4th 846.) In *McKinnon*, for example, a witness named Hawkins testified that another witness, Lee, told her that the defendant had threatened Lee with harm. Lee, however, was not asked about the alleged threat during her testimony. Without discussing whether Lee had been excused unconditionally or subject to recall, the Court found that Hawkins' testimony was not properly admitted as a prior inconsistent statement. Respondent does not address either *McKinnon* or *Alexander*.

In short, respondent is asking for a third bite at the apple. The prosecutor could have presented the informants, with their incredible claims that appellant had made inculpatory statements to them, during the case-in-chief. But he chose not to. The prosecutor could have questioned appellant about the statements during the lengthy cross-examination so that the testimony would have met the requirements for admissibility as declarations against penal interest. But he failed to do so.[15] Now, on appeal, respondent

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[15] Of course appellant continues to maintain that the testimony

(continued...)

wants this Court to ignore the tactical choices and omissions of the prosecutor because the trial court did not utter the magic words "excused unconditionally" after appellant testified in his defense. A sentence of death should not be based on such hypertechnicalities.

Third, respondent asserts that the trial court properly limited cross-examination of informants Wilson and Magee. (RB:123-124.) Respondent complains that appellant did "not adequately explain how the information he was attempting to elicit would have been relevant to any of the issues the jury had to consider." (RB:123.) This claim should be rejected. As appellant has indicated, whether these witnesses were credible was a critical issue for jurors to resolve. Details of the stabbing by Wilson may have convinced the jury that his "alleged *current* disdain for violence" (RB:123) was insincere.

Regarding Magee, respondent implausibly contends that information about his testimony and resulting benefits in other cases was not relevant to his credibility in appellant's case. As explained in the opening brief, however, the jury was entitled to know whether Magee was a serial informant, receiving benefits for his testimony. (AOB:287-288, 291-292.) Judge Kozinski of the Ninth Circuit Court of Appeals has recently emphasized the perils of using such witnesses to obtain a conviction: "Serial informants are exceedingly dangerous because they have strong incentives to lie or embellish, they have learned to be persuasive to juries and there is no way to verify whether what they say is true." (Kozinski, *Preface: Criminal Law 2.0,* 44 Geo. L.J.Ann. Rev. Crim. Proc. (2015) pp. xxx [hereafter Kozinski].) Here, the more often Magee was conveniently in

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[15](...continued)
should not have been allowed as rebuttal. (See Arg. VII.)

a position to supply testimony for the prosecution, the less credible his testimony in any individual case.

The informant scandal currently unfolding in Orange County vividly demonstrates the importance of fully vetting the testimony of such witnesses. In *People v. Dekraai*, an Orange County death penalty prosecution, trial counsel discovered that law enforcement in that county had for years been cultivating jailhouse informants who were then used by the prosecution in multiple cases. After extensive litigation of the issue in *Dekraai*, the trial court "eventually found that the Orange County District Attorney's Office had engaged in a 'chronic failure' to disclose exculpatory evidence pertaining to a scheme run in conjunction with jailers to place jailhouse snitches known to be liars near suspects they wished to incriminate, effectively manufacturing false confessions." (Kozinski, *supra*, at p. xxvi.) The use of these serial informants by Orange County prosecutors has already led to dismissals in several murder cases.[16] In appellant's case, he was denied an opportunity to establish whether Magee was a serial informant whose testimony, as a result, should have been viewed with extreme skepticism.

Fourth, respondent claims that several of appellant's claims were forfeited. Respondent emphasizes that appellant did not object that Hill's

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[16] (See Saavedra, *Here is why an admitted killer walked free*, Orange County Register (Oct. 22, 2014); Moxley, *Tony Rackauckas' Truth or Consequences: DA Continues Dropping Cases to Avoid Disclosures*, OC Weekly (Oct. 1, 2014); Dalton, *More Murder Charges Dropped in Wake of DA Informants Case*, Voice of OC (Sept. 29, 2014); Moxley, *OC prosecutors mischaracterized Henry Cabrera's gang ties for more than a decade – and now it's coming back to bite them*, OC Weekly (Aug. 21, 2014).)

testimony violated the Secondary Evidence Rule. (RB:117.) But as the trial court's ruling based on this objection to Wilson's testimony demonstrated, any objection would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) The same principle applies to defense counsel's failure to make hearsay objections to Magee's testimony. (See RB:119-120.) There is no reason to believe the trial court would have sustained such an objection after denying the same objection to the testimony of Hill and Wilson. (See AOB:286, fn. 134.)

Fifth, respondent offers yet another desultory harmlessness argument, claiming that the case-in-chief was overwhelming. (RB:124.) As appellant has repeatedly explained, the state's case was actually underwhelming. There is more than an abstract possibility that appellant would have secured a more favorable result if this highly suspect yet extraordinarily prejudicial testimony had not been admitted. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

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IX.

MULTIPLE OTHER INSTANCES OF PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE DEPRIVED APPELLANT OF A FAIR TRIAL

Appellant has argued that the prosecutor committed numerous acts of misconduct which deprived him of a fair trial. (AOB:294-310.) Respondent appears to agree that some of the challenged conduct was improper, but argues that other conduct was not improper and concludes that any error was harmless. (RB:125-140.) These claims are unsupported.

Appellant argued that the prosecutor unfairly suggested that he was a danger to the inmate witnesses the state called in rebuttal. (AOB:295-297.) Respondent asserts that the jury was not likely to have realized that the prosecutor's improper objection was an insinuation as to appellant's dangerousness. (RB:126-127.) But the import of the improper remark was clear: after the trial court ruled that defense counsel could ask Wilson where in Calipatria prison he was housed for purposes of demonstrating that the informant witnesses had an opportunity to coordinate their testimony, the prosecutor gratuitously stated "With Mr. Barrett being in Calipatria, we're asking for bigger problems than we can even imagine." (AOB:295-297; 63RT:8004.) Respondent fails to explain how this statement could have otherwise been understood. Any juror, after hearing the prosecutor's remark in context and the trial court's exasperated response to it, would have divined the import of these words. (See AOB:296.)

Respondent then claims that the misconduct was not prejudicial because it was stipulated that appellant would be dangerous to informants. (RB:128.) This argument should be rejected, however, because the stipulation was proposed only in an effort to prevent the prosecutor from

eliciting additional evidence of appellant's in-custody misconduct pursuant to the trial court's erroneous ruling under Evidence Code section 1103, subdivision (b). (See AOB:194-195.) Further, it led to an inference that appellant was dangerous even during trial.

Appellant also argued that the prosecutor acted inappropriately by asking if correctional officer Brumbaugh as a sworn peace officer had any reason to lie. (AOB:297-298.) Respondent does not defend the improper questioning but rather claims that it would not have affected the outcome of the guilt phase. (RB:128-129.) This is probably correct if considered in isolation but it must be assessed in combination with the other misconduct committed, as well as with any other errors this Court finds were made during the trial.

The opening brief further demonstrates how the prosecutor inappropriately attempted to elicit inadmissible evidence of a non-violent escape attempt from CYA. (AOB:298-300.) Respondent avers that the prosecutor was simply trying to establish that appellant was not held in CYA until age 25 but rather sent to adult prison as a teenager. (RB:129-130.) The record speaks for itself, however. Asking appellant whether he was a "washout" who could not handle incarceration in CYA was not designed to produce any relevant, admissible testimony. (See AOB:299.)

The same is true about the prosecutor's questioning of whether appellant had previously been sent to Calipatria's Ad Seg for other violent acts. (See AOB:300.) Respondent does not try to justify the questioning, but claims it did not harm appellant, emphasizing that the jury heard "abundant evidence of Barrett's violent acts committed while incarcerated . . ." (RB:130.) This evidence, however, was admitted only because of the trial court's erroneous construction of Evidence Code section 1103,

subdivision (b). (See AOB:Arg. IV.)

Appellant also argued that the prosecutor unfairly invoked the prestige of his office when he emphasized that he was the People's representative. (AOB:301-303.) Respondent argues that since the prosecutor's declaration that he represented the state, and not the CDC or Mr. Richmond, was true there was no misconduct. (RB:131-132.) It is the context of this representation, however, which was offensive. The prosecutor juxtaposed his position as the People's representative to a belief in truth and justice, which intimated that defense counsel may not have shared these lofty ideals. (See AOB:302; 69RT:8755-8756.) The prosecutor's invocation of his office was not a neutral statement meant to disabuse the jury of any confusion about his role in the case. The statements also benefitted the state because they set the prosecutor apart from the Department of Corrections, which according to the prosecution's own expert did a dreadful job collecting and preserving the forensic evidence in appellant's case.

The prosecutor also misstated the facts concerning Richmond's disciplinary record during argument to make it look as though appellant had lied about it in his testimony. (AOB:303-306.) Respondent first argues that the claim is forfeited because appellant's counsel did not object. (RB:133.) Respondent acknowledges that appellant has argued that objecting would have been futile. (RB:133.) But respondent fails to address the reason for this futility – the trial court's stated unwillingness to rule on any such objections. This Court should therefore reach the merits.

As to the substance of the claim, respondent emphasizes that appellant's argument relies on a "single line in a six-page memorandum." (RB:133.) Respondent suggests that the prosecutor either did not know

about this statement in the memo or forgot about it. (RB:135.) That rings hollow, however, in light of the importance the prosecutor attached to Richmond's alleged lack of a disciplinary history which he claimed seriously undercut appellant's credibility.

Respondent further argues that this misstatement could not have affected the outcome of the trial. (RB:134-136.) But as appellant has explained, his credibility was essential to the success of his defense. The prosecutor's manipulation of the facts provided fodder to argue that *all* of appellant's testimony should be rejected. (See AOB:304.)

Finally, the opening brief demonstrates that the prosecutor improperly baited appellant, presumably in hopes of provoking an outburst from him. (AOB:306-309.) Respondent claims that inflammatory questions about appellant's racial beliefs were merely responsive to an issue raised by the defense. (RB:136-137.) However, the evidence that Calipatria's inmates racially segregated themselves did not open the door to questions insinuating appellant was a racist. Nor was the snide question about how appellant had cut a weapon from the desk warranted, in light of appellant's polite reluctance to be more specific. (See AOB:307.) Respondent goes so far as to suggest that the prosecutor's juvenile behavior in approaching appellant with the weapon was simply responsive to appellant's testimony. (RB:137-138.) But the record passage cited by respondent does not establish that appellant invited the prosecutor to behave in a manner ill-becoming of an attorney.

Respondent also asserts that the prosecutor's petulant and aggressive argument was "brief and corrected." (RB:139.) As appellant has demonstrated, however, the cumulative effect of the prosecutor's misconduct deprived him of a fair trial. (AOB:309-310.) Respondent

disagrees, but offers no meaningful assessment of the evidence or of how the improper conduct might have impacted the jury's deliberations. (See RB:139-140.) This Court has recently affirmed that repeated misconduct takes its toll, stating: "We have held a number of instances of prosecutorial misconduct may act synergistically to create an atmosphere of prejudice more intense than the sum of its parts." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1350, citing *People v. Hill, supra*, 17 Cal.4th at p. 845; see *People v. Vance* (2010) 188 Cal.App.4th 1182, 1207.)

In fact, appellant's case is much like *Vance*; in both cases the only issue for the jury to determine was the defendant's mental state at the time of the charged killing. In *Vance*, the defendant acknowledged killing the victim but contended that he had not acted with premeditation and deliberation. The court of appeal found that although the evidence was sufficient to support the jury's verdict of first degree murder, it was "equally compatible with a conclusion that it showed no more than second degree murder . . . ." (188 Cal.App.4th at p. 1205.) The court elaborated:

> The prosecution's evidence was hardly overwhelming in pointing to defendant's guilt *for first degree murder*. None of the prosecution's evidence directly and unambiguously pointed to the mental state required for first degree murder. Even giving the prosecution's evidence its maximum effectiveness, the two sides were in equipoise. With the case teetering on a knife edge, it would not take much to tilt the balance.

(188 Cal.App.4th at p. 1206, original italics.) Given this equipoise, the *Vance* court found that the prosecutor's misconduct during argument created "at least a reasonable probability that a more lenient verdict would

have been returned in the absence of the errors." (*Id.* at p. 1207.)

As in *Vance*, the case for first degree murder in appellant's case was far from overwhelming. (See AOB:Arg. IV.G.) The prosecutor's repeated misconduct had a negative synergistic impact, particularly by undermining appellant's credibility as a witness, which was critical to the defense. There is at least a reasonable chance, and more than an abstract possibility, that a result more favorable to appellant in either guilt or penalty would have occurred without the misconduct. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

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X.

A COMBINATION OF ERRORS IN THE GUILT PHASE JURY INSTRUCTIONS DEPRIVED APPELLANT OF A CONSTITUTIONALLY FAIR TRIAL

The 80 pages of jury instructions in appellant's guilt phase included numerous inadequate, erroneous, and confusing instructions which the jury was reasonably likely to have constitutionally misapplied. (AOB:311-346.) Considering each of the challenged instructions individually, respondent claims that none could have misled the jury or prejudiced appellant. Respondent fails, however, to address the impact of the instructions as a whole. (RB:140-175.) Whether the instructions are evaluated singly or in their entirety, respondent's argument is flawed.

A. There Is No Forfeiture.

Initially, respondent erroneously asserts that appellant has forfeited his right to challenge the instructional errors on appeal because, according to respondent, appellant did not object below. (RB:142-144.) Respondent acknowledges that Penal Code section 1259 explicitly provides that an instruction may be reviewed for error despite the lack of objection below if the substantial rights of the defendant were affected. (RB:143.) Respondent contends, however, that there are "some limits to the applicability of section 1259," citing *People v. Dennis* (1998) 17 Cal.4th 468, 534-535, and *People v. Beeler* (1995) 9 Cal.4th 953, 983, for this proposition. (RB:143.) But in both of those cases, the Court invoked section 1259 to review the challenged instructions on the merits. (*People v. Dennis*, *supra*, 17 Cal.4th at pp. 534-535 ["Although section 1259 allows us to review – even in the absence of an objection – instructional error that affects substantial rights, the trial court's decision to give CALJIC No. 2.10 was not erroneous"]; *People v. Beeler*, *supra*, 9 Cal.4th at p. 983 [in

absence of a defense request, trial court has no obligation to amplify or explain an instruction but Court addresses the merits of defendant's challenge to instruction].) Thus, these cases do not support respondent's forfeiture argument.

Moreover, although no objections to the instructions challenged here were required, respondent is incorrect in asserting that "Barrett failed to object to any of the alleged instructional errors he now raises on appeal." (RB:142.) As respondent later acknowledges, appellant "proposed alternative pinpoint instructions to a number of instructions he now claims were given in error." (RB:144.) Contrary to respondent's position, these alternative or supplemental instructions alerted the trial court to most of the defects contained in the instructional charge.

B. Evidence Code Section 1103, Subdivision (b).

The instructions relating to Evidence Code section 1103, subdivision (b), the other crimes evidence, were faulty. They erroneously permitted the jury to consider the evidence as establishing appellant's violent character, as well as his intent and knowledge. Moreover, to the extent the bad acts evidence was admissible, the jury should have been instructed to consider Richmond's prior conduct as evidence of his violent character. (AOB:216-227.) Appellant's reply to respondent's argument on this issue is set forth in Argument IV.D., *ante*.

C. Penal Code Section 4500.

Appellant has shown how the trial court erred in three respects when it instructed on the Penal Code section 4500 charge. First, the court gave instructions, CALJIC Nos. 7.35 and 9.00, which included conflicting mental states. Second, it failed to instruct on the element of causation. Third, the court erred by not instructing on assault with a deadly weapon as a lesser

included offense to section 4500. (AOB:318-322.) Respondent contends that the jury was properly instructed and that any error was harmless. (RB:145-155.)

Citing *People v. Jeter* (2005) 125 Cal.App.4th 1212, appellant has explained that the trial court in his case erred because CALJIC No. 9.00, the instruction it gave to define assault, contradicts the requirement of malice aforethought. (AOB:319-320.) Respondent contends that *Jeter* was incorrectly decided because the court of appeal neglected to consider whether implied malice aforethought was inconsistent with CALJIC No. 9.00. Respondent argues – erroneously – that it is not. (RB:148-151.) However, the *Jeter* court did not fail to consider implied malice aforethought; it recognized that "Malice aforethought as used in section 4500 has the same meaning as it has for murder convictions, requiring either intent to kill or 'knowledge of the danger to, and with conscious disregard for, human life.'. . ." (125 Cal.App.4th at p. 1216, quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 536-537.) Moreover, *Jeter* was not "wrong to conclude that CALJIC No. 9.00 is erroneous," as respondent claims. (RB:150.) Implied malice, which as just stated requires acting with knowledge of the danger to, and conscious disregard for, human life is inconsistent with language in CALJIC No. 9.00 which states that an assault does not require "an actual awareness of the risk that injury might occur to another person." (46CT:12915.) A person cannot act with knowledge of danger to life yet lack awareness that injury might occur.

Appellant also asserted that the trial court erred by failing to instruct on the element of causation. (AOB:320-322.) Respondent declares that causation is not an element, because it "relates only to the *punishment*" for Penal Code section 4500. (RB:151.) That is akin to arguing that there are

no elements to special circumstances because *they* also relate only to punishment, which is of course erroneous. (See, e.g., *People v. Mendoza* (2011) 52 Cal.4th 1056, 1073 [describing the elements of the lying-in-wait special circumstance].)

As to appellant's argument that the trial court should have instructed on the lesser included offense of assault with a deadly weapon, respondent asserts that "this Court has specifically held that lesser included offense instructions should *not* be given when an assault by a life prisoner under section 4500 is charged." (RB:154.) However, the reasoning in the line of cases cited by respondent was rejected by this Court decades ago, in *People v. St. Martin, supra*, 1 Cal.3d at pp. 532-536. Moreover, although not acknowledged by respondent, this Court has expressly held that assault with a deadly weapon is a lesser included offense to Penal Code section 4500. (See AOB:322, citing *People v. Milward* (2011) 52 Cal.4th 580, 586.)

D. Drawing Adverse Inferences From Appellant's Testimony.

In the opening brief, appellant argued that the trial court erred in instructing the jury pursuant to CALJIC No. 2.62, which permits the jury to draw an adverse inference from a defendant's testimony, because it was not supported by the evidence. The court also erred in failing to give a proposed instruction on the issue which was more even-handed. (AOB:322-329.) Respondent asserts that CALJIC No. 2.62 was properly given and that the special instruction was correctly denied. (RB:155-163.) These arguments are erroneous.

