IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CARL DEVON POWELL, Defendant and Appellant.	S043520

APPELLANT POWELL'S REPLY BRIEF

Automatic Appeal from the Judgment and Death Sentence
of the Superior Court of the State of California
In and For The County of Sacramento, No. 113126
The Honorable James I. Morris, Presiding

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DEATH PENALTY

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INTRODUCTION

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

appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

ARGUMENT

GLOBAL ISSUES

I.

THE JUDGMENT MUST BE REVERSED BECAUSE THE PROSECUTOR PROMISED THE JURY IN HIS OPENING STATEMENT THAT APPELLANT WOULD TESTIFY HE DID NOT ROB MCDADE AND KILLED HIM ONLY UNDER DURESS FROM THE HODGES BROTHERS, BUT APPELLANT ULTIMATELY EXERCISED HIS RIGHT TO REMAIN SILENT.

Appellant, who was young (23RT 8850), mentally slow (28RT 10412, 10431) and easily led (31CCT 9270, 9288)[1] was tried with his codefendants, John and Terry Hodges. Dual juries were used – one for appellant and one for the Hodges – to protect the Hodges' *Aranda-Bruton*[2] rights. (1RT 80-84, 5RT 2175-2176.) The Hodges were older, more sophisticated and more criminally oriented than appellant. (30CCT 8967, 8980, 31CCT 9295 [Hodges are older], 25RT 9471-9472, 28RT 10195; 32CCT 9303, 9311, 9314 [Hodges are criminally sophisticated], 31CCT 9001-9002 [appellant had never been involved in anything like the shooting].) Appellant feared them greatly. (31CCT 9006, 9012.) His defense was that they coerced him to commit the crimes. (2RT 1018; 2CT 528-529.) Whether appellant would testify was a major focus during the guilt phase proceedings.

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[1] At the penalty phase, Doctor Nicolas testified that appellant had an overall I.Q. of 75, which meant that 96 percent of the population had stronger intellectual capabilities than appellant did. (34RT 12002, 12006-12007.)

[2] *People v. Aranda* (1965) 63 Cal.2d 613 and *Bruton v. United States* (1968) 391 U.S. 123.

Appellant's attorneys represented that appellant would testify while also acknowledging that there was no guarantee he would do so. (2RT 1022, 4RT 1788, 14RT 5934, 15RT 6266.) Defense counsel took the unprecedented step of making appellant available as a witness for the prosecution even though the prosecutor offered appellant no consideration and still sought to convict him of capital crimes and put him to death. (2RT 1018-1023, 14RT 5953-5956, 31RT 11340.) Counsel even gave the prosecutor appellant's statement, which was otherwise privileged attorney-client communication, concerning his expected testimony. (15RT 6267; 29CCT 8486.) The prosecutor decided he would call appellant as a state witness. (14RT 6095.)

Uncertainty over whether appellant would testify loomed over the proceedings. The court and parties extensively addressed how appellant's testifying or remaining silent would impact the trial, including whether the prosecutor should be allowed in his opening statement to mention appellant's anticipated testimony, despite its uncertainty. (4RT 1788, 14RT 5905, 5909, 5934-5935.) Everyone acknowledged that there was no guarantee that appellant would testify. (2RT 1022, 1062, 1104, 6RT 2349; see also RB 20-22.) Everyone also recognized that if the prosecutor outlined appellant's expected testimony in opening statement but appellant exercised his right to remain silent, mistrials would be in order. (14RT 5934-5935, 5938, 5949, 14RT 5934-5935.) The Hodges unsuccessfully moved to preclude the prosecutor referencing appellant's expected testimony. (14RT 5938, 5950-5953, 5965-5966.) Defense counsel took the position that that the prosecutor should refrain from doing so to prevent risking mistrials. (14RT 5934.)

Aware of the risk he faced, the prosecutor made a calculated decision to outline appellant's anticipated testimony. (14RT 5911, 15RT 6304, 6229-6330.) He told both juries that appellant would testify he approached McDade unarmed to discuss getting his job back. The Hodges brothers approached, talked about robbing McDade, took his money and forced appellant at gunpoint to shoot him. (15RT 6344-6345.) In the end, appellant relied on his Fifth Amendment right not to incriminate himself and did not testify for either side. (2CT 518; 29RT 10702, 30RT 10805, 10816.) The jurors convicted him of robbery and first degree murder and found true the robbery felony-murder special circumstance. (2CT 550, 3CT 670, 672-684.)