According to respondent, CALJIC No. 2.62 was supported by the evidence. (RB:159-162.) Citing *People v. Belmontes* (1988) 45 Cal.3d 744, 784, respondent contends that when a defendant in his testimony gives

an explanation which is bizarre or implausible, the trial court may instruct on No. 2.62. (RB:161-162.) Respondent asserts that appellant's testimony that he could not recall how he cut the knife from the steel desk triggered the giving of the instruction. But appellant's case is distinguishable from *Belmontes* and the case upon which it relies, *People v. Mask* (1986) 188 Cal.App.3d 450. First, this Court in *Belmontes* noted that the defendant did not object to CALJIC No. 2.62. (45 Cal.3d at p. 783.) In appellant's case, defense counsel made clear that he did not believe the instruction was appropriate in light of the facts. Moreover, he offered a special instruction that was a balanced and fair alternative. (See AOB:324-325.) Second, in both *Belmontes* and *Mask* the defendants implausibly explained facts relating to material issues in their cases – i.e. their conduct during the charged offenses. (See *People v. Belmontes*, *supra*, 45 Cal.3d at pp. 783-784; *People v. Mask*, *supra*, 188 Cal.App.3d at p. 455.) In contrast, *how* appellant cut the metal desk was not a material issue, because he readily admitted that he did so and that this was the instrument he used to stab Richmond.

Respondent also argues that appellant's proposed instruction was not a correct statement of law and was therefore appropriately denied. (RB:156-158.) Respondent believes that appellant has misread *People v. Denton* (1947) 78 Cal.App.2d 540. (RB:158.) However, appellant addressed in the opening brief all the points respondent raises. Specifically, the *Denton* court implicitly endorsed the language of the proposed instruction by finding that the trial court's refusal to give it was not prejudicial because another instruction covered the same ground. And, in appellant's case, the trial court agreed that the proffered instruction was a correct statement of the law. (See AOB:325-326.)

Respondent then asserts that the last sentence of the proposed instruction was argumentative "because it invited the jury to draw an inference favorable to Barrett on a disputed question of fact." (RB:158.) It was not. The last sentence read "And if his testimony is such that it creates a reasonable doubt in your mind, then, you must find the Defendant not guilty." (See AOB:323; 66RT:8430.) This was a true statement, as the issue was the mental state with which appellant stabbed his cellmate. If appellant's testimony that he believed he was defending his life created a reasonable doubt in the mind of any juror, then the jury would not be able to find him guilty of capital murder. It therefore appropriately pinpointed the defense theory in this case. (See *People v. Earp* (1999) 20 Cal.4th 826, 886 [upon request, defendant generally is entitled to instruction that pinpoints his theory of defense and how the evidence of that defense relates to the prosecution's burden of proving guilt beyond a reasonable doubt].) Moreover, if the last sentence was somehow objectionable, the trial court had a duty to revise it. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [trial court has a duty to modify an otherwise proper pinpoint instruction so that it comports with the facts of the case and law].)

Respondent's claim that the defense proposed instruction was duplicative is curious. (See RB:158-159.) If the other instructions given adequately informed the jury how to evaluate appellant's testimony – i.e., the same as that of any other witness – then CALJIC No. 2.62 was itself duplicative and should not have been given. In fact, No. 2.62 is not duplicative because no other instruction encourages the jury to draw an unfavorable inference from the defendant's failure to explain or deny evidence. This of course is why prosecutors want jurors to hear it. In this case, the trial court should not have given No. 2.62. But once it decided to

single out appellant's testimony for special scrutiny, the court should have at least permitted the defense to neutralize the one-sidedness of this charge by also giving the requested special instruction.

E. Heat of Passion and Sudden Quarrel.

Appellant has demonstrated that the instruction he proposed on sudden quarrel and heat of passion was far more comprehensible than the lengthy and impenetrable pattern instruction the trial court gave. (AOB:330-332.) In fact, as is discussed at length *post*, the manslaughter instructions as a whole were so conflicting and confusing that they made it exceedingly difficult for the jury to give effect to defense evidence concerning imperfect self-defense and provocation. (See X.I., *post*.)

Respondent states only that appellant has failed to cite a case establishing that CALJIC No. 8.42 was an incorrect statement of law, adding "Therefore, even though Barrett's proposed instruction used simpler terms and may be a correct statement of the law, the trial court properly declined to instruct the jury with this proposed instruction because it is duplicative of the pattern instruction." (RB:165.)

However, as appellant has argued, the trial court had a duty to give clear instruction in plain language. (AOB:331-332.) Thus, it does not matter that no case has held No. 8.42 invalid. The point is that the trial court erred in rejecting appellant's straightforward and correct instruction in favor of the convoluted CALJIC instruction.

F. CALJIC Nos. 8.71 and 8.72.

Appellant has claimed that the trial court erred when it gave the 1996 verison of CALJIC Nos. 8.71 and 8.72, while denying a defense special instruction. The pattern instructions, relating to choosing between first and second degree murder, and between murder and manslaughter, could lead

jurors to erroneously understand that they could find appellant guilty of the lesser offense only if they agreed unanimously, thereby making the greater offense the default finding. In *People v. Moore* (2011) 51 Cal.4th 386, 411, this Court held that Nos. 8.71 and 8.72 "carry at least some potential for confusing the jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter." Had the special instruction requested by the defense been given instead, this confusion would have been eliminated. (AOB:332-335.)

Respondent states that appellant "has provided no authority stating that such instructions were improper statements of the law," claiming that *People v. Dennis* (1998) 17 Cal.4th 468, 536-537, upheld the validity of Nos. 8.71 and 8.72. (RB:167.) *Dennis* does not support respondent's argument, as the instructions at issue there appear to have been a different version. As *Moore* explains, the confusing language in the 1996 versions of Nos. 8.71 and 8.72 was not present in previous CALJIC editions:

> On the merits, respondent correctly notes that in *People v. Frye* (1998) 18 Cal.4th 894, 963-964 [], we rejected a similar challenge to earlier versions of CALJIC Nos. 8.71 and 8.72. These earlier versions, however, did not contain the problematic language of which defendant now complains. . . . We have not previously decided whether the particular instructions at issue here are reasonably likely to be understood and applied in an unconstitutional manner. . . .

(51 Cal.4th at p. 410.) *People v. Dennis*, which was decided by this Court in 1998, apparently involved pre-1996 versions of Nos. 8.71 and 8.72, or

else the Court would have referred to it in *Moore*.[17]

Respondent's reliance on *People v. Pescador* (2004) 119 Cal.App.4th 252 and *People v. Gunder* (2007) 151 Cal.App.4th 412, is similarly misplaced. (See RB:167-169.) After considering both of these cases, this Court in *Moore* concluded that "the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72 . . . ." (*People v. Moore*, *supra*, 51 Cal.4th at p. 411.) Moreover, in *Pescador* and *Gunder* the trial courts also gave CALJIC No. 17.40 which, the appellate courts found, "adequately dispelled" the confusion created by CALJIC Nos. 8.71 and 8.72. (*Moore*, *supra*, 51 Cal.4th at p. 412.) Although the Court did not determine in *Moore* whether this conclusion was correct, it does not matter here because CALJIC No. 17.40 was not given in appellant's case. (See generally 46CT:12833-12916 [guilt phase instructions given].)

In sum, while *Moore* does not expressly state that the 1996 editions of these instructions were incorrect statements of law, in this case appellant provided an alternative that included a correct statement of the law that would not have engendered any confusion. The trial court erred when it opted for confusion over clarity.

G. Lying in Wait.

In the opening brief, appellant argued that the instruction given on the lying-in-wait special circumstance was faulty in several respects. It failed to require a *substantial* period of watching and waiting. It failed to require that the purpose concealed must be a deadly one and a continuous flow of a culpable mental state. And it failed to distinguish between lying

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[17] The charged offenses in *Dennis* occurred in 1984. (17 Cal.4th at p. 489.) According to the opening brief in the case, the trial occurred in 1988.

in wait and premeditation and deliberation. (AOB:335-338.)

Respondent emphasizes that the instruction has previously been upheld by the Court and maintains that there is no valid reason for reconsidering that conclusion. (RB:171-173, citing *People v. Stevens* (2007) 41 Cal.4th 182, 203-204; *People v. Streeter* (2012) 54 Cal.4th 205, 251-252.) In the opening brief, however, appellant explained why this Court should reconsider *Stevens*. And, as demonstrated elsewhere in this brief, this Court's recent cases addressing the lying-in-wait special circumstance further underscore why a reconsideration of what constitutes lying in wait under section 190.2 is in order. The same is true regarding the claim that, as written, CALJIC No. 8.81.15 conflates the element of lying in wait with that of premeditation and deliberation. (See AOB:Arg. XII.)

Moreover, whether or not the pattern instruction is valid in general, it was erroneous given the particular facts of appellant's case. As explained in the opening brief, the facts are susceptible to a conclusion that the purpose appellant concealed was not an intent to kill and that he did not have a culpable state of mind continuously from the period of watchful waiting to the lethal attack. Yet, as instructed, the jury could have nonetheless found the special circumstance allegation true. (AOB:336-337.) In *Streeter*, *supra*, a supplemental instruction corrected for at least one of these defects by informing the jury that a continuous flow of culpable state of mind was required. (54 Cal.4th at p. 252; AOB:337.) No such instruction was given in appellant's case.

Given the unique facts of this case, the lying-in-wait instruction was erroneous because it permitted the jury to find the special circumstance true even if appellant acted in self defense or imperfect self-defense. The jury was instructed that to find the special circumstance true, it needed to find an

intent to kill and "waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence." (46CT:12912.) One who kills in actual or imperfect self defense may harbor express malice, or intent to kill, but that intent is excused or negated by law. A lay person would not necessarily understand, however, that the "intent to kill" referred to in CALJIC No. 8.81.15 would not apply to one negated by operation of law. And here appellant testified that he waited on his bunk, prepared to surprise Richmond with a defensive attack, in case his cellmate tried to assault him. Yet the instruction did not explain that the watchful waiting and surprise attack could not include conduct initiated in self defense or in an unreasonable but sincere belief in the need to defend oneself. (AOB:335-338.)

H. The Errors Denied Appellant Due Process.

Appellant has argued that the errors in the instructions, when considered as a whole, deprived him of due process. (AOB:313, 338-340, citing *Middleton v. McNeil* (2004) 541 U.S. 433, 437.) Respondent agrees that the standard is whether it is reasonably likely that the jury has applied the challenged instructions in a way that violates the federal constitution. (See RB:142, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72 and *Boyde v. California* (1990) 494 U.S. 370, 380.) However, respondent does not directly respond to appellant's argument that there was such a likelihood here. In fact, as discussed in the opening brief and below, it is reasonably likely that the jury applied the ambiguous charge in a way that deprived appellant of his due process rights to have each element of the charged offenses proved beyond a reasonable doubt and to present a defense. (See AOB:338-340; ARB X.I., *post*; *Sandstrom v. Montana* (1979) 442 U.S.

510, 520-521; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [trial court's failure to instruct correctly on defense theory may deprive defendant his due process right to present a defense].)

I. Prejudice.

Appellant has argued that the erroneous instructional charge as a whole prejudiced him under the standards of both *Chapman v. California* (1967) 386 U.S. 18, and *People v. Watson* (1956) 46 Cal.2d 818. In short, it was a close case in which his mental state at the time of Richmond's death was the pivotal issue. The flawed instructions prejudiced appellant because they rendered incomprehensible the points of law that were most crucial to his defense: they negatively impacted the jury's consideration of his testimony about his mental state and provided the jury with incorrect and confusing information about the various mental states at issue and how they related to the charged and lesser offenses. (AOB:340-342.)

Respondent does not address this argument but rather examines each error in isolation and finds no harm. But as appellant shows below, the combined effect of the instructional errors had a profoundly prejudicial impact.

The errors relating to Evidence Code section 1103, subdivision (b), and CALJIC No. 2.62 unfairly undermined appellant's testimony that he stabbed Richmond because he believed his cellmate was about to assault him with a weapon. CALJIC No. 2.50, the erroneous instruction relating to section 1103(b), permitted the jury to use the extensive other crimes evidence to find appellant had a violent character, thereby undercutting his claim of self-defense, while simultaneously precluding any consideration of Richmond's character for violence. It also permitted the jury to consider

this evidence as to appellant's intent and knowledge.

CALJIC No. 2.62, which improperly invited the jury to draw a negative inference from appellant's testimony, likely led the jury to infer that appellant was a liar. That is certainly what the prosecutor argued. (69RT:8769-8771.) After emphasizing appellant's failure to explain how he cut the knife from the desk, the prosecutor stated:

> When a person gets on this stand and swears to tell the truth, that means that they've got to answer the questions truthfully . . . . And he wasn't truthful. Why? Because he's got something to hide. [¶] He murdered Tommy Kent Richmond on April the 9th, 1996.

(69RT:8771.) Although respondent argues that any error in giving CALJIC No. 2.62 was harmless in this case, she fails to explain why. (See RB:162-163.) In fact, had it not been given, the prosecutor's argument on this point would have had far less force, since the factual issue of how the knife was made was otherwise insignificant.

Regarding the other erroneous instructions, respondent argues that they were not prejudicial because the first degree murder verdict demonstrates that the jury found that the killing was premeditated and deliberate. (See, e.g., RB:152, 154-155 [Pen. Code, § 4500 errors], 165 [heat of passion and sudden quarrel].) However the jury might have rejected a first degree murder verdict but for the erroneous CALJIC Nos. 2.50 and 2.62 instructions, which unfairly damaged appellant's testimony establishing he did not commit premeditated murder. CALJIC No. 8.71, which improperly made first degree murder the default finding if some jurors had doubts about the existence of premeditation and deliberation, further diminished the significance of the first degree finding. Had these

errors not occurred the jury might have found anything from true self-defense to second-degree murder. Accordingly, the impact of all of the erroneous instructions must be considered.

Indeed, the charge as a whole made it exceedingly difficult for the jury to give effect to defense evidence concerning imperfect self-defense and provocation. For the reasons that follow, the instructions actually given failed to inform the jurors clearly and consistently that there is a difference between malice aforethought existing in fact and malice aforethought, although present in fact, which is negated or excused by law when a defendant acts with a sincere but unreasonable belief in the need to defend himself, upon a sudden quarrel or in the heat of passion.

First, several of the instructions would have led a reasonable juror to understand that if she determined appellant had acted *with* either implied or express malice, he could not be convicted of manslaughter. CALJIC No. 8.37 told the jury that manslaughter is a killing without malice aforethought. (46CT:12895.) In CALJIC No. 5.17, the jury was informed that a person who kills with an actual but unreasonable belief in the need to defend himself does not harbor malice. (46CT:12880.) CALJIC No. 3.31.5 instructed that malice aforethought is the necessary mental state for first degree murder, second degree murder, and assault by a life prisoner, but not – by omission – manslaughter. (46CT:12873.) From these instructions, a reasonable juror would have concluded that one who acts with malice cannot be convicted of manslaughter.

Second, CALJIC No. 8.40, the voluntary manslaughter instruction, failed to clarify the situation. It stated that voluntary manslaughter has been committed when a person kills without malice aforethought but either with an intent to kill, or with a conscious disregard for life. (46CT:12896.) At

this point, the jurors were undoubtedly left scratching their heads, wondering how a killing could be committed without malice aforethought while at the same time with either express malice or implied malice.[18]

Although CALJIC No. 8.40 went on to instruct that "[t]here is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend," this portion of the instruction inadequately explained the interplay between these circumstances and malice. A juror would have been unlikely to grasp that a person who acted with malice may be convicted of voluntary manslaughter because imperfect self-defense, sudden quarrel, or heat of passion legally operate to negate such malice. Here, a reasonable juror could have understood the instruction to mean that if she believed the defendant had acted with malice aforethought, the defendant could not have been acting in imperfect self defense, upon a sudden quarrel, or in the heat of passion. (46CT:12896.)[19]

Third, the involuntary manslaughter instruction, CALJIC No. 8.45, was similarly confusing. It told the jury that *involuntary* manslaughter was committed when a person was killed without malice aforethought. It then indicated that there is no malice where the killing occurred in the actual but

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[18] The jurors had been instructed that malice aforethought was either express, meaning an intent to kill, or implied, if the killing resulted from an act committed with conscious disregard for human life. (46CT:12891 [CALJIC No. 8.11].)

[19] CALCRIM 570 essentially eliminates the confusion appellant identifies here, because it simply states, in part, that "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." It does not require the jury to pretend that malice is not present.

unreasonable need to defend, and also included a paragraph about when implied malice is present. (46CT:12900.) But again, this language was insufficient to inform the jurors that imperfect self defense legally negated or excused malice that was *in fact* present.[20]

Fourth, the confusion generated by these instructions was not alleviated by others. CALJIC Nos. 3.31.5, 8.42, 8.43, and 8.50, did refer somewhat more directly to the legal effect of imperfect self defense, heat of passion and sudden quarrel on malice, but they also lacked clarity and consistency. A defense-modified 3.31.5 told the jury that if it had a reasonable doubt that malice was negated by heat of passion or "unreasonable but actual fear for the need for self defense," it must find there was no malice aforethought. (46CT:12874.)[21] This was the only instruction which referred to the *negation* of malice, but it did not link such negation directly to manslaughter.

CALJIC Nos. 8.42 and 8.43 told the jury that a killing was *reduced* from murder to manslaughter when committed upon a sudden quarrel or heat of passion. (46CT:12897-12898.) But these instructions did not explain that this reduction was on account of malice being negated by operation of law. Nor did it include a reference to imperfect self defense.

CALJIC No. 8.50 was the most direct explication of the interrelation between malice and manslaughter provided to appellant's jurors, yet it too

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[20] Also, CALJIC Nos. 8.40 and 8.45 contradicted each other. Under 8.40, a person who killed with implied malice but in imperfect self defense would be guilty of voluntary manslaughter. Under 8.45, the exact same conduct would constitute involuntary manslaughter. This undoubtedly left the jury perplexed.

[21] This instruction neglected to include sudden quarrel.

was abstruse. It began by stating that murder requires malice while manslaughter does not. Significantly, CALJIC No. 8.50 then indicated that express malice was in effect legally negated by heat of passion, sudden quarrel, or an actual but unreasonable belief in the need to defend, stating: "In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent." (46CT:12901.) It was silent as to implied malice, however, which created an implication that these circumstances somehow interacted differently with implied malice than with express malice.

All told, there was only one sentence among the 80 pages of guilt phase instructions which indicated that a person who killed with malice could be found guilty of manslaughter because, if he acted pursuant to imperfect self-defense or provocation, those circumstances legally negated that malice. The remainder of the instructions relating to manslaughter, when read together, constituted an inconsistent and indecipherable hodgepodge that likely left the jurors misguided as to how they could give effect to the defense evidence. Had the jury been properly instructed, there is at least a reasonable chance, and more than an abstract possibility, that it would have found him guilty of something less than first degree murder. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 351; see also *People v. Watson*, *supra*, 46 Cal.2d 818.) Further, there is at least a reasonable chance that a jury properly instructed on the impact of imperfect self-defense and provocation on malice would have convicted appellant of a lesser offense to Penal Code section 4500, that of assault with a deadly weapon, had that option been presented.

Empirical data support appellant's prejudice argument. Research consistently demonstrates that jurors do not properly understand some

pattern jury instructions, particularly those with legal terms of art. (Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting The Presumption That Jurors Understand Instructions* (2004) 69 Mo. L.Rev. 163, 198-200 [hereafter Ritter].) Instructions using such terms, including malice aforethought, "resonate with jurors in unforeseen ways." (Heyman, *Lost in Translation: Criminal Jury Trials in the United States* (2014) 3 Brit. J.Am. Leg.Stud. 1, 24 [hereafter Heyman].) Moreover, categories of mens rea "are notoriously difficult [for jurors] to conceptualize . . . ." (Ginther et al., *The Language of Mens Rea* (2014) 67 Vand. L.Rev. 1327, 1363 [hereafter Ginther].) Juror comprehension increases, however, when such instructions are written in plain English. (Ritter, *supra*, at pp. 207, 241; Heyman, *supra*, at p. 23; Ginther, *supra*, at p. 1363.) For these reasons, some of the very instructions at issue here were significantly revised when CALCRIM instructions were drafted. (See Tiersma, *Redrafting California's Jury Instructions* (2009) Legal Studies Paper No. 2009-42, pp. 17-21 [explaining how CALJIC instructions on murder and malice aforethought were improved in CALCRIM].)[22]

Finally, in light of these incomprehensible instructions, the misleading CALJIC Nos. 8.71 and 8.72 might have led one or more jurors to opt for first degree murder although believing appellant's conduct to be second degree murder, or to agree to a murder verdict instead of a manslaughter verdict. Respondent disagrees, arguing that the versions of CALJIC Nos. 8.71 and 8.72 given here did not cause harm in light of the true finding on the lying-in-wait special circumstance verdict. (RB:170-

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[22] Reprinted in The Routledge Handbook of Forensic Linguistics (Coulthard & Johnson, edits., 2010), and available at http://ssrn.com.abstract=1504984.

171.) Respondent relies on *People v. Moore*, *supra*, 51 Cal.4th 386, but *Moore* is distinguishable from appellant's case. In *Moore*, the Court could say that giving Nos. 8.71 and 8.72 was harmless beyond a reasonable doubt under *Chapman* because the jury there found the defendant was guilty of felony-murder, which could not have been affected by the flawed instructions. (51 Cal.4th at p. 412.)

In appellant's case, no felony murder charges were alleged, and the lesser offenses of second degree murder and manslaughter were definitely in play in light of the defense evidence. The lying-in-wait special circumstance finding did not cure the harm created by the faulty pattern instructions, as respondent insists, because CALJIC No. 8.80.1 instructed the jury to consider the special circumstance only if the jury found appellant guilty of first degree murder. Thus, any confusion caused by the faulty instructions would already have done their damage before the jury even reached the question of lying in wait.

Moreover, as appellant has argued, the lying-in-wait special circumstance instruction was itself erroneous. And if under the charge as a whole the jury did not understand that malice in fact was legally negated if the homicide was committed in imperfect self defense, as the result of a sudden quarrel, or in the heat of passion, then it could not have been expected to reject the lying-in-wait special circumstance.

The instructional errors therefore were not harmless.

J. Missing Instructions.

Many of the instructions proffered by the defense but rejected by the trial court were not preserved and made part of the record. Appellant has argued that this denied him his right to meaningful appellate review. (AOB:342-345.) Respondent asserts that appellant has forfeited this claim

because he agreed to the disposal of the instructions and that, in any event, the record is adequate. (RB:173-175.)

Respondent's claims that defense counsel invited the improper destruction of the proposed instructions must be rejected. (See RB:173-174.) Rule of Court, rule 8.610(a)(1)(D) requires that all instructions submitted in writing must be made part of the clerk's transcript on appeal, along with an indication of which party requested each one. Respondent offers no authority for the proposition that one of the parties or the trial court itself may choose to ignore this mandate. *People v. Lang* (1989) 49 Cal.3d 991, on which respondent relies, is completely inapposite. (RB:174, citing *People v. Lang*, *supra*, 49 Cal.3d at pp. 1031-1033 [trial counsel not ineffective for agreeing to defendant's demand that grandmother not be called as a penalty phase witness].) The reporter's transcript does not support respondent's claim either. The passage cited by respondent does not indicate an agreement by defense counsel to destroy all written proposed instructions but only an earlier draft of the particular instructions the court was reviewing at that time. (See 67RT:8591.) And after this exchange, the court again assured defense counsel that their proposed instructions were part of the record. (68RT:8667-8668.)

Respondent also argues that the record is adequate for review, faulting appellant for failing to show how the missing instructions prejudiced him. (RB:174-175.) But without the instructions, appellant is unable to demonstrate the kind of specific harm respondent believes is required. Appellant has set forth what is known about the missing instructions and has emphasized that many of them apparently went to the critical issue of appellant's mens rea at the time of Mr. Richmond's death. (See AOB:345.) He has also set forth above and in the opening brief how

the instructions that were actually given were flawed. This should be enough.

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XI.

APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE PREJUDICIAL AND UNJUSTIFIED DELAY IN CHARGING HIM WITH MURDER

Appellant has asserted that the more-than-two-year delay in charging him for Richmond's death violated his due process rights. The resolution of such a claim requires the trial court to engage in a three-step analysis: first, it must determine whether the defendant has made a prima facie showing of prejudice from the delay; if so, the burden shifts to the prosecution to justify the delay; finally, the court must balance the harm to the defendant against the reason for the delay. (See AOB 355.) Here, appellant presented a prima facie showing of prejudice by proffering evidence that Cruz and Hogan, two inmates with exculpatory information, had died during the charging delay. The prosecutor offered no justification for the delay, however and the trial court failed to engage in the necessary balancing process. (AOB:357-365.)

Respondent agrees that this three-step test provides the correct analytical framework. Although respondent acknowledges that the prosecutor did not offer any justification for the belated charging and that the trial court did not engage in any balancing, she asserts appellant's claim must be denied because he did not initially make a prima facie showing of prejudice. (RB:175-184.) Respondent faults appellant's showing of prejudice on three grounds. Respondent claims it was based only on appellant's own "self-serving declaration." Respondent contends that since Cruz and Hogan both died before trial, they would have been unable to testify on appellant's behalf even if he had been charged in a timely manner. Finally, respondent characterizes the evidence appellant was

unable to present as merely cumulative of that adduced at trial. (RB:175-184.) As set forth below, respondent's argument is not persuasive.

First, respondent is mistaken in suggesting that appellant's pretrial evidentiary proffer was deficient because it was based on his "own self-serving declaration as to what these witnesses would have testified to." (RB:182.) Motions, including one alleging a due process violation based on pre-charging delay, may be decided on the basis of factual affidavits or declarations made under penalty of perjury. (*People v. Sahagun* (1979) 89 Cal.App.3d 1, 24, citing Code Civ. Proc., §§ 2003, 2009.)[23] Accordingly, in *People v. Pellegrino* (1978), 86 Cal.App.3d 776, 780, the trial court properly relied on affidavits by the defendants claiming an inability to recall the relevant events. (See also, *People v. Penney* (1972) 28 Cal.App.3d 941, 948-949, 952-953 [affidavits by defendants that witnesses who could have provided alibis had died established a prima facie showing of prejudice].) The trial court may also properly rely on factual representations made by counsel. (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1332.)

Of course declarations that include only vague assertions are insufficient to establish prejudice due to pre-charging delay. Thus, in *Sahagun, supra*, the declaration of counsel failed to demonstrate prejudice because it contained only general allegations that did not specify the identities of the witnesses allegedly unavailable, the nature of their testimony, when they became unavailable, etc. (89 Cal.App.3d. at pp. 23-24.) By contrast, appellant's declaration was far more specific. He named two witnesses who had become unavailable to him during the charging

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[23] In fact, earlier in this case the trial court made clear that it preferred to proceed on motions by way of declaration rather than by in-court testimony. (10RT:1601-1605.)

delay, and summarized what each could have said to support his defense. (See AOB:348-349.) Significantly, at trial the prosecutor did not contest the defense representations, either in responsive papers or in urging the trial court to deny the motion to dismiss. (3CT:606-613; 74RT: 8943, 8945; see *People v. Mirenda, supra*, 174 Cal.App.4th at p. 1332 [counsel's representations, which were uncontested, provided credible evidence of prejudice].)

Respondent further asserts that appellant's declaration was unsupported by other evidence, stating: "No other physical or testimonial evidence has been offered to support Barrett's claim that Cruz and Hogan would have offered testimony which would have supported his defense at trial." (RB:182.) Respondent cites no case holding that a factually-specific declaration by a defendant that has not been contested by the prosecution may not be credited by the trial court unless it is supported by other evidence. But in any event, the evidence adduced at trial presented abundant support for appellant's claims.[24] It included testimony from appellant that Richmond had a knife and that appellant struck at him because he believed his cellmate was about to stab him. There was testimony from inmate Christopher Poore that Richmond told Poore he planned on assaulting appellant and that Poore saw a weapon fished into cell 146 on April 8, 1996. And there was very significant testimony from forensic expert Lisa DiMeo that the physical evidence strongly indicated Richmond had a weapon on the night of his death. (See AOB:29-49.) This

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[24] Because appellant renewed his motion to dismiss after the guilt phase evidence was presented, this Court should consider all of the evidence before the trial court at that point. (See *People v. Cowan* (2010) 50 Cal.4th 401, 431.)

trial evidence lent substantial support to appellant's claims that inmates Cruz and Hogan knew that Richmond had received an order to kill appellant and had been provided with a knife to complete this task.

Second, respondent claims that appellant was not prejudiced by the charging delay because Cruz and Hogan died "during the 27-month period between the murder and Barrett's indictment," so "that regardless of when Barrett would have been *charged* with the murder, this capital murder trial would not have been underway, at least not to the point of calling witnesses, within a year and a half after the murder, i.e., while Cruz and Hogan were still alive." (RB:182.) Thus, respondent asserts, "regardless of what these inmates had to say, the jury would never have heard it." (RB:182.) The state did not make this argument below, however, and should therefore be precluded from arguing it on appeal. (See, e.g., *People v. Sharret* (2011) 191 Cal.App.4th 859, 864.)

Morever, respondent's argument is misguided. One can only speculate as to when – or even if – the trial might have gone forward if the prosecution had not unjustifiably delayed in charging appellant.[25] Significantly, respondent cites no pre-charging delay case that turns on when a trial *might* have occurred. Rather, the focus in these cases is on what occurred prior to the belated charging. In appellant's case, had he been charged in a timely manner he would have been appointed counsel and investigative services. The defense team would have been able to interview

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[25] Appellant's case came very close to being resolved prior to trial. (See, e.g., 10RT:1538-1539; 1552; 1561.) Had appellant been charged promptly, his counsel might have been able to use the information provided by Cruz and Hogan to strengthen the defense hand in settlement negotiations.

Cruz and Hogan and determine how they had learned that Richmond had been ordered to kill appellant and who had given the order. If trial had commenced after one or both of these witnesses died, defense counsel might have been able to present alternative witnesses with the same information. (See *People v. Boysen* (2007) 165 Cal.App.4th 761, 778 ["Not only did (the witness's) death deny the defense her statement about hearing a shot the night of the murders, it denied the defense the ability to develop additional evidence concerning what she heard and the particular circumstances under which she heard it"].)[26]

Third, respondent's assertion that the evidence was cumulative is not supported by the record. Respondent states that inmate Poore "testified to the very same things that Barrett claims the deceased inmate witnesses would have testified to – that it was Richmond who wanted to obtain a weapon to stab Barrett." (RB:183-184.) Appellant has already demonstrated this inaccuracy of this claim. Inmates Cruz and Hogan could have provided a critical missing piece of the defense – knowledge that Richmond had received an order to kill appellant. Moreover, given the facts of this case, testimony that Richmond had received a weapon would not have been merely cumulative. (See AOB:359-360.)

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[26] It is also possible that the testimony Cruz and Hogan could have given might have been presented through the testimony of a defense trial investigator, had one been able to interview them before their deaths, under a hearsay exception such as a declaration against interest if either had any involvement in the plan to assault appellant. Or, the state may have been willing to forgo a hearsay exception in order to mitigate prejudice that would otherwise require dismissal. (See, e.g., *People v. Boysen*, *supra*, 152 Cal.App.4th at p. 778; *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1186 [trial court should inform jury of what deceased witness would have said to mitigate delay].)

In short, respondent's efforts to negate appellant's prima facie showing of prejudice are unavailing. In fact, the showing made here is at least as strong as that made in other cases where relief has been granted. (See, e.g., *People v. Mirenda*, *supra*, 174 Cal.App.4th at pp. 1331-1332 [prejudice established where detective who had interviewed the only independent eyewitness to the charged shooting had died and so was unavailable to corroborate or impeach witness' testimony]; *People v. Boysen*, *supra*, 152 Cal.App.4th at pp. 778-780 [prejudice established where victims' neighbors who died before charges were filed could have testified they heard a gunshot and a car engine at a time when defendant was at home]; *People v. Hartman* (1985) 170 Cal.App.3d 572, 579-580 [prejudice established where coroner who initially concluded that victim died of natural causes, and his supervisor who supported the findings, both died shortly before murder charge was filed]; *Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 949-950 [prejudice established where two alibi witnesses had died and an investigator who had first interviewed a key prosecution witness and could impeach her testimony had also died].)

Despite the clear prejudice appellant suffered, the state has *never* offered an explanation for the delay. To the contrary, the prosecutor who finally indicted appellant demonstrated his disdain for appellant's due process rights when he told a reporter he was in no hurry because appellant was "not going anywhere." (AOB:349; 3CT:588, 596.)[27] This despite

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[27] Respondent asserts that "the defendant must show that the delay was in bad faith or deliberately undertaken to gain a tactical advantage" under the federal constitution. (RB:179.) Appellant disagrees. United States Supreme Court decisions have not held that a showing of deliberate delay must be made. (See *People v. Boysen*, *supra*, 152 Cal.App.4th at p.

(continued...)

appellant's repeated requests for proceedings to begin so he could have counsel and an investigator. (See AOB:348.) Respondent also fails to address appellant's argument that at the very least he is entitled to a reversal of his death sentence. (See AOB:364-365.)

For all of the foregoing reasons, this Court should find that appellant's due process rights were violated.

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[27](...continued)
775.) But in any event, the comments by deputy Filter establish intentional delay.

XII.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT BECAUSE IT FAILS TO ADEQUATELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

In his opening brief, appellant argued that the lying-in-wait special circumstance (Pen. Code, § 190.2(a)(15)) contravenes the Eighth Amendment to the United States Constitution because it does not provide a basis for rationally distinguishing those who are deserving of the ultimate punishment from those who are not. (AOB:366-373.)

As respondent correctly observes, this Court "has consistently upheld the constitutionality of the lying-in-wait special circumstance . . . ." (RB:185.) Respondent further contends that appellant has offered "no compelling reason to revisit that decision here." (RB:185.) Appellant disagrees, for the following reasons.

First, as appellant demonstrated in the opening brief, the Court's then most recent cases upheld the lying-in-wait special circumstance on such disparate facts that it is difficult to discern any consistent standards for its application, as required by the Constitution. (See AOB:371-373.) Respondent's brief does not address this critical aspect of appellant's argument.

More recently, in *People v. Hajek* (2014) 58 Cal.4th 1144, this Court reversed the lying-in-wait special circumstances for insufficient evidence without addressing the profound inconsistencies in the Court's jurisprudence. Thus, the facts of *Hajek* only create further confusion as to how California's lying-in-wait special circumstance can constitutionally distinguish those defendants who are deserving of the most extreme punishment. In *Hajek*, two defendants held members of the Wang family

hostage inside their home for several hours. They eventually killed the family's grandmother, Su Hung. This pre-planned attack was motivated by a minor dispute which had occurred days earlier between the family's teenaged daughter and Hajek. (58 Cal.4th at p. 1157.) The evidence relevant to the lying-in-wait special circumstance was set forth by the Court:

> Defendants entered the Wang residence by ruse, displayed a gun, and shortly thereafter bound and blindfolded the frightened victim and isolated her in an upstairs bedroom for several hours before finally killing her. From the moment defendants took Su Hung and [her daughter] Alice hostage, Su Hung could not have perceived their actions as anything other than a serious threat to her safety, even if they untied her for a period of time while she was kept isolated in the bedroom. Thus, even assuming defendants engaged in a period of watchful waiting before entering the house using the element of surprise, it was followed by "a series of nonlethal events" over the course of several hours, "and then a cold, calculated, inevitable, and unsurprising dispatch" of the victim. [Citation.]

(*People v. Hajek*, *supra*, 58 Cal.4th at p. 1185.) The *Hajek* Court concluded that although the victim was killed "in a most horrifying manner, it falls short of establishing she was killed while defendants were lying in wait for her." (*Ibid.*)

Compare *Hajek* to *People v. Mendoza* (2011) 52 Cal.4th 1056, discussed in the opening brief. In *Mendoza*, the defendant was walking along the street with friends when a police officer approached them from

behind. As the officer began to pat down one member of the group, Mendoza slowly moved toward the officer with his arm around his girlfriend. He then pushed her aside and shot the officer in the face. (*Id.* at p. 1065.) This Court held that although "only a few minutes elapsed between the time [the officer] pulled up in his car and the time of the shooting," the evidence supported a finding that Mendoza watched the victim "for a substantial period as he not only waited for, but affirmatively engineered, the opportune moment to launch a surprise attack." (*Id.* at p. 1074.) The Court found it unimportant that Mendoza "did not wait for a victim to arrive at a chosen location, or follow or lure a victim to a particular spot . . . ." (*Ibid.*)

Although the defendants in *Hajek* waited for their victims to arrive, entered their home by ruse, and launched a surprise attack, they did not kill while lying in wait because it was hours before they finally killed their victim. In contrast, Mendoza was found to have killed while lying in wait although he was approached by the victim, who was "surprised" only to the extent that Mendoza did not announce his intent to kill before shooting. The results in these two cases are indeed difficult to reconcile. Any distinction between them does not provide a rational basis upon which to distinguish death-eligible killers for purposes of the Eighth Amendment.

Second, recent developments in death penalty jurisprudence remind us that a reviewing court's duty does not end once a statute is declared constitutional. In *Glossip v. Gross* (2015) 135 S.Ct. 2726, Justice Breyer, joined by Justice Ginsburg, concluded that it is time to revisit the constitutionality of the death penalty – as it is applied today. (*Id.* at p. 2755 [dis. opn. of Breyer, J.].) Although a majority of their colleagues apparently did not find *Glossip* – a case concerning the lethal injection protocol used in

Oklahoma – to be an appropriate vehicle to address the broader Eighth Amendment issue, Justice Breyer's scholarly, well-supported opinion makes the case that – as circumstances change over time – the death penalty as a whole, as well as its constituent parts, should be reexamined. He stated:

> Nearly 40 years ago, this Court upheld the death penalty under statutes that, in the Court's view, contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. [Citations.] The circumstances and the evidence of the death penalty's application have changed radically since then. Given those changes, I believe that it is now time to reopen the question.