The defense moved for a mistrial on the ground that the broken promise of appellant's testimony drew attention to appellant's exercise of his right to silence in a way that encouraged jurors to draw the negative inference that appellant's outlined testimony about acting under duress was false. (30RT 10818-10829, 10834-10838; 2CT 521-527.) The trial court denied the motion. (30RT 10837-10838.) It found that the claim had been forfeited and any error was invited and harmless. (*Ibid.*) Respondent defends the trial court's ruling on each of these grounds. (RB 19-54.) The State's efforts are unpersuasive.

As shown below, appellant was entitled to a mistrial because the broken promise of his testimony constituted prejudicial error. Appellant cannot be penalized for exercising his absolute, Fifth Amendment right to remain silent. The court and parties were constitutionally required to respect and work around appellant's unconditional right to take refuge in

the privilege against self-incrimination.[3] The trial court penalized appellant for exercising his right even though the court and parties had all acknowledged that it was impossible to guarantee that appellant would testify. It failed to hold the prosecutor accountable for his calculated decision to outline appellant's expected testimony in his opening statement despite uncertainty that appellant would testify. Faced with an obvious gap between appellant's promised testimony about duress and the evidence presented, the jurors would have reasonably concluded that appellant did not testify because his claim of duress was false. Appellant was prejudiced as a result. The defense he presented in the absence of his testimony was very closely related to duress, i.e., he did not actually form the mental state for robbery and first degree murder because his mind was clouded with fear and pressure from the Hodges. Appellant's defense had enough support in the record to raise a reasonable doubt. Jurors, however, could not have put out of their minds the adverse inference that appellant's claim of duress was false when evaluating appellant's defense because duress and appellant's defense were so very closely related.

Accordingly, respondent's position must be rejected, and the judgment must be reversed.

A. Appellant's Claim Has Been Preserved for Review.

Respondent argues that appellant's claim has been forfeited and any error was invited. (RB 27-31.) Both claims must be rejected.

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[3] In Argument II, respondent alleges that appellant is personally to blame for the prosecutor's broken promise of his testimony because appellant apparently told his counsel that he would testify but then changed his mind. (RB 63.) Appellant addresses this claim in Argument II, *post.*

1. The Claim Was Not Forfeited

Respondent argues that appellant's challenge to the prosecutor's undelivered promise of appellant's testimony in his opening statement has been forfeited due to appellant's failure to object to the prosecutor's referring to the anticipated testimony before the damage was done. (RB 27-29.) According to respondent, defense counsel should have done what the Hodges brothers did in order to preserve the claim. "They objected before the opening statement, immediately afterwards, and during the People's case." (RB 31, citations to record omitted.) The contention must be rejected.

As explained more fully below, before opening statements the trial court and counsel for all the parties engaged in extensive discussions concerning prosecutorial reference to appellant's anticipated testimony. Appellant's attorneys, like the Hodges, argued that grave problems would result if the prosecutor outlined appellant's expected testimony in his opening statement but appellant chose to remain silent. The trial court nevertheless overruled the Hodges' motion to preclude prosecutorial mention of appellant's anticipated testimony. It allowed the prosecutor to proceed and indicated that the way to address the problem, if it came to fruition, was by way of mistrial. In light of these circumstances, appellant's claim of error has been preserved for review. The trial court was aware of appellant's position and nevertheless allowed the prosecutor to proceed. The court's ruling on the Hodges's motion shows that a more specific objection by appellant prior to opening statement or after it would have been futile. Also, the trial court decided that the issue only became

ripe at the end of trial if appellant did not testify. At that point, appellant made a timely motion for a mistrial.[4]

When defense counsel Castro first announced that appellant would testify "whenever I tell him to," including as a witness for the prosecution (2RT 1020-1021), the court and parties all recognized that it was impossible to guarantee appellant's testimony. A criminal defendant has an absolute, federal constitutional right to either testify or claim the privilege against self-incrimination, and he may assert either right even over his attorney's express objection. (*Rock v. Arkansas* (1987) 483 U.S. 44, 49-53.) Further, a defendant may wait to see how the evidence develops before making a final decision about whether to testify or remain silent. (*Brooks v. Tennessee* (1972) 406 U.S. 605.) The following exchange occurred:

> MR. MACIAS:[5] ... I don't see how he'll take the stand during the prosecutor's case in chief –
>
> MR. SHERRIFF: Or at any time.
>
> MR. MACIAS: Or at any time.
>
> MR. HOLMES: Because that's his final decision at any time. He couldn't give you a guarantee.