(*Glossip v. Gross*, *supra*, 135 S.Ct. at p. 2755.)[28]

Justice Breyer's analysis focused on several factors, including the arbitrary and capricious manner in which the death penalty has been imposed. He explained that when capital punishment was reinstated in 1976, the high court "believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence." (135 S.Ct. at p. 2762, citing *Gregg v. Georgia* (1976) 428 U.S. 153, 195 (joint opn. of Stewart, Powell, and Stevens, JJ.).) *Gregg*, in turn, had looked to the American Law Institute's Model Penal Code section on the death penalty (§ 210.6) as proof that it was possible to formulate constitutionally sufficient "standards to guide a capital jury's sentencing deliberations." (*Gregg*, *supra*, 428 U.S. at p. 193.) However, as

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[28] See also, *State v. Santiago* (Conn. 2015) 122 A.3d 1 (state supreme court relies on, inter alia, new insight on history and devolution of capital punishment's imposition to find Connecticut death penalty statute unconstitutional).

Justice Breyer noted in *Glossip*, the ALI has since withdrawn this section of the Model Penal Code. (*Glossip*, *supra*, 135 S.Ct. at p. 2775, citing ALI, Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty (April 15, 2009) [hereafter ALI Report].) A key factor in the ALI's decision was the difficulty of limiting the number and scope of aggravating factors so that they do not cover a large percentage of murderers. (ALI Report at p. 5.)

Similarly it is time to reconsider whether California's lying-in-wait special circumstance provides "the 'reasonable consistency' legally necessary to reconcile with the Constitution's commands." (*Glossip*, *supra*, 135 S.Ct. at p. 2760 [dis. opn., of Breyer, J.], quoting *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) As appellant has shown in the opening brief and this brief, the manner in which it has been applied has changed radically over time. Section 190.2(a)(15) no longer "genuinely narrow[s] the class of persons eligible for the death penalty" or "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244 [internal quotation marks omitted].)

That the lying-in-wait special circumstance has been stretched over time beyond constitutional bounds in California becomes clear when compared to its use in other states. Apparently only three other states – Indiana, Colorado and Montana – use lying in wait as a death eligibility factor. (Osterman & Heidenreich, *Lying In Wait: A General Circumstance* (1996) 30 U.S.F. L.Rev. 1249, 1276-1277; Caldwell, *The Prostitution of Lying In Wait* (2003) 57 U. Miami L.Rev. 311, 330, 353-366.) In Indiana, the provision is construed more narrowly than in California, however, as it requires watching, waiting and *physical* concealment. The physical

concealment must be the direct means of attacking or gaining control of the victim. (See Caldwell, *supra*, at pp. 353-362, and cases discussed therein.) In California, of course, physical concealment is not required, only concealment of purpose. (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

In Colorado, the parameters of the lying-in-wait aggravator, which includes "from ambush," are still unclear. The Colorado Supreme Court has rejected a claim that it is unconstitutionally vague, finding that "lying in wait" and "ambush" are terms that can be understood by the average juror. (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 752.) In *Dunlap*, the Colorado high court stated: "Indeed, the concept of murder by lying in wait or from ambush now has a common sense, widely understood meaning: the killer conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise." (*Id.* at p. 751.) However, it appears that the court has never had to decide whether the evidence of a particular case was sufficient to meet the demands of the statute. (See Caldwell, *supra*, 57 U. Miami L.Rev., at p. 365.) More importantly, although the aggravator theoretically applies to "an extremely large number of murder cases in Colorado," it is infrequently invoked as the death penalty is only rarely imposed that state. (Marceau, et. al., *Death Eligibility In Colorado: Many Are Called, Few Are Chosen* (2013) 84 U. Colo. L.Rev. 1069, 1089, 1073.)[29]

Similarly in Montana, where a deliberate homicide committed by a person lying in wait or ambush is potentially capital, there has been little

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[29] Only three persons are on Colorado's death row and only one other has been executed since the death penalty was reinstated there in 1977. (https://en.wikipedia.org/wiki/Capital_punishment_in_Colorado, last visited Aug. 19, 2015.)

occasion to test the limits of this aggravating circumstance. (See *State v. Dawson* (Mont. 1988) 761 P.2d 352, 358-359 [substantial evidence to support lying in wait or ambush]; cf. *Fitzpatrick v. State* (Mont. 1981) 638 P.2d 1002, 1017, 1044-1045 [dis. opn. of Shea, J., finding aggravating circumstance of lying in wait or ambush was improperly expanded to apply to Fitzpatrick's case].) But the small number of death cases there generally indicates that the circumstance is not widely used.[30]

Because California stands alone in its broad use of this ill-defined special circumstance, it is time for this Court to revisit the question of whether section 190.2(a)(15) violates the Eighth Amendment.

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[30] In Montana, three persons have been executed since 1976 and two others are on death row. (See http://www.deathpenaltyinfo.org/state_by_state, last visited Aug. 19, 2015.) Fitzpatrick's conviction and sentence were later reversed by the Ninth Circuit Court of Appeals. (*Fitzpatrick v. McCormick* (9th Cir. 1989) 869 F.2d 1247.)

XIII.

THE PRIOR MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED BECAUSE APPELLANT'S MORAL CULPABILITY FOR THE JACKSON HOMICIDE WAS DIMINISHED DUE TO HIS AGE AT THE TIME IT OCCURRED.

Appellant has asserted that the use of his prior murder conviction as a special circumstance (Pen. Code, § 190.2(a)(2)) violated the Eighth Amendment because he was a juvenile at the time of that offense. Appellant argued that his death sentence should therefore be reversed. (AOB:374-383.)

Respondent, on the other hand, contends that there is no constitutional problem with using as a death-eligibility factor a prior murder conviction sustained when the defendant was a minor. Respondent also claims that any error was harmless. (RB:187-193.) As demonstrated below, respondent reads the pertinent authorities too narrowly, misunderstands the nature of the prior murder special circumstance, ignores the question of reliability, and gets the prejudice analysis wrong.

A. Juveniles Are Constitutionally Different From Adults for Sentencing Purposes.

In his opening brief, appellant explained that in a series of recent cases the United States Supreme Court has recognized that juveniles as a group are less culpable than adults and are therefore constitutionally different from adults for sentencing purpose. (*Roper v. Simmons* (2005) 543 U.S. 551 (*Simmons*);[31] *Graham v. Florida* (2010) 130 S.Ct. 2011; *Miller v. Alabama* (2012) 132 S.Ct. 2455; see also *J.D.B. v. North Carolina*

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[31] In the opening brief, appellant referred to *Roper v. Simmons* as "*Roper*," but it should be referred to as "*Simmons*." The latter designation is used in this brief.

(2011) 131 S.Ct. 2394.)

This Court has applied the *Simmons* line of jurisprudence in determining whether California laws pass constitutional muster when applied to juveniles who commit serious offenses. (See *People v. Caballero* (2012) 55 Cal.4th 262; *People v. Gutierrez* (2014) 58 Cal.4th 1354.) As set forth in the opening brief, in *Caballero*, the Court looked to the principles espoused in *Simmons* and its progeny to find that a 110-years-to-life sentence for a juvenile who did not commit homicide violates the Eighth Amendment. (55 Cal.4th at pp. 267-268; see also AOB:379.) Since then, the Court in *Gutierrez* has held that these same principles must be considered when trial courts sentence 16- and 17-year olds who commit special circumstance murder to either life without parole or 25-years-to-life pursuant to Penal Code section 190.5, subdivision (b). (58 Cal.4th at pp. 1360-1361.) Quoting *Miller*, this Court in *Gutierrez* stated:

> "To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or

> prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."

(*People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1377, quoting *Miller*, *supra*, 132 S.Ct. at p. 2468.)

Appellant contends that these principles should apply to section 190.2(a)(2) as well, to prohibit the use of a prior juvenile murder conviction as a special circumstance since a jury has no ability to consider any of the hallmarks of youth in determining a defendant's eligibility for death. (AOB:376-382.) Respondent argues that appellant has stretched the holdings of these cases too far. Respondent contends that *Simmons* was concerned only with a juvenile's reduced culpability at the time of the charged offense, not when that offense is later used to make a defendant death eligible. (RB:188-189.)

While respondent's claim is technically correct, she fails to explain why the principles set forth in *Simmons* and its progeny do not apply to the death-eligibility arena. Special circumstances must constitutionally narrow the class of persons eligible for a death sentence to the most culpable group of offenders. (See *Simmons*, *supra*, 543 U.S. at p. 568.) Moreover, this narrowing must differentiate among cases "in an objective, evenhanded and substantially rational way . . . ." (*Zant v. Stephens* (1983) 462 U.S. 862, 879.) In light of the diminished culpability of youthful offenders, it is not objective, evenhanded or substantially rational to treat a prior homicide conviction sustained as an adult in the same manner for death eligibility purposes as a conviction sustained while a juvenile.

Respondent emphasizes that in California "juvenile murder

convictions have long been used to prove section 190.2, subdivision (a)(2), special circumstances. (See, e.g., *People v. Trevino* (2001) 26 Cal.4th 237, 244; *People v. Andrews* (1989) 49 Cal.3d 200, 221.)" (RB:191.) These case were decided before *Simmons*, however.

Respondent also points out that this Court has refused to apply the *Simmons* principles to preclude the prosecution from introducing prior violent conduct committed as a juvenile during the penalty phase as aggravating evidence under factor (b). *(People v. Bivert* (2011) 52 Cal.4th 96; RB:190-191; see also, AOB:379-380 [discussing *Bivert*].) Respondent states that in *Bivert*, the Court "denied the underlying basis for Barrett's claim in a slightly different context . . . ." (RB:190.) But appellant made clear in the opening brief that there is more than a slight difference between using a prior juvenile murder conviction as a special circumstance and as an aggravating factor. In the special circumstance context, the jury has no ability to consider the hallmarks of youth in deciding whether a defendant is death eligible. If there is a prior murder conviction, then the jury must automatically find the defendant eligible for the ultimate punishment. In contrast, if the prior murder is used as aggravation, the defense at least has an opportunity to show the jury why the defendant's youth made him less culpable. Thus, this Court has not addressed the issue appellant raises here. (AOB:379-380.)

Moreover, since *Bivert* was decided, the high court, this Court and others have recognized that the principles set forth in *Simmons* apply equally in other contexts. (See, e.g., *Miller v. Alabama*, *supra*, 132 S.Ct. 2455; *People v. Caballero*, *supra*, 55 Cal.4th 262; *People v. Gutierrez*, *supra*, 58 Cal.4th 1354.) Such cases illustrate that the evolving standards of decency which the Court must consider in determining whether the Eighth

Amendment has been violated (see *Simmons*, *supra*, 543 U.S. at p. 561), require taking into account more broadly in death penalty law the lesser culpability of juvenile offenders.

For example, Judge Martin of the Eleventh Circuit Court of Appeals recently urged his colleagues to consider whether *Simmons* permits the use of prior juvenile convictions to obtain a death sentence. (*Melton v. Florida Department of Corrections* (11th Cir. 2015) 778 F.3d 1234, 1237 (dis. opn. of Martin, J.).) In *Melton*, the defendant's prior conviction for first-degree felony-murder, which he committed at age 17, was used as an aggravating factor. (*Id.* at p. 1235.) Emphasizing that *Simmons* itself was an extension of the principles enunciated in *Atkins*, Judge Martin would have granted a certificate of appealability on Melton's claim that reliance on this prior conviction as aggravation violated of the Eighth Amendment. (*Id.* at pp. 1237-1238, 1241.) The jurist recognized that *Simmons*, narrowly read, held that "the Eighth and Fourteenth Amendments prohibit the execution of only those who committed crimes as a juvenile . . . ." (*Id.* at p. 1240.) But, Judge Martin explained, "[o]n the other hand, *Simmons* reaffirmed the idea that "[c]apital punishment must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution." (*Ibid.*) He went on to state that: "*Simmons* tells us, as a categorical matter, that offenses committed by a juvenile are 'not as morally reprehensible as that of an adult.'. . ." (*Id.* at p. 1241, quoting *Simmons*, *supra*, 543 U.S. at p. 570.) Thus he concluded that defendant Melton "could reasonably argue that he lacks extreme culpability because . . . his weightiest aggravating factor was a juvenile conviction . . . ." (*Id.* at p. 1240.)[32]

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[32] Of course the question before the circuit court in *Melton* was

(continued...)

This Court is therefore not bound by *Bivert* in deciding whether *Simmons* permits the use of a prior juvenile homicide to support the prior murder special circumstance.

B. Respondent's Recidivism Analogy Is Inapt.

In rejecting appellant's use of *Simmons* and its progeny, respondent employs an "analogy to ex post facto analysis pertaining to increased punishment for recidivist offenders . . . ." (RB:189.) Emphasizing that increased penalties for repeat offenders are constitutional, respondent states "Here, similarly, Barrett was not punished for his 1986 first degree murder conviction. Rather, he was punished more severely, i.e., by becoming 'death eligible,' for his 1996 first degree murder which was aggravated because of its repetitive nature." (RB:190.)

Respondent's analogy between recidivist statutes and the prior murder special circumstance is inappropriate. (See *People v. Hendricks* (1987) 43 Cal.3d 584, 595.) In *Hendricks*, this Court explained why:

> The function of 190.2(a)(2) is . . . clear – to circumscribe, as the Eighth Amendment requires (*Zant v. Stephens* (1983) 462 U.S. 862, 878 []), the classes of persons who may properly be subject to the death penalty. Defendant misconstrues the purpose of the provision, which he inaptly analogizes to statutes aimed at the habitual criminal. (Citations omitted.) Unlike recidivism statutes, however, section 190.2(a)(2) is

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[32](...continued)
different than that presented to this Court. In *Melton*, the issue was whether reasonable jurists could debate that the Supreme Court of Florida had unreasonably applied clearly established federal law to his case, by failing to find that *Simmons* precluded the use of the prior juvenile murder conviction in his capital trial. (778 F.3d at p. 1236.)

directed neither to deterring misconduct nor to fostering rehabilitation.

(*People v. Hendricks*, *supra*, 43 Cal.3d at p. 595.)

In *People v. Gurule* (2002) 28 Cal.4th 557, 635-637, the Court reiterated that the prior murder special circumstance and recidivism laws serve different purposes. Section 190.2(a)(2) comports with the Eighth Amendment, the Court found, because California may "determine that one charged with committing first degree murder, who has committed another murder at some other time in his or her life, falls into that narrow category of persons who are more deserving of the death penalty than other murderers." (28 Cal.4th at p. 637.) *Gurule* did not involve a prior murder committed when the defendant was a minor. (*Id.* at pp. 634-635 ["prior" murder was committed after the capital homicide].) But the Court's holding that section 190.2(a)(2) is concerned with *culpability*, i.e., determining who is most deserving of death, coupled with the high court's decision in *Simmons* declaring that juvenile offenders are categorically less culpable than adults, makes clear that a defendant like appellant is not among the most culpable and should not be eligible for capital punishment based on a prior homicide committed when he was only 16.

C. Juvenile Murder Convictions Are Not Sufficiently Reliable for Eighth Amendment Purposes.

Appellant has also argued that a prior murder special circumstance should not be based on a juvenile offense because the particular vulnerabilities of youth increase the likelihood that such convictions are insufficiently reliable for Eighth Amendment purposes. (AOB:381-382.) Respondent does not address this aspect of appellant's argument, but it should not be overlooked.

The United States Supreme Court has made it abundantly clear that capital cases demand heightened reliability. In *Johnson v. Mississippi* (1998) 486 U.S. 578, 584, the high court stated:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. [Citations]

As this Court has recognized, the requirement of heightened reliability applies to the special circumstance provisions that in California distinguish those persons who are eligible for the ultimate sanction from those who are not. (*People v. Horton* (1995) 11 Cal.4th 1068, 1134 [prior murder special circumstance reversed because conviction upon which it was based was constitutionally invalid].) In *People v. Horton*, the Court concluded that the defendant's prior murder conviction was fundamentally flawed because Horton had been denied the assistance of counsel at a critical stage of his trial. (*Id.* at p. 1135.) The Court accordingly reversed his death sentence, stating:

> As the *Johnson* decision, *supra*, 486 U.S. 578, demonstrates, the special need for reliability in the death penalty context is undermined whenever a prior conviction (upon which a death penalty judgment is based) is tainted by a fatal fundamental constitutional defect.

(11 Cal.4th at p. 1135; see also, *People v. Trujeque* (2015) 61 Cal.4th 227, 249-252 [relying on *Horton* and the special need for reliability to reverse a prior murder special circumstance because the conviction was obtained in violation of double jeopardy].)

Appellant acknowledges that all murder convictions of defendants who were minors at the time of their prior offenses are not necessarily constitutionally invalid in the way the convictions were in *Horton* and *Trujeque*. But there are compelling reasons to find that as a class they are not sufficiently reliable to serve as a special circumstance under Penal Code section 190.2, subdivision (a)(2). As *Simmons* and its progeny explain, "[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2032; see also *J.D.B. v. North Carolina*, *supra*, 131 S.Ct. at p. 2468.) These features include impulsive and rebellious decisionmaking, deficits in the weighing of long-term consequences, a poor understanding of the criminal justice system and a reduced ability to work effectively with their attorneys when compared to adults. (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2032.)

These hallmarks of youth leave young defendants vulnerable at many points in the criminal justice system, resulting in less reliable convictions. For example, as explained in the opening brief and elsewhere in this brief, juveniles have difficulty understanding their Fifth Amendment rights to silence and to counsel during interrogation, and in deciding whether to waive those rights. They are also particularly vulnerable to common interrogation tactics and are more likely than adults to confess falsely or make inaccurate inculpatory statements. Thus, the reliability of such statements is always a concern when a minor is involved. (See Arg. XVI, *post*, and AOB:407-425.)

The complexities involved in assessing juvenile competence to stand trial inject additional unreliability into the murder convictions of minors. Research during the last decade into "juveniles' capacities to participate in

their defense has underscored the need for special care in applying the right to juveniles, especially because youths' capacities for decision-making are still developing." (Larson & Grisso, Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers (Nov. 2011) p. 1 [hereafter "Developing Statutes"].)[33] Determining juvenile trial competence is complicated by the interconnection of three broad concerns: mental illness, developmental immaturity and intellectual disability. Studies show that each of these deficits is overrepresented among youth in the criminal justice system as compared to their non-involved peers. Delinquent juveniles are much more likely than other youth to suffer from mental illness, including disorders with symptoms that are particularly likely to affect their ability to participate in legal proceedings, including Attention Deficit/Hyperactivity Disorder, depression, anxiety and trauma exposure. Moreover, they present diagnostically complex cases, often presenting with two or more mental disorders. Their symptoms are often just emerging and may be complicated by developmental immaturity and intellectual disability. (Developing Statutes, *supra*, at pp. 10-11.)

Not surprisingly, assessment of trial competency is "often more complex with juveniles than with adults." (Developing Statutes, *supra*, at p. 10.) Yet, California only recently has grappled with these special challenges by enacting a statute designed to "tailor the juvenile competency procedures to better fit the significant developmental differences between adults and juveniles . . . ." (*In re R.V.* (2015) 61 Cal.4th 181, 194,

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[33] Available as of Aug. 20, 2015 at <http://www.modelsforchange.net/publications/330>.

interpreting Welf. & Inst. Code, § 709.)

Further, defendants convicted of murder when they were juveniles may not have had fitness hearings, which decreases the likelihood that the hallmarks of youth were adequately taken into account at that time and increases the likelihood of a constitutionally unreliable conviction. California law generally provides for such hearings so that a juvenile court judge may consider a variety of criteria in determining whether the youth at issue is properly handled in the juvenile justice system or in adult criminal court. (Welf. & Inst. Code, § 707, subd. (a)(1).) In murder cases, however, this crucial proceeding is often dispensed with. Under California's Welfare and Institutions Code, a defendant who is 14 years or older, is charged with special circumstances murder, and alleged to be the actual killer *must* be prosecuted in adult court. (Welf. & Inst. Code, § 602, subd. (b)(1).) In other murder cases, the prosecutor has the ability to circumvent a fitness hearing by charging the minor directly in adult court. (See Welf. & Inst. Code, § 707, subds. (b)(1), (d)(2) [children 16 years and older]; subd. (d)(2) [children 14 years and older].)

California's direct file system runs contrary to best practices because it prevents consideration of the hallmarks of youth. The National Research Council's recent authoritative report summarizing research on adolescent development leaves no doubt on this point:

> [E]ven for youth charged with serious violent crimes . . . an individualized decision by a judge in a transfer hearing should be the basis for the jurisdictional decision. The committee counsels against allowing the prosecutor to make the jurisdictional decision, as is allowed under direct-file statutes. The committee also opposes automatic transfer based solely

> on the offense with which the youth is charged because it fails to consider the maturity, needs, and circumstances of the individual offender or even his or her role in the offense or past criminal record – all of which should be considered in a transfer hearing.

(National Research Council, National Academies of Sciences, Reforming Juvenile Justice: A Developmental Approach (2013) p. 135.)

Not surprisingly, California's direct file statutory scheme, which was adopted in 2000 by Proposition 21, has been soundly criticized. (See, e.g., Lynn-Whaley & Russi, Improving Juvenile Justice Policy in California: A Closer Look At Transfer Laws' Impact On Young Men & Boys Of Color (Aug. 2011) The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School [hereafter Lynn-Whaley & Russi].)[34] Researchers have found that direct file rates have substantially increased over the years, vary dramatically by county, and have had a profoundly disproportionate effect on youth of color. (*Id.* at pp. 3-4; Males & Teji, Charging youths as adults in California: A county by county analysis of prosecutorial direct file practices (Aug. 2012) Center on Juvenile and Criminal Justice.)[35]

Finally, inadequate representation by counsel may inject further unreliability into the mix. Only recently have the unique challenges

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[34] Available at https://www.law.berkeley.edu/files/BMOC_Brief_Juvenile_Justice_CA_final.pdf.

[35] Available at http://www.cjcj.org/uploads/cjcj/documents/Charging_youths_as_adults_in_California.pdf

presented by the defense of minors charged with serious crimes been expressly acknowledged. Special guidelines – along the lines of those long existing for capital representation – have thus been promulgated and endorsed by dozens of national and local organizations and academic institutions that provide defense services for youth. (Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence, issued by the Campaign for the First Sentencing of Youth, March 2015 [hereafter "Guidelines"].) The Guidelines are based on the U.S. Supreme Court's recognition that children are constitutionally and developmentally different from adults and an understanding that "[t]he representation of children in adult court facing a possible life sentence is a highly specialized area of legal practice . . . ." (Guidelines, *supra*, at p. 5.) Thus, they call for a defense team able to communicate with "child clients in a trauma-informed, and developmentally and age-appropriate manner." (*Id.* at p. 11 [Guideline 2.1].) The team must have members with

> specialized training in identifying symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, post-traumatic stress disorder, and neurological deficits; long-term consequences of deprivation, neglect, and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental, and ethnic influences on behavior; effects of substance abuse; and the presence, severity, and consequences of exposure to trauma.

(*Guidelines*, *supra*, at p. 9 [Guideline 1.1] .)

In light of the unique vulnerabilities minors face in the criminal justice system, it is not surprising that the prior murder convictions

invalidated in both *Horton* and *Trujeque* were obtained when the defendants were juveniles. In *Horton*, the defendant was 16 years old when he and three others were charged with a gang-related murder in Illinois. He was transferred to adult court and tried jointly with one of the co-defendants. Horton's appointed attorney was paid $250 to represent him. The co-defendant's lawyer presented several witnesses but Horton's attorney did not. Although the co-defendant's lawyer was present when the jury declared it was deadlocked, Horton's attorney was absent. Ultimately Horton was convicted and the co-defendant was acquitted. (*People v. Horton*, *supra*, 11 Cal.4th at pp. 1126-1127.) In the capital proceedings, his counsel raised a host of constitutional violations Horton had suffered in the Illinois proceedings including "(1) failure to provide a constitutionally adequate fitness hearing; (2) denial of the right to counsel at the juvenile proceedings, during plea negotiations, and at critical stages of trial; (3) speedy trial violations; (4) violation of the right to unconflicted counsel; and (5) ineffective assistance of counsel." (*Id.* at p. 1127.) This Court needed to reach only one of these claims – denial of the assistance of counsel at a critical stage of trial – to invalidate the prior murder conviction. (*Id.* at pp. 1135-1136.)

In *Trujeque*, the defendant was 16 years old when he was alleged to have committed a murder. A petition was filed in juvenile court pursuant to Welfare and Institutions Code section 602. After several witnesses were called at an adjudicatory hearing, Trujeque admitted to a charge of involuntary manslaughter and the referee dismissed the other allegations, noting his history of mental illness and apparent brain damage. After the prosecutor objected, another juvenile court judge reheard the adjudication, reinstated the murder allegation and found Trujeque unfit for juvenile court.

He was subsequently prosecuted in adult court, where he entered a plea to second degree murder. (*People v. Trujeque*, *supra*, 61 Cal.4th at pp. 246-247.) This Court found the adult prosecution to be invalid because it placed Trujeque twice in jeopardy for the same offense. (*Id.* at pp. 252-253.)

In both *Horton* and *Trujeque*, the fundamental flaws in their convictions were directly related to their status as minors, and the flaws in the procedures that applied to them. And significantly, these convictions were obtained at a time when the defendants' lives were not hanging in the balance. The Court has recognized:

> In the capital context, a defendant almost invariably will face much graver consequences from the use of the prior conviction, as a predicate for a special circumstance finding, than he or she faced in the earlier criminal proceeding; it is because of those grave consequences, of course, that a defendant has been accorded special procedural protections and assistance in a capital case. In many instances, it may be unfair – and inconsistent with the special need for reliability – to deprive a defendant of the right to demonstrate the invalidity of the prior conviction in the subsequent capital prosecution simply because in the prior proceeding, when much less may have been at stake and the defendant may not have been accorded the same procedural protections, defendant did not prevail on the issue.

(*People v. Horton*, *supra*, 11 Cal.4th at p. 1138; see also *People v. Trujeque*, *supra*, 61 Cal.4th at p. 252.)

The defendants in *Horton* and *Trujeque* challenged the validity of their prior juvenile murder convictions at trial – and were ultimately

successful in getting their special circumstances reversed by this Court on appeal. But permitting a capital defendant to attack the constitutional validity of a juvenile prior murder conviction pretrial does not adequately address the risk that his youth might have led to an unreliable conviction. *Simmons* and its progeny teach that how the vulnerabilities of youth actually impact any particular young defendant's experience in the criminal justice system may be difficult to ascertain, even at the time the defendant *is* a youth. Trying to assess years later whether a defendant's then-developmental and psychosocial immaturity may have rendered his prior juvenile murder conviction fundamentally flawed would be extremely difficult if not impossible in some cases.

In *Miller*, the high court observed that *Simmons* and ensuing cases "teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." (132 S.Ct. at p. 2468; see also AOB:378-379.) For the reasons set forth above, this observation is equally applicable to the use of a juvenile prior murder conviction as a special circumstance.

D. The Use of the Invalid Special Circumstance Requires Reversal of Appellant's Penalty Verdict.

If this Court invalidates the prior murder special circumstance, appellant's death sentence must be reversed, pursuant to *Brown v. Sanders* (2006) 546 U.S. 212 [hereafter *Sanders*]. (AOB:382-383.)

Citing numerous cases decided before *Sanders*, respondent concludes: "Thus, this Court may uphold a death sentence where one of the special circumstances is invalid, as long as there are other valid special circumstances." (RB:192.) Of course, appellant has argued that all of the death eligibility factors in his case crumble under constitutional scrutiny.

But even if this Court were to vacate only the section 190.2(a)(2) special circumstance, reversal of the penalty verdict is required.

The test for when an invalidated special circumstance requires reversal of a death sentence is as follows:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances

(*Brown v. Sanders*, *supra*, 546 U.S. at p. 220, fn. omitted; see also AOB:382-383.) Thus, the question is not simply whether other valid eligibility factors remain.

Implicitly acknowledging this, respondent then invokes cases decided by this Court which cite *Sanders* to contend that in appellant's case "Reversal of the prior-murder special circumstances would 'not alter the universe of facts and circumstances to which the jury would accord aggravating weight.'" (RB:192, quoting *People v. Bonilla* (2007) 41 Cal.4th 313, 334; see also RB:193, citing *People v. Morgan* (2007) 42 Cal.4th 593, 628.) This is because, respondent alleges, "Barrett's prior murder would have been admitted at the penalty phase as an aggravating factor (just as it was) even had it not been used as a special circumstance pursuant to section 190.2, subdivision (a)(2). (See *People v. Bivert*, *supra*, 52 Cal.[4th] at p. 122.)" (RB:192.) Not so.

In appellant's case, evidence about the Jackson homicide (the conviction and the confession) was admitted as factor (a) evidence only. (See 84RT:10028-10029.) If not permitted to use it as a special

circumstance, perhaps the prosecutor might have offered the confession under factor (b) in the penalty phase. However, as appellant has shown elsewhere in the briefing, the evidence of his confession to the homicide was erroneously admitted. (See Arg. XVI.)

But even assuming for the sake of argument that the confession would have been admitted under factor (b), the *conviction* evidence added extra facts and circumstances that the confession did not. The conviction informed the capital jury that another twelve citizens had considered *all* of the pertinent information about the killing and had unanimously concluded, beyond a reasonable doubt, that appellant had committed first-degree murder. Although respondent may be suggesting the conviction itself would have otherwise been admissible pursuant to factor (c),[47] appellant disagrees. If this Court agrees that a prior juvenile murder may not constitutionally be used as a special circumstance, it should also conclude that it cannot be admitted in the penalty phase under factor (c). The same factors that render a prior juvenile murder conviction unsuitable for use as an eligibility factor – reduced culpability, heightened unreliability, and the inability of the sentencing body to consider adequately how the hallmarks of youth might have impacted the conviction – militate against permitting it to be used under factor (c).

In sum, because the use of the prior murder conviction added an improper element to the aggravating side of the scale, appellant's sentence

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[47] Respondent does not specify under which aggravating factors evidence of the Jackson homicide might have been introduced at the penalty phase. Respondent's brief does, however, cite *People v. Bivert*, *supra*, 52 Cal.4th at p. 122. (RB:192.) The facts underlying Bivert's prior juvenile homicide convictions were adduced at the penalty phase under factor (b). (*Ibid.*)

must be reversed. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 220.)

Even if a harmless error analysis is applied, however, the state cannot establish beyond a reasonable doubt that the fact of conviction did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18.) As demonstrated elsewhere, the penalty case was a close one. (See Arg. XVIII.B.2.) As noted above, the fact of conviction added important harmful aggravation beyond that presented to the jury through the confession evidence. Under the circumstances of appellant's case, these additional, powerful facts could have affected the decision of one or more jurors to vote for death.

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XIV.

THE DEATH ELIGIBILITY PROVISION OF PENAL CODE SECTION 4500 IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY AND IRRATIONAL

Appellant has argued that Penal Code section 4500, which makes an inmate serving a life sentence eligible for capital punishment if he commits a fatal assault, violates the Eighth Amendment. To predicate death eligibility on the label an inmate's sentence has been given is irrational and arbitrary, and it fails to serve the purpose of either deterrence or retribution. (AOB:384-399.) Respondent disagrees, but fails to respond to many of appellant's key points. (RB:193-201.)

First, respondent challenges appellant's claim that life prisoner status fails to rationally make death-eligible those persons who are most deserving of the ultimate sanction. (See AOB:389-394.) Respondent contends that "Barrett's custody status as an inmate serving a life prison term constitutionally narrowed his eligibility for the death penalty . . . ." (RB:193.) Respondent asserts that pursuant to *Tuilaepa v. California* (1994) 512 U.S. 967, "[t]he narrowing function is accomplished in the eligibility phase if two criteria are met: first, the aggravating factor only applies to a subclass of defendants convicted of murder and not all murderers; and second, the aggravating circumstance is not unconstitutionally vague." (RT 194.) Respondent then argues that section 4500 satisfies the Eighth Amendment because it applies to a subclass of defendants. (RB:194-196.)

What respondent fails meaningfully to address, however, is appellant's argument that section 4500 *irrationally* and *arbitrarily* defines a subclass of defendants eligible for capital punishment. *Tuilaepa*

emphasizes that the eligibility phase "must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." (512 U.S. at p. 973.) Under respondent's interpretation of *Tuilaepa*, designating inmates with green eyes who commit in-prison homicides as death eligible would be constitutional, because such a designation limits capital eligibility to only a small subclass of offenders and is not vague. But as explained in the opening brief, the eligibility factors must "adequately differentiate . . . in an objective, evenhanded, and substantially rational way" the many defendants for whom the jury may consider a death sentence from those for whom it may not. (AOB:385, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Capital punishment must be limited to those offenders "whose extreme culpability makes then 'the most deserving of execution.'" (*Roper v. Simmons* (2005) 543 U.S. 551, 568, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319.) Obviously, singling out green-eyed inmates who kill for death eligibility is not rational and would not serve to identify those offenders most deserving of execution.

The differentiation made by section 4500 is wholly inadequate to meet constitutional concerns. As appellant has shown, in light of the way California sentences criminal defendants, those who are serving a life sentence are not as a class more deserving of a death sentence than those who are not. An inmate may be sentenced to a life term for a nonviolent crime and have a realistic opportunity for parole. In contrast, an inmate sentenced to a term of years rather than life may have committed multiple heinous, violent acts and have no hope of ever leaving prison. To make the first inmate eligible for death if he commits a lethal assault but not the second, based solely on the label given to their respective sentences,

contravenes basic Eighth Amendment principles. (See AOB:389-394.)

In response to this argument, respondent simply quotes *Finley v. California* (1911) 222 U.S. 28, 31, a case decided more than half a century before *Furman v. Georgia* (1972) 408 U.S. 238. (RB:199.) In *Finley*, the defendant argued that Penal Code section 246 (the precursor to § 4500, which required the mandatory imposition of death) deprived him of equal protection under the Fourteenth Amendment because "it provides an exceptional punishment for life prisoners." (222 U.S. at p. 31.) Rejecting this claim, the high court found that the situation of life-term inmates was legally different from other prisoners: "Their civic death is perpetual.' [Citation.] Manifestly there could be no extension of the term of imprisonment as a punishment for crimes they might commit, and whatever other punishment should be imposed was for the legislature to determine." (*Ibid.*)

Appellant is advancing an Eighth Amendment claim rather than one based on equal protection, however. Moreover, appellant has already shown how the historical distinction between life and non-life inmates relied upon in *Finley* no longer obtains. *Finley* predates three-strikes laws and other developments in sentencing law that have eroded any rational distinction between "lifers" and those serving very long determinate sentences. (AOB:389-394.) The United States Supreme Court recognized as much in *Sumner v. Shuman* (1987) 483 U.S. 66, 81, when it stated that "the label 'life-term inmate' reveals little about the inmate's record or character." And no longer is a death sentence for a life inmate who kills in prison required to effectuate capital punishment's goals of retribution and deterrence. (*Id.* at p. 84; see also AOB:394-396.)

Second, respondent disagrees with appellant's argument that section

4500 does not rationally promote deterrence, which has been recognized by the high court as a social purpose served by the death penalty. (RB:199.) In his opening brief, appellant demonstrated both that capital punishment does not actually deter in-prison homicide and that the likelihood of whether an inmate would be deterred from killing in prison by the prospect of a future death sentence cannot rationally be linked to whether or not he is serving a life term. (AOB:396-398.) Respondent asserts that because the jury in appellant's case "weighed all of the constitutionally requisite factors before imposing the death penalty," section 4500 "passes constitutional muster as a deterrent." (RB:199.) This claim does not respond to appellant's argument.

Respondent similarly argues that because section 4500 permits guided discretion in the selection phase, appellant's argument that it does not rationally serve the social purpose of retribution must also be rejected. (RB:200.) But again this argument is not responsive to appellant's claim. In California there are meaningful ways to punish inmates who kill short of the death penalty and that to single out inmates with life terms for the ultimate punishment makes no sense. (See AOB:394-396.) Respondent does not refute this argument.

Moreover, the fact that a jury can consider mitigating circumstances in the selection phase does not save section 4500. Because it operates as an eligibility factor, rather than as a selection or sentencing factor, section 4500 must be sufficiently narrow to identify those persons for whom a death sentence may be sought, not just those for whom it will actually be imposed. (*Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) Whether or not the weight to be given to an eligibility factor may *later* be mitigated during the selection phase has no bearing on whether it meets the constitutional

narrowing requirements as an eligibility factor in the first instance. (Cf. *Lowenfield v. Phelps* (1988) 484 U.S. 231 [finding that a factor used to establish death eligibility serves a different function than the same or similar factor considered as a basis for sentencing a particular individual to death].) Thus, it is not enough that a jury can theoretically give mitigating effect to the fact that a capital defendant was serving a life term for a non-violent offense, an offense committed while he was a juvenile, or even a de minimus "violent" offense, once it has already determined that he should be considered for a possible death sentence.