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[4] Should this Court decide that defense counsel's failure to object to the prosecutor's outlining appellant's expected testimony in opening statement has forfeited this claim, appellant contends in his petition for writ of habeas corpus, filed with this Court on January 22, 2013, that defense counsel rendered ineffective assistance of counsel. (*In re Carl. D. Powell, on Habeas Corpus,* No. S208154, (hereinafter "PetHC"), Claim III, 165-252.)

[5] Julian Macias represented John Hodges, James Sherriff represented Terry Hodges and Brad Holmes was appellant's *Keenan* (*Keenan v. Superior Court* (1982) 31 Cal.3d 424) counsel.

> THE COURT: I don't feel that any of us should operate with an understanding that something is guaranteed, as far as who is going to waive their privilege against self-incrimination and who's going to testify. I think – I think we need to assess the case, apart from what you would hope and expect out of one of the defendants, any one of the defendants as far as what the strength of the D.A.'s case is.
>
> (2RT 1022.)

When the prosecutor observed that Castro had told him appellant was willing to testify for the State, the court responded incredulously, "even though you're seeking to put him in the gas chambers, he's ready, willing and able to testify for you; is what your understanding is?" (*Ibid.*)

The trial court again articulated its understanding that there was no guarantee that appellant would testify when it put its thoughts on the record about whether to proceed with one trial and dual juries to protect the Hodges's rights under *Aranda-Bruton.* (2RT 1103-1104.) The court stated:

> ... if we proceed with dual juries, one trial but dual juries, and if defendant Powell testifies in the D.A.'s case in chief, that would have belatedly eliminated the reason for the dual juries. Only we would still have dual juries, and both juries, I assume, would be hearing the testimony. And, as we mentioned yesterday, if we knew that there was a certainty, we could have avoided the dual juries. But we can't guarantee that Mr. Powell will testify in the D.A;'s case in chief.
>
> (*Ibid.*)

Later on, prior to opening statements, the Hodges's attorneys objected to the prosecutor's mentioning appellant's anticipated testimony because there was no way to ensure that appellant would actually take the stand. They argued that if the prosecutor outlined appellant's testimony that the Hodges coerced appellant into shooting McDade but appellant

ultimately claimed the privilege against self-incrimination, they would be prejudiced and entitled to a mistrial. (14RT 5938, 5950-5953, 5959, 5966.) Notably, both of appellant's attorneys voiced similar concerns and indicated that the prejudice would flow to appellant as well. (4RT 1788, 14RT 5934-5935.) Defense counsel Castro warned the prosecutor "to protect himself" from mistrial by crafting his opening statement knowing that appellant might not testify. (4RT 1788.) Defense counsel Holmes pointed out that the decision about whether or not to testify was entirely up to appellant. (14RT 5934.) He, too, warned that if the prosecutor tells "either one or both juries – that Carl Powell is going to testify," the prosecutor would set himself up "for a couple of mistrials here if [appellant] in fact doesn't testify. [The prosecutor's] already got up and told both juries what he's going to say." (*Ibid.*) The trial court's response once again acknowledged its understanding that there was no guarantee that appellant would testify. It replied, "[w]ell, that's what I've already I thought indicated." (*Ibid.*) It agreed that if the prosecutor "gets up and in front of the juries – both juries he details what Carl Powell's going to say and Carl Powell doesn't take the stand ... then we have that dilemma." (14RT 5934-5935.) The prosecutor also acknowledged that he risked mistrials if he told the jurors to expect appellant's testimony but appellant ultimately remained silent. (14RT 5905, 5909.) Unquestionably, the court and all parties understood that there was no way to guarantee that appellant would testify. They also recognized that if jurors heard he was going to testify but he ultimately did not this could result in mistrials.

Respondent argues that the above "couple of mistrials" exchange between Holmes and the trial court (14RT 5934-5935) was limited to mistrials for the Hodges (RB 30), but the record refutes this. Holmes's warning that the prosecutor risked "a couple of mistrials" if he mentioned

the anticipated testimony to "either one or both juries" made clear the defense's position that the danger of mistrial extended both to appellant and to the Hodges brothers. Clearly, the trial court understood that if the prosecutor outlined appellant's testimony in his opening statement but appellant did not testify, he risked causing mistrials for both appellant and the Hodges brothers. (14RT 5934-5935.) The trial court also knew that appellant's attorneys had cautioned the prosecutor not to take this risk by refraining from referencing appellant's testimony in his opening statement. (4RT 1788, 14RT 5934-5935.)