In arguing that Penal Code section 4500 constitutes an arbitrary and irrational death-eligibility factor, appellant relied on *Sumner v. Shuman*, *supra*, 483 U.S. 66. (See AOB:392-396.) Respondent claims *Shuman* is inapposite because it invalidated a statute which *mandated* a death sentence for an inmate serving life without the possibility of parole who committed murder. (RB:196-197, 199.) Of course appellant acknowledged in his opening brief that there are important differences between Penal Code section 4500 and the Nevada statute invalidated in *Shuman*. (See AOB:392-394.) But that does not change the fact that many of the principles central to *Shuman* apply equally to this case, including, as noted above, that a life-sentence designation provides little information about an inmate's relative culpability. (483 U.S. at p. 81.) Although under section 4500, the jury in the penalty phase may consider the circumstances behind an inmate's life sentence, such consideration fails to resolve the complaint that appellant is making – that determining death eligibility at the outset based on whether or not the defendant was sentenced to a life term, versus a term of years, is irrational and arbitrary.

Finally, respondent contends that the fact that only a handful of

states have statutes similar to section 4500 is irrelevant because "inter-case proportionality review of death sentences is not constitutionally required." (RB:200.) But appellant is not pressing a proportionality review claim. Rather, he has presented an interjurisdictional comparison to support a claim that section 4500 does not meet the evolving standards of decency (see *Roper v. Simmons*, *supra*, 543 U.S. at p. 561) which must be considered under the Eighth Amendment. (See AOB:398-399.)

In sum, respondent has not cogently addressed appellant's argument that Penal Code section 4500 violates the Eighth Amendment.

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XV.

THE TRIAL COURT ERRED IN PERMITTING THE THE PROSECUTOR TO ELICIT TESTIMONY ABOUT APPELLANT'S RACIALLY INFLAMMATORY WORDS AND CONDUCT

Appellant has asserted that the trial court erred in admitting irrelevant and prejudicial non-statutory aggravation when it permitted a penalty phase witness to testify that he had confronted a group of African Americans with offensive racial slurs. Appellant argued that the error, to which he vigorously objected, violated Penal Code section 190.3, as well as his state and federal constitutional rights. (AOB:400-406.)

Respondent concedes that "Barrett appears correct that the evidence of [his] encounter with the African-Americans did not qualify as a threat of violence, and was thus not an aggravating factor." (RB:208.) And, respondent does not refute appellant's claim that the error was of constitutional magnitude. (See generally RB:201-211.) Instead, respondent contends that the jury would not have used the improperly admitted evidence as aggravation in light of the instructions they were given. (RB:208-209.) Respondent further argues that any error was not prejudicial. (RB:210-211.) Respondent's arguments are not supported by the record.

Although respondent agrees that this incident was not an aggravating factor, she goes on to argue that nothing in the jury instructions permitted the jury to properly consider this evidence. (RB:208-209.) By this logic, the prosecutor would be free in a capital case to introduce mountains of non-statutory aggravation as long as the jury was instructed to consider only that which falls within the factors enumerated in Penal Code section 190.3. But as this Court has made clear, "Evidence of a defendant's background,

character, or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible." (*People v. Nelson* (2011) 51 Cal.4th 198, 222.) The evidence should not have been admitted.

Moreover, the circumstances under which the evidence was introduced heightened the likelihood that the jury considered it while deciding on penalty. When the defense first objected to the testimony on the grounds of relevance, the trial court stated, "I'll strike it if [it] doesn't tie up some way." (76RT:9013.) The prosecutor assured the court that he would "tie it in." (*Ibid.*) When he failed to do so, the defense again objected, arguing that the incident did not relate to violent conduct by appellant, but the court overruled these additional objections. (76RT:9014-9015; see also, AOB:400-401.) These rulings effectively told the jurors that the prosecutor had adequately established that the incident related to an act of violence and that they could therefore consider it in the penalty deliberations.

Respondent also relies upon *People v. Yeoman* (2003) 31 Cal.4th 93, 156. (RB:208.) That case is not applicable to this situation, however. The issue in *Yeoman* was whether the trial court had erred in refusing the defendant's request to instruct the jury that the statutory factors were exclusive, not whether evidence had been improperly admitted at the penalty phase. (See 31 Cal.4th at p. 156.) Appellant is not raising an instructional issue here.

Respondent then argues that any error was not prejudicial under either the *Chapman v. California* (1967) 386 U.S. 18, or *People v. Brown* (1988) 46 Cal.3d 432, standards. (RB:210-211.) Respondent asserts that the improperly admitted evidence of racial bias "pales in comparison to the

facts and circumstances surrounding the crimes of which he was convicted in the instant case, as well as his substantial criminal history . . . ." (RB:210.) But respondent's assertion is belied by the record; as appellant has demonstrated, this was a close case, both in the guilt and penalty phases. (See AOB:228-229 [guilt phase]; 448-451 [penalty phase].)

Although respondent characterizes the offending evidence as "brief" (RB:201, 211), it was highly inflammatory (see AOB:405). Indeed, the Ninth Circuit has recently emphasized that slurs "directed at a specific ethnic group particularly risk[] sparking visceral outrage among members of the jury and encourage[] them to convict based on emotion rather than evidence." (*Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1114 [prosecutor's use of "scrap" and "wetback" was prejudicial].) The slurs elicited by the prosecutor in appellant's case similarly were directed at a specific ethnic group, likely sparked outrage among his jurors and encouraged them to choose death based on emotion rather than evidence.

A comparison of appellant's case with the facts underlying *Delaware v. Dawson* (1992) 503 U.S. 159, illustrates how even limited evidence of this nature can be prejudicial, despite strong aggravating evidence and weak mitigation. The offending evidence in *Dawson* was slight; it included testimony that the defendant had "Aryan Brotherhood" tattooed on his hand and a short stipulation concerning the nature of the organization. (503 U.S. at 162.) The circumstances of the capital crime were extremely aggravated. Dawson had escaped from prison, stolen a car, and burglarized a home. He then arrived at the murder victim's residence, where he bound, gagged, strangled and stabbed her to death. After stealing her car, Dawson drove to a bar and drank for hours. (*Dawson v. State* (Del. 1990) 581 A.2d 1078, 1082-1084; judg. vacated (1992) 503 U.S. 159.)

The penalty phase aggravating evidence in *Dawson* was abundant. Defendant Dawson had an extensive criminal history, "resulting in a lifetime of almost continuous incarceration . . . ." (*Dawson v. State*, *supra*, 581 A.2d at p. 1101.) He had fourteen prior felony convictions and was first committed to a juvenile correctional facility at age 13. Dawson's in-custody record was abysmal: he escaped six times from juvenile and adult facilities, and committed dozens of conduct violations while incarcerated. (*Id.* at p. 1101, fn. 25.) The mitigating evidence presented in Dawson's behalf was minimal. At the penalty phase, his sister and aunt testified that they loved Dawson and that he had once offered to donate a kidney to his cousin. (*Id.* at pp. 1085, 1108.)

Dawson's crimes and criminal history were *more* egregious than appellant's and his mitigating evidence was *less* substantial. Yet after remand by the United States Supreme Court, the Delaware Supreme Court reversed Dawson's death sentence because it concluded that the state could not establish beyond a reasonable doubt that the error did not contribute to the verdict. (*Dawson v. State* (Del. 1992) 608 A.2d 1201, 1205.) Likewise, in this case, respondent cannot meet its burden of showing beyond a reasonable doubt that the erroneous introduction of evidence that appellant had confronted several African Americans with racial slurs did not contribute to his death sentence. (*Chapman v. California*, *supra*, 386 U.S. 18.) There is also a reasonable possibility that the jury would have rendered a different verdict if the evidence had not been admitted. *(People v. Brown*, *supra*, 46 Cal.3d 432, 447.)

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XVI.

APPELLANT'S 1986 CONFESSION WAS ERRONEOUSLY ADMITTED BECAUSE IT WAS UNRELIABLE AND OBTAINED IN VIOLATION OF HIS *MIRANDA* RIGHTS

When appellant was sixteen years old, he confessed to killing James Jackson; an audio recording of his statement was played for his capital jury during the penalty phase. Appellant argued in the opening brief that the state had failed to prove that he was properly advised of his *Miranda* rights before he was questioned or that his ensuing waiver of them was voluntary. He further contended that the record did not show that the confession was sufficiently reliable, in light of appellant's youth and other factors. (AOB:407-425.)

Respondent argues that appellant has forfeited his opportunity to challenge the admissibility of the statement and that, in any event, appellant has failed to demonstrate a prejudicial violation of his constitutional rights. (RB:211-222.)

A. Appellant's Waiver of His Rights Was Not Knowing and Intelligent Because the State Failed to Show What Advisements He Was Given.

Appellant has argued that the trial court could not have found that his 1986 *Miranda* waiver was knowing and intelligent because the prosecution failed to establish what advisements he was given. (AOB:412-415.) As appellant's suppression motion emphasized, the taped recording of the interrogation does not include any information about what San Francisco police inspector McCoy told appellant about his constitutional rights. (46CT:12961.) The transcript starts with McCoy stating "Joe, do you understand each of these rights that I have explained to you?" Appellant responded, "Yes, I do." Appellant then answered affirmatively

when McCoy asked if he wished to speak with them. (3rd Supp. CT:426; AOB:412-413.) At the suppression hearing prior to the start of the penalty phase, the prosecutor assured the trial court that he would remedy this deficiency, promising to "lay the foundation for the admissibility of the defendant's confession." (74RT:8936; AOB:407-408.) He did not do so, however. When McCoy took the witness stand, the prosecutor merely asked the former inspector whether he had advised appellant of his constitutional rights and if appellant had waived them. (76RT:9052; AOB:408-409.) On such a record, it simply cannot be determined that McCoy adequately advised appellant of his rights and that, as a result, his waiver of those rights was knowing and intelligent.

In response to this argument, respondent states that "The essential inquiry is simply whether the warnings reasonably conveyed to a suspect his *Miranda* rights." (RB:217.) While this proposition is correct, this "essential inquiry" cannot be conducted in this case because the prosecution has failed to show what was said to appellant when the advisements were given. (AOB:407-409, 412-415.)

Appellant's argument is not based on a technicality. Research shows that *Miranda* warnings come in hundreds of different versions. After reviewing a multitude of such waivers, Professor Barry Feld concludes that "[t]he length, complexity and reading grade level necessary to understand warnings varied considerably." (Feld, Kids, Cops, and Confessions: Inside the Interrogation Room (2013) p. 72 [hereafter Feld].) Moreover, Feld states that "How police administer a warning may affect adolescents' ability to understand it." (*Id.* at p. 73.) It matters whether the advisements are given slowly and carefully or in a rapid and rote delivery. (*Ibid.*) In this case, the record says nothing about the content of the warnings given to

appellant or the manner in which they were delivered.

Respondent asserts that appellant's "responses clearly showed that he understood the rights that were read and he did not indicate that further attempts by McCoy to explain those rights were necessary." (RB:218.) However, any seeming understanding in a case such as this is inadequate to prove that a waiver was knowing and intelligent. Again, because we do not know what appellant was told about his rights, his purported understanding of them is meaningless.

Moreover, researchers question whether youth grasp the import of *Miranda* warnings, even when they express an apparent understanding. (Feld, *supra*, at p. 89.) Minors may claim to understand their rights "to avoid appearing ignorant or confused." (*Id.* at p. 90.) Feld explains: "Juveniles' appearance of comprehension – an affirmation of understanding, a nod in agreement, absence of signs of confusion – may reflect compliance with authority or passive acquiescence rather than true understanding." (*Ibid.*) Older teens are not immune; one study of delinquent sixteen- and seventeen-year olds found that more than one-third of them exhibited a significant lack of comprehension of *Miranda* warnings. (*Id.* at p. 73.)

Finally on this issue, respondent cites cases holding that a *Miranda* waiver may be implied. (RB:217, citing *People v. Waidla* (2000) 22 Cal.4th 690; *North Carolina v. Butler* (1979) 441 U.S. 369; *People v. Whitson* (1988) 17 Cal.4th 229; *People v. Cruz* (2008) 44 Cal.4th 636; and *People v. Medina* (1995) 11 Cal.4th 694.) But none of these cases holds that the state can meet its "heavy burden" of proving that a waiver was knowing and intelligent (*Berghuis v. Thompkins* (2010) 130 S.Ct. 2250, 2261) without evidence about the content of the rights advisement.

B. The Prosecution Failed to Establish That the Waiver Was Voluntary.

Appellant also argued that the prosecution failed to establish, under the totality of the circumstances, that his waiver was voluntary. Appellant apparently had been up all night, was tired and possibly still intoxicated, and was deprived of parental support when he waived his constitutional rights. (AOB:415-421.)[48] Respondent disputes this claim, asserting that the questioning by inspector McCoy was "polite, respectful, and conversational." (RB:219.) According to respondent, appellant "did not seem to be under the influence of any intoxicant" (*ibid.*) and "demonstrated sufficient mental ability to comprehend the meaning of the *Miranda* rights and the significance of waiving them" (RB:220).

Cordial questioning does not render a confession voluntary, however. To the contrary, a tired, intoxicated 16-year-old suspect, without parental support, would be very vulnerable to "softening up" techniques. (See Weisselberg, *Mourning Miranda* (2008) 96 Cal. L.Rev. 1519, 1562 ["it is easy to mistake the significance of officers' friendly behavior with suspects. Courts are more likely to cite officers' rapport-building acts as evidence that a waiver is voluntary, rather than understand it as part of a strategic and well-structured interrogation sequence."].) The evidence is also silent as to what occurred prior to appellant's waiver.[49] Moreover,

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[48] Respondent finds the record to be unclear as to whether appellant had been intoxicated prior to the interrogation. (RB:219, fn. 60.) But appellant repeatedly told the inspectors he had been very intoxicated. (46CT:13043 ["Highly intoxicated"], 13045 ["pretty loaded"], 13046 ["pretty loaded"].)

[49] Appellant was arrested on the evening of October 11, 1986, some
(continued...)

even if appellant did have sufficient mental ability to comprehend the warnings – assuming for argument's sake that they were properly given – a knowing waiver is not necessarily a voluntary waiver. An adolescent with an adequate factual understanding of *Miranda* warnings may be developmentally unable to use this understanding to make an appropriately considered decision whether to waive his rights. (AOB:416-419.) Professor Feld explains: "Developmental psychologists report that the cognitive ability of sixteen- and seventeen-year-old youths begins to approximate that of adults. However, their ability to make adultlike decisions, to control impulses, and to exercise judgment remains a work-in-progress." (Feld, *supra*, at p. 82; see also, *id.* at p. 84 ["A juvenile who understands the words of a warning may not be able to act on the information provided."].)

Courts have relied on the science of adolescent development to recognize the detrimental impact of immature decisionmaking skills in the *Miranda* context. For example, in a persuasive and well-supported opinion, the First District Court of Appeal recently stated: "[R]esearch on juveniles' ability to exercise *Miranda* rights and their adjudicative competence consistently reports that, as a group, adolescents understand legal proceedings and make decisions less well than do adults." (*In re Elias V.* (2015) 237 Cal.App.4th 568, 595-596; see also sources cited therein.)

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[49](...continued)
time after the Spychala incident at 8:30 or 9:00 p.m. His interrogation ended at 5:16 a.m. on October 12th. (AOB:408, fn. 188.) Because the prosecutor failed to establish the critical details of when appellant was arrested and when his interrogation began, it is unknown how much time passed between these two events, which could have been as much as six hours, and what transpired during this gap.

California's Legislature also has relied on this growing body of research, to enact special legal protections for youth in the criminal justice system. In 2013, the Legislature passed Senate Bill 569 (SB 569), which requires the video recording of the entire custodial interrogation of a minor suspected of having committed a murder. (Pen. Code, § 859.5, effective Jan. 1, 2014.) The legislative history of SB 569 emphasizes that the still-developing brains of youth make it more difficult for them, as compared to adults, to make reasoned decisions. (Sen Com. on Public Safety, Analysis of Sen. Bill No. 569 (2012-2013 Reg. Sess.) as introduced Feb. 22, 2013, p. P.)

The voluntariness of a youth's *Miranda* waiver may be tainted not only by immature judgment but also by societal pressures to defer to authority. (Overbeck, *No Match for the Police: An Analysis of Miranda's Problematic Application to Juvenile Defendants* (2011) 38 Hastings Const. L.Q. 1053, 1053-1054.) As Professor Feld found: "Juveniles' legal obligations to clearly invoke their rights conflicts with research that finds that many youths do not understand *Miranda*, do not appreciate the function of rights, and lack the psychological fortitude to assert them effectively." (Feld, *supra*, at p. 89.)

In sum, the record in this case – incomplete at critical junctures – does not affirmatively demonstrate that appellant had the fortitude to assert his rights, in light of his youth, lack of sleep, and other factors, and that his waiver of them was voluntary.

C. The Prosecution Has Failed to Establish That the Confession Was Reliable.

In his opening brief, appellant also contended that the same factors that made appellant's *Miranda* waiver involuntary rendered the confession

unreliable for purposes of the Eighth Amendment. (AOB:421-423.) Respondent does not address this portion of appellant's argument.

False and otherwise inaccurate confessions are a concern when juveniles are interrogated. (See *In re Elias V.*, *supra*, 237 Cal.App.4th at pp. 577, 578.) The court in *Elias V.* explained: "An extensive body of literature demonstrates that juveniles are 'more suggestible than adults, may easily be influenced by questioning from authority figures, and may provide inaccurate reports when questioned in a leading, repeated and suggestive fashion'. . . . (citations)." (*Id.* at p. 578.)

In this case, it is difficult to ascertain whether appellant's confession was sufficiently reliable for Eighth Amendment purposes. Few facts concerning the Jackson homicide independent of the confession were presented to appellant's capital jury; thus, there was limited corroboration of the statement. Some details provided by appellant did appear to be consistent with information supplied by inspector McCoy, such as facts about Mr. Jackson's apartment. But the importance of this information was diminished by the fact that appellant had been in the home before. And, while appellant claimed complete responsibility for the killing, his account was lacking some important particulars – the officers' questions suggested that Jackson's credit cards and identification were missing from his wallet, yet appellant had no knowledge about these items. (See 47CT:13051-13052, 13064-13065.)[50] This gap in appellant's knowledge, when

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[50] Appellant was inconsistent about the wallet itself. First he stated that he did not know that Jackson had a wallet. (47CT:13064.) Later, he stated he did not take it. (47CT:13064.) Finally, he said he took an empty billfold, but that no credit cards or driver's license were in it. (47CT:13065.)

combined with his youth, his condition at the time of the interrogation, and the inadequate record regarding the admonitions appellant was given before he agreed to speak with the officers, raise a serious doubt as to whether the confession evidence satisfied the Eighth Amendment's heightened reliability requirement.

D. The Issue Was Not Forfeited.

In addition to challenging the merits of appellant's claims, respondent asserts that appellant has forfeited his ability to raise them on appeal. Respondent states that "at the hearing on his motion, Barrett abandoned his claim that his confession was taken in violation of any of his constitutional rights, was improper because he was a juvenile and his parents were not contacted, or was otherwise unreliable." (RB:215.) This is not a correct reading of the record.

Respondent does not contend that the written motion was insufficient to apprise the court and prosecutor of appellant's constitutional objections. In fact, respondent acknowledges that the motion asserted that "the admission of his confession would violate his *Miranda* rights because 'there was no transcription of the advisement or assurance that [the reading of his rights] actually occurred' . . . ." (RB:212, citing 46RT:12959-12963.) Instead, respondent contends that defense counsel's advancement of a corpus delicti issue at the hearing on the motion was an implicit abandonment of appellant's constitutional claims. (RB:215.) It was not. The written motion adequately expressed the basis of the *Miranda* claim – because the warnings were not part of the recording, appellant's statement "should be excludeable [sic] absent proper foundation." (46CT:12961.) Although respondent faults appellant for failing to obtain an explicit ruling at the hearing on the motion, there was no need to do so. When the

prosecutor responded with a promise to lay the missing foundation (74RT:8936), he in effect conceded the merit of the *Miranda* claim; pressing for a formal ruling was unnecessary.

If defense counsel was required to reobject when the prosecutor neglected during trial to lay the proper foundation, appellant should not be penalized for this failing. In similar contexts, reviewing courts have found it appropriate to reach the merits of an issue, either directly or under the rubric of ineffective assistance of counsel. For example, in *People v. Rand* (1962) 202 Cal.App.2d 668, the appellate court reached the merits of the defendant's claim that his confession was involuntary despite trial counsel's failure to fully preserve the issue, in light of the fundamental right at issue. The *Rand* court explained:

> [C]ounsel for the appellant argued the matter of the involuntary character of the defendant's statement prior to the time that the trial judge made his determination that the defendant was guilty. But assuming that no proper objection was made in the trial court prior to the admission of the evidence, if such a statement was in fact involuntarily made the defendant may still claim error on appeal because to hold otherwise would be to sanction a denial of due process.

(202 Cal.App.2d at pp. 672-673.)

In appellant's case, any inadequacy in preserving the *Miranda* issue could have been due only to mistake and inadvertence. There could have been no tactical reason for the defense to simply drop this meritorious issue and keep the confession out of evidence. (See, e.g., *People v. Trujeque* (2015) 61 Cal.4th 227, 249 [no possible tactical reason for counsel's failure to move to strike a prior conviction on one ground when counsel had

challenged it on another]; see also, *People v. Crittenden* (1994) 9 Cal.4th 83, 146 [court addresses merit of claim where trial counsel's failure to object raises specter of constitutionally inadequate representation].) If more was required to preserve this critical claim for appeal, then appellant's counsel has provided ineffective assistance under *Strickland v. Washington* (1984) 466 U.S. 668.

E. The Error Was Not Harmless.

As the opening brief demonstrates, the state cannot meet its burden of showing that the erroneous admission of appellant's confession to the Jackson homicide was harmless beyond a reasonable doubt. (AOB:423-425.) Respondent disputes this, claiming that the aggravating circumstances were overwhelming and that the mitigation was limited. (RB:221-222.) The record facts indicate otherwise. The jury's deliberations at both phases of trial were lengthy and readbacks were requested, indicating the case was a close one. (See AOB:449-451 [penalty phase]; AOB:228-229 [guilt phase].) Had the jury not heard the graphic and disturbing account of how sixteen-year-old appellant smashed the skull of Mr. Jackson with a dumbbell, one or more of his jurors might have voted for life. (*Wiggins v. Smith* (2003) 539 U.S. 510, 513.)

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XVII.

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO EVIDENCE THAT APPELLANT HAD OBTAINED A PROTECTIVE VEST AND BY ELICITING TESTIMONY THAT APPELLANT WAS ABLE TO GET OUT OF HIS CELL

Appellant has demonstrated that his counsel provided constitutionally ineffective assistance by failing to object to inadmissible testimony that he had managed to obtain a correctional officer's protective vest. Counsel also performed deficiently by himself eliciting the non-statutory and highly aggravating evidence that appellant was apparently able to leave his cell at will. (AOB:426-438.)

Respondent disputes this claim, contending that defense counsel had a tactical reason for his conduct. Respondent further asserts that any deficient performance was not prejudicial as required by *Strickland v. Washington* (1984) 466 U.S. 668. (RB:222-228.) Neither of respondent's contentions are supported by the record.

First, respondent argues that it was reasonable for counsel to want the jury to know that appellant had procured a protective vest and left his cell at night undetected by staff because it would show that "even when Barrett had an opportunity to assault or even kill prison staff, he did not do so . . . ." (RB:225.) This proposition must be rejected. The notion that it was to appellant's benefit for the jury to know he could leave his cell and obtain correctional equipment as he pleased is absurd. It is true that appellant did not harm prison staff on this particular occasion, but of course the jury would understand that he could if he desired to do so. Further, the jury would likely conclude from this evidence that the public was at risk, since appellant's ability to manipulate his surroundings in this manner made

escape seem like a plausible scenario. If it indeed was counsel's thinking that he was helping his client by permitting and even soliciting this devastating evidence, it was objectively unreasonable logic. (See, e.g., *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, fn. 3 [appellate court rejects Attorney General's claim that it should assume trial counsel's failure to object to evidence of uncharged murders was a tactical decision]; *Crotts v. Smith* (9th Cir. 1996) 73 F.3d 861, 866, superseded by statute on other grounds, *Van Tran v. Lindsey* (9th Cir. 2000) 212 F.3d 1143, 1149; [state's argument that counsel had tactical reasons for not objecting to prejudicial evidence about "killing a cop" was "specious"]; *Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1116 [federal court rejects state court's conclusion that trial counsel might have had a tactical reason not to object to prosecutor's improper jury argument including false and inflammatory evidence].)

Second, respondent avers that no harm resulted from counsel's actions because the evidence at issue was minimally prejudicial compared to the other aggravating evidence introduced at trial. (RB:227.) This is not correct. The penalty decision was close, with lengthy deliberations and a readback of appellant's statement to the jury. Lingering doubt presumably was a consideration, as the jury had a difficult time at the guilt phase as well. The prior murder was mitigated by the fact that the victim was seeking to sexually exploit a runaway teenager at the time of his death. (See AOB:449-451; 228-229.) And appellant's most aggravated conduct as an adolescent should not have been admitted. (See AOB:439-458.) That leaves his in-prison conduct, which respondent correctly asserts was damaging. But as appellant has already shown, evidence about the vest and cell exit aggravated this evidence rather than mitigated it. (AOB:435-438;

see also *People v. Smith* (2015) 61 Cal.4th 18, 60 ["evidence of defendant's violence in jail and his persistence in making escape attempts was dramatic and compelling"].)

Further, respondent's use of this evidence to argue the harmlessness of other errors undermines her claim that it was not prejudicial. For example, respondent has argued that the prosecutor's reference to the "Barrett" cell could not have been prejudicial in light of the evidence appellant could escape from his Ad Seg cell. (RB:243; see also RB:266 [evidence of purported CYA escape attempt was not prejudicial given the other aggravation, including evidence that appellant could get out of his cell].)

Counsel's performance was both deficient and prejudicial. Appellant's death sentence should be reversed.

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XVIII.

A COMBINATION OF ERRORS RESULTED IN THE ADMISSION OF EXTREMELY INFLAMMATORY EVIDENCE ABOUT THE ASSAULT OF AN ELDERLY MAN, WHICH DEPRIVED APPELLANT OF A FAIR TRIAL

Appellant has demonstrated how a series of errors allowed the admission of highly prejudicial evidence about an assault he committed as a twelve-year-old on a man in his eighties. More specifically, defense counsel provided ineffective assistance in failing to object to such evidence during cross-examination of a mitigation witness and by the prosecutor's misconduct in asserting that the facts of this incident were even more egregious than the evidence showed. Appellant was also denied his Sixth Amendment right to confrontation. (AOB:439-458.)

Respondent asserts that trial counsel's conduct was the product of a reasonable tactical decision, that the prosecutor's argument did not rise to the level of misconduct, and that the Sixth Amendment claim was forfeited. Respondent further claims that any error was not prejudicial. (RB:228-247.) These arguments should be rejected.

A. Counsel Provided Ineffective Assistance.

The prosecutor did not present any evidence of the assault on Lloyd Young in the state's penalty case-in-chief. Rather, he brought it out during the cross-examination of Charles Rand, appellant's former probation officer. Although Rand had no personal knowledge of the event, and in fact was not even working with appellant until some years after it occurred, defense counsel failed to object and raise several meritorious bases for exclusion of this testimony. (AOB:439-448.)

Respondent does not dispute that evidence of the assault could have been successfully challenged. Rather, respondent argues that it was a

reasonable strategy choice to permit the admission of such evidence, so that the defense could show how remorseful appellant was about the incident. (RB:243-246.) This claim is not persuasive. While remorse is an important mitigating factor, no attorney would reasonably choose to permit a highly prejudicial and otherwise inadmissible act of violence into evidence for the purpose of showing defendant was sorry for it. The fact that appellant's lawyer tried to make the best of this evidence once adduced by emphasizing that appellant was remorseful does not change the analysis.

As shown below (subsec. D., *post*), this deficient performance was prejudicial.

B. The Prosecutor Committed Misconduct.

In the opening brief, appellant showed how the prosecutor managed to exacerbate the prejudicial nature of this already inflammatory evidence by claiming, without evidentiary support, that appellant had used a knife during the incident and that the beating put Mr. Young in the hospital with his eyes swollen shut. (AOB:454-457.) Respondent asserts that appellant forfeited the issue by failing to object and that the prosecutor's misstatements of the evidence did not constitute misconduct. (RB:237-242.)

Appellant has argued that objection would have been futile because the trial court had clearly stated that it would not rule on the merits of such objections. (AOB:456-457.) Respondent insists that an objection would not have been futile because it would serve to "make a record" and the court would have reminded the jury of its duty to determine the facts. (RB:239.) This argument ignores the purpose of the forfeiture rule. An objection is required because it gives the trial court notice of the error and an opportunity to remediate it. (*People v. Green* (1980) 27 Cal.3d 1, 27.) It

this case, the judge declared in advance that he would not rule on any objections concerning misstatements of the evidence, thus making clear he did not want to be put on notice and would not remedy this type of error. Nor would appellant have "made a record" by objecting, because a critical part of that record is the trial court's determination of the merits of the objection which may be reviewed by an appellate court. An objection here would not have created such a record. And an admonition to the jurors that they are the triers of fact would have accomplished nothing, as the instructions of law given to them made that point abundantly clear. (See 47CT:13109, 13111.) Further, even though jurors are told that attorneys' arguments are not evidence, jurors often assume that prosecutors are privy to information that has not been disclosed to them. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 827-829.) A misstatement like this is therefore a bell that cannot be unrung except by the specific type of correction the judge refused to give.

Appellant also argued that if an objection was required to preserve the issue under these circumstances, then his counsel afforded him ineffective assistance. (AOB:445, citing *Strickland v. Washington* (1984) 466 U.S. 668.) There could have been no tactical reason for counsel to let these distortions of the record go uncorrected. (See, e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 674-676 [no reasonable tactical reason for failing to object to prosecutor's mischaracterization in argument of the concept of reasonable doubt].)

Respondent next argues that the misstatements did not amount to prosecutorial misconduct because they did not constitute use of a deceptive or reprehensible method to persuade the jury or infect the trial with fundamental unfairness. Respondent suggests that the prosecutor simply

became confused over the facts. (RB:240-242.) Even if that is the case, misconduct need not be intentional. (*People v. Hill, supra*, 17 Cal.4th at pp. 822-823.) It remains that these comments were not supported by the record and, as demonstrated below, they added to the prejudice which resulted from the combination of errors in this case.

C. The Sixth Amendment Was Violated.

Appellant has asserted that his Sixth Amendment right to confrontation was violated by the admission of former probation officer Rand's hearsay testimony about the Young assault. (AOB:452-454.) Respondent argues that this claim was forfeited and that any error was not prejudicial. (RB:233-237.)

As to forfeiture, respondent emphasizes that defense counsel did not object to Rand's testimony. (RB:234.) This Court has held, however, that a trial attorney's failure to raise a *Crawford* claim before that case was decided does not forfeit the issue, since *Crawford* was a dramatic departure from prior law. (*People v. Banks* (2014) 59 Cal.4th 1113, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.) Moreover, there was no tactical reason for counsel not to object, at least on hearsay grounds under state law. Thus, the Court should reach the merits of this claim. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 146 [Court addressed merits of unobjected-to claim of prosecutorial misconduct in light of likely ineffective assistance of counsel claim]; see AOB:445-452 [counsel was ineffective in failing to object].)

Perhaps more significantly, respondent does not dispute the merits of the *Crawford* argument. Appellant argued that Rand's testimony violated the Sixth Amendment because he was simply repeating testimonial hearsay. (AOB:452-454.) Respondent does not dispute that the testimony was

hearsay or that the materials it was undoubtedly based on were testimonial.

D. Appellant Was Prejudiced.

Respondent denies that this extremely inflammatory evidence prejudiced appellant. (RB:236-237, 242, 246-247.) Respondent is mistaken on this point.

As respondent recognizes, the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24, applies to the Sixth Amendment error. (RB:236.) The prosecutorial misconduct here is assessed under the reasonable possibility test of *People v. Brown* (1988) 46 Cal.3d 432, 448. (*People v. Tate* (2010) 49 Cal.4th 635, 687, 704.) And counsel's deficient performance is measured pursuant to the reasonable probability test of *Strickland v. Washington* (1984) 466 U.S. 668. As appellant has demonstrated, the erroneously admitted evidence about the Young assault was not harmless under even the most lenient standard. The facts suggest that the penalty decision was a close one. The beating of Mr. Young could well have been the deciding factor for one or more jurors. (See AOB:448-452, 457-458.)

Respondent asserts that "the fact that Barrett beat an elderly man when he was 12 years old pales in comparison to the facts and circumstances surrounding the crimes of which he was convicted in the instant case, as well as his substantial criminal history both during his adolescence and while serving time in custody, including Barrett's prior murder . . . ." (RB:237.) But respondent's assertion is belied by the emphasis the prosecutor gave to the incident. (See AOB:443-444.) In his closing argument, after describing the assault on Mr. Young, the prosecutor told the jurors that it was "a very extremely aggravating factor." (84RT:10037.) In his rebuttal argument, the prosecutor returned to the

incident and asserted it was "very very aggravating." (84RT:10060.) Under the circumstances of appellant's case, respondent's claim of harmlessness must be rejected.

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XIX.

THE PROSECUTION'S PERVASIVE MISCONDUCT DURING THE PENALTY PHASE DEPRIVED APPELLANT OF A FAIR TRIAL

Appellant has established that the prosecutor committed misconduct throughout the penalty phase, including asking improper questions designed to elicit inadmissible evidence, misstating repeatedly the facts and law during argument, and invoking the prestige of his office to convince the jury that death was the appropriate sentence. (AOB:459-487.) This misconduct specifically targeted and unfairly undermined the defense case in mitigation, thereby depriving appellant of a fair penalty phase. (AOB:488-496.)

In claiming there was no prejudicial misconduct, respondent considers each of the prosecutor's actions in isolation and concludes that none of them infected the trial with fundamental unfairness or constituted a deceptive or reprehensible method to persuade the jury. Respondent further argues that appellant has forfeited the opportunity to challenge the misconduct during argument for lack of objection. Finally, respondent argues there was no prejudice from any misconduct. (RB:247-279.) These claims should be rejected.

A. The Prosecutor's Conduct Was Improper.

Appellant has demonstrated at length that the prosecutor committed repeated acts of impropriety during the penalty phase. (AOB:459-487.) Thus, he replies only briefly to the points raised by respondent.

First, respondent asserts that the misconduct was not intentional: "Here, Barrett's claim of prosecutorial misconduct in the examination of Esten and Barrett must be denied because the prosecutor did not

intentionally elicit inadmissible testimony." (RB:248-249.) This Court has made clear, however, that bad faith or intentionality need not be shown. (*People v. Hill* (1998)17 Cal.4th 800, 822-823.) [51]

Second, respondent emphasizes that many of the defense objections to the prosecutor's improper questions were sustained by the trial court and not answered. Respondent avers that because the jury was admonished not to speculate about what answers might have been given, there was no misconduct. (See, e.g., RB:249 [question to Esten about an alleged assault on a correctional officer]; RB:252 [question about the "Barrett cell"]; RB:255 [questions about appeal and escape]; RB:258-259 [questions about violent and disobedient behavior as a teen]; RB:261 [questions about appellant's survival on the streets].) To the contrary, as demonstrated in the opening brief, the fact that the prosecutor persisted in asking improper questions designed to elicit inadmissible evidence, despite repeated, sustained objections, only underscores his willingness to flout the rules in order to win a death verdict. This is the opposite of a prosecutor's ethical responsibility. (*Berger v. United States* (1935) 295 U.S. 78, 88 [A prosecutor's duty is not to "win a case" but to see that "justice shall be done. . . . [W]hile he may strike hard blows, he is not at liberty to strike foul ones."].)

Third, respondent finds no problem with the argumentative questions the prosecutor directed to appellant, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 755-756. (RB:257-258.). It is difficult to tell from the analysis

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[51] To the extent bad faith is required to establish the use of deceptive and reprehensible methods under the state law standard, appellant asserts that the misconduct here, when considered as a whole, demonstrates bad faith on the part of the prosecutor.

in *Mayfield* what kinds of questions the Court declined to find were improperly argumentative. Notwithstanding *Mayfield*, this Court has emphasized that the prosecutor has a special obligation to refrain from "offensive personality," stating:

> ". . . A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] . . . Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]"

(*People v. Hill, supra*, 17 Cal.4th at p. 820, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 819-820.)

In this case, respondent seeks to shift the Court's attention from the prosecutor's rude and intemperate behavior to appellant, by faulting him for answering questions even after the trial court had sustained objections by defense counsel. (RB:257-258.) But the fact that the prosecutor was successful in his efforts to goad appellant while on the witness stand should not insulate his conduct from scrutiny. The Court has elaborated on the importance of respectful behavior by the state's attorney by quoting the American Bar Association Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and The Defense Function (Approved Draft 1971):

> "The prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of

> professional respect toward the judge, opposing counsel, witnesses, defendants, jurors and others in the courtroom. . . . It is unprofessional conduct for a prosecutor to engage in behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel. . . ."

(*People v. Hill, supra*, 17 Cal.4th at p. 832.)

Fourth, respondent asserts that the prosecutor did not misstate facts during his penalty argument but merely offered his interpretation of them. (RB:268-273.) As demonstrated in the opening brief, however, the prosecutor went well beyond urging his "interpretation" of the evidence. Instead, he asserted and insinuated the existence of facts which had not been established by the evidence. (AOB:477-483.)

Fifth, respondent argues either that the prosecutor did not misstate the law during argument or that no harm was done by his misstatements. (RB:273-276; see AOB:483-486.) For example, respondent acknowledges that post-crime lack of remorse is not a statutory aggravating factor and tries to equate the prosecutor's argument here with that in *People v. Pollack* (2004) 32 Cal.4th 1153, a case concerning remorselessness during flight from the murder scene. (RB:274-275.) The prosecutor's argument in this case, however, had nothing to do with remorselessness during flight but referred explicitly to appellant's post-crime conduct. (See AOB:483-485.) Similarly, respondent acknowledges that the prosecutor misstated the law by telling jurors that the circumstances of the crime under factor (a) could only be aggravating and that some of the factor (b) evidence could instead be considered under factor (a). (RB:275-276.) Nevertheless, respondent argues that none of these numerous misstatements amounted to deceptive and reprehensible methods and did not infect the trial with unfairness. As

discussed further below, however, the persistent nature of the prosecutor's misconduct, and its cumulative effect, distorted the capital sentencing process and rendered appellant's penalty trial fundamentally unfair.

Finally, respondent disputes appellant's claim that the prosecutor improperly invoked the prestige of his office to secure a death sentence. Respondent says this case is "a far cry" from those cited in the opening brief. (RB:277-279; see AOB:486-487.) Contrary to respondent's argument, the prosecutor in this case, like those in the cited cases, improperly capitalized on the prestige of his office. He told the jury that, as a prosecutor, he had a higher calling to do justice, which in this case required him to set aside his purported personal reluctance to ask for a death sentence. This conveyed to the jury both that appellant was uniquely deserving of the death penalty in the eyes of the prosecuting authority and that the jurors would be serving a higher purpose by setting aside whatever hesitation they had and sentencing him to death.

In sum, the prosecutor's actions in the instant case, "at times childish and unprofessional and at other times outrageous and unethical, betrayed [his] trust as a public prosecutor. [His] methods were deceptive and reprehensible." (*People v. Hill*, *supra*, 17 Cal.4th at p. 845.)

B. The Penalty Phase Was Fundamentally Unfair.

Under the federal constitution the question is whether a prosecutor's improper conduct deprived the defendant of a fundamentally fair trial. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.) Under state law, a penalty reversal is mandated when there is a reasonable possibility that the misconduct affected the verdict. (*People v. Tate*, *supra*, 49 Cal.4th at p. 704; AOB:488.)

Respondent argues that appellant was not prejudiced by the

prosecutor's inappropriate conduct, but only considers each improper act individually. (See, e.g., RB:250, 251-252, 253, 258, 259, 269-270, 270-271, 271, 273, 275, 276, 279.) Under both state and federal constitutional law, such misconduct must be considered as a whole. (*People v. Hill, supra*, 17 Cal.4th at pp. 844-845; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927 ["when the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process," citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 294]; see also AOB:488.) Factors to consider include the strength of the state's case, whether the misconduct was part of an ongoing pattern, whether it related to a critical part of the case and whether the prosecutor misstated or manipulated evidence. (*Baldwin v. Adams* (N.D. Cal. 2012) 899 F.Supp.2d 889, 904.)

The prosecutor's pervasive misconduct was cumulatively prejudicial. The decision between life without parole and death was a difficult one for the jury to make in this case. The misconduct, which occurred throughout the penalty phase, misstated and distorted the evidence, striking at the heart of appellant's case for life. (AOB:488-496.) Respondent simply fails to address this point.

Moreover, even respondent's efforts to isolate and trivialize individual incidents of misconduct do not persuade. For example, respondent asserts that the prosecutor's improper question to prison consultant Esten about escape was not harmful "because no evidence was before the jury as to any possibility that Barrett could escape prison . . . ." (RB:257.) However, earlier in this same argument, respondent maintained that evidence there was a special cell made for appellant was not prejudicial because the jury knew "that Barrett had previously escaped from his cell in

Ad Seg . . . ." (RB:253; see also RB:266 [improper questioning about escape from CYA was not prejudicial because jury knew that appellant could get out of his cell in Calipatria prison].)

Contrary to respondent's assertion, the prejudice was not ameliorated by instructions given by the trial court. (See, e.g., RB:249, 252, 256, 261, 265.) Courts have recognized that the damage of misconduct cannot always be undone by admonitions. "[O]nce such statements are made, the damage is hard to undo: 'Otherwise stated, one "cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it."'" (*United States v. Garza* (5th Cir. 1979) 608 F.2d 659, 666, quoting *Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886; see also *Krulewitch v. United States* (1949) 336 U.S. 440, 453 ["The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."].) This conclusion by judicial authorities is supported by empirical data. (See Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal* (2013) Catholic Univ. L.Rev. 51, 85 [admonitions may actually increase the prejudicial impact of erroneously admitted evidence], see also articles cited in fns. 237-238.)

Further, in *People v. Hill*, *supra*, 17 Cal.4th 800, this Court acknowledged that repeated misconduct is particularly unlikely to be cured by admonitions:

> Given . . . the onslaught of the misconduct that occurred in this case, it became increasingly difficult for the jury to remain impartial. "It has been truly said: 'You can't unring a bell.'" [Citation omitted.] Here, the jury heard not just a bell,

but a constant clang of erroneous law and fact.

(17 Cal.4th at pp. 845-846.) In appellant's case, the misconduct was simply too pervasive for admonitions to cure the harm it caused.

C. The Claim Was Not Forfeited.

Appellant explained fully in his opening brief why all of the instances of misconduct are adequately preserved for appeal. In particular, appellant demonstrated that additional objections during the prosecutor's argument would have been futile because the trial court informed the parties in advance that it would not rule on such objections but instead simply remind the jurors that they are the ones who determine the facts. (AOB:496-498; see also AOB:456-457.)

Respondent nonetheless claims that defense counsel's failure to object during the prosecutor's penalty argument has forfeited the claim. (RB:266-268.) According to respondent, counsel should have objected to "make a record." (RB:267.) Appellant has already demonstrated the flaw in this proposition. (See XVIII.B, *ante*.) Further, respondent recognizes that defense counsel did try to object at times, but asserts that these efforts prove that objections were not pointless. (RB:268, fn. 68.) In fact, the record indicates that when appellant's lawyer *attempted* to object, the trial court interrupted him mid-sentence, preventing him from "making a record." (See AOB:479-480.) In this case, the objections raised by counsel, as well as those they tried to make, were sufficient to preserve for appeal all of the challenged misconduct. (See *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1100 [when misconduct is part of a pattern and multiple objections are made, reviewing court may consider unobjected-to misconduct "in evaluating the pattern of impropriety"].)

Moreover, if this Court finds that trial counsel was somehow

inadequate in this regard, it should nonetheless reach the merits of the issue. This Court will address the merits of a claim where trial counsel's failure to object raises the specter of constitutionally inadequate representation. (*People v. Crittenden* (1994) 9 Cal.4th 83, 146.) In this case, there could have been no tactical reason for letting these misstatements go uncorrected. If an objection was required under the circumstances presented here, then counsel's performance was deficient. (See, e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 674-676 [no reasonable tactical purpose for not objecting to prosecutor's mischaracterization of the concept of reasonable doubt in argument].)

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XX.

THE ELEVEN-DAY JURY SEPARATION DURING PENALTY PHASE DELIBERATIONS REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

Appellant has argued that his death sentence should be reversed because the trial court erred in permitting the jury to separate for eleven days during the critical stage of penalty phase deliberations so that one of the jurors could go on vacation. (AOB:499-512.) Respondent argues that the claim was forfeited, and that it is also without merit. (RB:279-292.) Respondent's argument should be rejected on both points.

A. The Trial Court Erred in Suspending Deliberations.

As to the merits of the claim, appellant relied on *People v. Santamaria* (1991) 229 Cal.App.3d 269, which also involved a jury separation of eleven days during deliberations in a special circumstances murder case. (AOB:503-509.) The *Santamaria* court identified several pertinent factors for a reviewing court to consider, including whether there was good cause for continuing the proceedings, whether there was an alternative to suspending them, and the timing and duration of the break. (229 Cal.App.3d at pp. 277, 278.)

Respondent argues that *Santamaria* is distinguishable from appellant's case for several reasons. (RB:288-292.) First, respondent emphasizes that the separation in *Santamaria* was due to the judge's absence rather than a juror's, but this is a distinction without a difference. (RB:289.) As *Santamaria* makes clear, the cause of the continuance is only one of several factors to be considered. The *Santamaria* court emphasized that there was an alternative to suspending trial: substituting another judge pursuant to Penal Code section 1053. (229 Cal.App.3d at pp. 277-278.) In

appellant's case, there was also an alternative to sending deliberating jurors out into the community for a week and a half: substitution with an alternate juror.

Respondent also discounts the importance of the length and timing of the separation in appellant's case, stating that "Any risk of prejudice was minimized by the trial court's admonitions and instructions to the jury." (RB:289.) This proposition is simply too broad. Under respondent's logic, a separation during jury deliberations of any length could be justified. Although courts generally may presume jurors follow instructions, such presumptions are unwarranted when extreme variations from an established mode of trial practice are involved. (AOB:505-508.) For this reason, the court in *Santamaria* stated:

> Under certain circumstances, then, presumptions and burdens of proof concerning prejudice are simply not helpful; instead, a reviewing court's assessment of all the relevant factors, including constitutional due process standards, may lead to the conclusion that an improperly granted continuance compels reversal, even though the defendant cannot show actual prejudice.

(*Santamaria*, *supra*, 229 Cal.App.3d at p. 281.)

Thus, although the jurors in *Santamaria* were admonished not to discuss the case with anyone during the break, the court of appeal concluded that under the circumstances the defendant was prejudiced:

> The deleterious effects of an undue and prolonged gap in deliberations may be difficult to quantify, but their existence cannot be doubted. When issues of liberty are at stake, all sides are entitled as far as practicable to the undisturbed

focused attention of the jury.

(*Santamaria, supra*, 229 Cal.App.3d at p. 282.)

Of course, in this case appellant's very life, not just his liberty, was at stake. And, as the opening brief demonstrates, there was ample reason to believe that his jurors were exposed to inappropriate and negative influences during the lengthy break in penalty deliberations. The community sentiment against appellant and attendant media focus would have been very difficult for the jurors to avoid. (AOB:508-509.)

Although appellant has shown that it is inappropriate to assume that the trial court's admonitions mitigated the prejudice created by the separation, respondent asserts that Juror 4's report to the court regarding what she heard at work about appellant "demonstrated that the jurors were taking the court's instructions and admonitions seriously." (RB:291.) Research suggests, however, that even well-meaning jurors who believe they are following the court's instructions may be affected by sources outside of the courtroom. (See Ruva & Guenther, *From the Shadows Into The Light: How Pretrial Publicity And Deliberation Affect Mock Jurors' Decisions, Impressions, And Memory* (2015) 39 Law & Hum. Behav. 294 [hereafter *From the Shadows*], and studies cited therein.) This is because such jurors may wrongly attribute information they have been exposed to via pretrial sources to evidence presented by the parties. (*Id.* at p. 295.)

In fact, Ruva & Guenther found that mock juries exposed to negative pretrial publicity were willing to find a defendant guilty despite the fact that the evidence they were presented did not establish guilt beyond a reasonable doubt. These juries viewed the defendant as less credible, engaged in substantially less discussion of the law and instructions, and viewed ambiguous evidence in a more pro-prosecution manner than juries not

exposed to such influences. (*From the Shadows*, *supra*, at pp. 301, 305, 307.) Although courts assume that group deliberation and admonitions will attenuate bias, research suggests that jurors are likely to discuss the publicity during deliberations even when admonished not to, and that group deliberation may actually accentuate bias. (*Id.* at pp. 302, 306-307.)

Even if this Court assumes that appellant's jurors were not exposed to prejudicial influences during the separation, prejudice should be inferred. As the *Santamaria* court emphasizes, during an extended break jurors' recollections of evidence, argument and instructions may dim: "A long adjournment of deliberations . . . disrupts the very process and pattern of the jury's orderly examination of the evidence. . . ." (*Santamaria*, *supra*, 229 Cal.App.3d at p. 278; see also cases cited therein.)

The particular facts of appellant's case increase the likelihood that the deliberative process was impacted. Prior to the separation, the jury had not reached a verdict despite approximately three days of deliberations.[52] It would be expected that after eleven days apart, the jurors would need time as a group to recap the evidence, arguments, and instructions and then resume deliberations. In fact, they reached a death verdict in approximately thirty minutes. (See AOB:502, 509.) In the context of juror misconduct, this Court has found such timing significant. (See *People v. Hensley* (2014) 59 Cal.4th 788, 826 [presumption of bias arising from juror's misconduct in talking to his pastor during penalty deliberations about the role of mercy

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[52] On February 24th, deliberations began at 10:54 a.m. The jury recessed between noon and 1:30 p.m., and then continued deliberations until 4:00 p.m. (47CT:13168-13169.) Deliberations resumed on February 25th (47CT:13173 [9:40 a.m. to 4:00 p.m.]) and February 27th (47CT:13176 [9:30 a.m. to 3:00 p.m.]). The note about Juror 1's vacation was received on February 24th. (47 CT:13164; see also RB:280, fn. 71.)

and sympathy was not negated where the "jury, which had previously deliberated for a day and a half, returned a death verdict less than half an hour after deliberations resumed"]; see also *In re Boyette* (2013) 56 Cal.4th 866, 900, 903 (dis. opn. of Corrigan, J.) [fact that a death verdict was reached within 30 minutes of resuming deliberations after two jurors committed misconduct by watching movie about gangs in prison provides strong evidence they were influenced by it].)

In sum, when "the complex and delicate dynamics of deliberation" has been "interrupted for a sustained period" (*Santamaria*, *supra*, 229 Cal.App.3d at p. 282), reversal is warranted.

B. Appellant Has Not Forfeited This Claim.

In the opening brief, appellant demonstrated that the issue was preserved for appeal. (AOB:510-512.) Respondent acknowledges that "a reviewing court *can* address a claim of improper adjournment" when faced with sufficiently egregious circumstances. (RB:282.) Respondent argues, however, that such circumstances do not exist here. (See RB:281-287.) In *Santamaria*, the egregious circumstances included the length and timing of the separation, which were the same as in this case. (See RB:283.) But respondent asserts that "the differing circumstances surrounding any available alternative" to the adjournment distinguishes appellant's case from *Santamaria*. (RB:283.) In fact, the availability of an alternative to the jury separation in appellant's case renders it materially indistinguishable. In *Santamaria*, there could have been a substitution of judges. In appellant's case, there could have been a substitution of Juror 1. (See AOB:512.)

Respondent suggests that in *Santamaria* the defendant sought, or at least agreed to, an alternative to suspending deliberations but that appellant rejected one. (RB:283-285.) This is not correct. In *Santamaria*, it was the

prosecutor who may have inquired about substituting judges rather than adjourning, but the record contained conflicting recollections about whether the defense expressed any position on the issue. (229 CalApp.4th at pp. 275-276.) In this case, when appellant began to voice concern about the separation, his attorney interrupted him without any discussion of the matter. Further, the trial court failed to inform him of the possibility of using an alternate juror, either at the start of deliberations or if the jury had not reached a verdict by the time of Juror 1's vacation. Thus, appellant did not expressly reject an alternative to the separation. (See AOB:499-500.)

Respondent also argues that appellant specifically agreed to the continuance. (RB:284.) But as demonstrated in the opening brief, it was his counsel, not appellant, who agreed. They did so immediately, without any consultation with their client even when he expressed hesitation. (See AOB:499-500.) Under the particular circumstances of this case, counsel's acquiescence should not prevent this Court from reaching the merits of this issue.

Respondent next asserts that appellant must have had tactical reasons for agreeing to the continuance, reasoning that a capital defendant would not want to upset the jury by making one of its members miss a vacation or forcing an alternate juror upon it. (RB:284.) Respondent is correct in recognizing that appellant was in an exceptionally difficult position. That is precisely why the trial court and appellant's attorneys should not have dismissed his concerns without further inquiry. The matter called for careful consideration by all parties. Once appellant expressed misgivings, the trial court should have informed him fully of the alternatives, and explained to him that if he chose juror substitution over separation, it could be done without attributing it to the defense, to avoid antagonizing the

panel. The court should have then offered appellant an opportunity to confer with his counsel and obtained an informed waiver from him.

Respondent further contends that the defense must have wanted to keep the vacationing juror. (RB:284.) But again, the rapidity with which the matter was addressed provided appellant no time to consider his options in an informed manner. Because appellant was not fully apprised by either his counsel or the trial court of the risk inherent in halting penalty deliberations for such a prolonged period, he could not have meaningfully weighed it against the merits of having any one individual juror remain on the panel.

Finally, respondent relies on *People v. Johnson* (1993) 19 Cal.App.4th 778 (RB:285-287), but that case is factually distinguishable. In *Johnson*, the parties had previous agreed to a break over the Christmas holidays and all of the jurors had made plans accordingly. (19 Cal.App.4th at 791.) Thus, the adjournment there could not have been avoided by the substitution of an alternate juror. Respondent also quotes at length the *Johnson* court's discussion of *Santamaria* (RB:285-287) to conclude that "the dictum is [sic] *Santamaria* does not apply here . . ." (RB:287). But as respondent has already acknowledged, and appellant has previously shown, this Court's opinion in *People v. Ochoa*, *supra*, demonstrates that *Santamaria* is good law. (RB:283; AOB:510-511.)

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CONCLUSION

For all the foregoing reasons, appellant's conviction must be reversed and his judgment of death vacated.

DATED: December 17, 2015

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Senior Deputy State Public Defender

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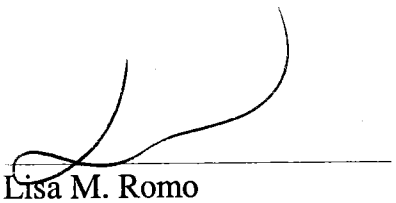
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630 (b)(2))

I, Lisa M. Romo, am the Senior Deputy State Public Defender assigned to represent appellant Joseph Anthony Barrett, in this automatic appeal. I have 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 49,584 words in length excluding the tables and this certificate.

DATED: December 17, 2015



Lisa M. Romo
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Joseph Anthony Barrett*

Superior Court No. CF5733
Supreme Court No. S124131

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

APPELLANT'S REPLY BRIEF

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

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Each said envelope was then, on December 17, 2015, sealed and deposited in the United States Mail at Alameda, 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.

Executed on December 17, 2015, at Oakland, California.

DECLARANT