Despite this knowledge, the trial court denied the Hodges's motion to preclude the prosecutor from mentioning appellant's testimony in his opening statement. (14RT 5966.) Although appellant did not formally join in the Hodges' motion or make a formal motion himself, it was unnecessary for him to do so in order to preserve the issue for review.

It would have been futile for appellant to make a formally phrased objection before or after opening statement. The trial court knew that both appellant and the Hodges maintained that if the prosecutor failed to deliver on a promise that appellant would testify, they would be prejudiced and would be entitled to mistrials. (14RT 5934-5935, 5938, 5949.) The Hodges formally moved to prohibit the prosecutor from referencing appellant's anticipated testimony in his opening statement because it was impossible to ensure that appellant would testify. (14RT 5938, 5950-5953, 5966.) The trial court overruled their objection. (14RT 5950.) It explained that the issue would need to be raised in a mistrial motion because only then could it assess prejudice. (14RT 5948, 5965.) Had appellant made a similar objection before or after the prosecutor's opening statement, the trial court would have made the same ruling. A party need not make a

futile objection to preserve a claim of error for review. (*People v. Boyette* (2002) 29 Cal.4th 381, 432; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

Further, it was reasonable for defense counsel to wait to raise the issue by seeking a mistrial after the close of evidence. The trial court explained that the issue should be handled this way because only then did it become ripe. (14RT 5934-5935, 5947-5948.) As long as the evidentiary portion of trial remained open, appellant could decide to testify. (17RT 6812 & 29RT 10606 [court denies John Hodges's mistrial motions due to the absence of appellant's testimony because court needed to wait to see how evidence developed]; *Brooks v. Tennessee, supra,* 406 U.S. 605.) Only after the evidence closed would appellant's decision become final and the trial court could assess if there was prejudice. (*Ibid.*) Appellant relied on the trial court's directive to raise the issue in a mistrial motion after the close of evidence, and he made a timely mistrial motion at that time. (30RT 1018-1029, 10834-10838; 2CT 521-527.)

The court's directive that the issue should be handled by way of mistrial motion made sense. If the prosecutor told the jurors in his opening statement that appellant was going to testify to certain matters and then appellant testified to them, no one could complain. (*People v. Hinton* (2006) 37 Cal.4th 839, 863 [defendant cannot complain that the prosecutor referenced witness statements whose admissibility was questionable where the statements were eventually admitted].) The prosecutor's promise of appellant's testimony did not ripen into a colorable claim until it became clear that appellant would not testify. Only after both sides rested did this become plain. Up until then appellant had an absolute right, guaranteed by the federal constitution, to either take the stand or remain silent, and he, not counsel, had the ultimate say over what course to take. (*Rock v. Arkansas,*

supra, 483 U.S. 44, 49-53.) Once both sides rested without appellant's testifying, appellant promptly moved for a mistrial on the ground that the prosecutor's unfulfilled promise of appellant's testimony adversely drew attention to appellant's decision to assert his right to remain silent. (30RT 10818-10829; 2CT 521-527.)

The decision of the First Circuit Court of Appeal in *Ouber v. Guarino* (1st Cir. 2002) 293 F.3d 19 supports the above approach. As the First Circuit observed, it is through the combination of two "inextricably intertwined" events, (1) an advocate's promise to the jurors that certain witness testimony will be presented and (2) the failure of the testimony to materialize into evidence, that a claim based on the failure to deliver promised testimony ripens into an arguable issue. (*Id.* at p. 27.) Either event standing alone is not necessarily problematic. (*Ibid.*) Had appellant objected earlier, the trial court could not have determined if the prosecutor's promise would remain undelivered or if it was prejudicial. (14RT 5965, 5948.)

In sum, appellant moved for a mistrial when the mistrial motion became ripe due to the prosecutor's unfulfilled promise of appellant's testimony. Objecting any earlier would have been futile. The court was aware that the prosecutor risked mistrial by mentioning appellant's anticipated testimony in opening statement, but it nevertheless ruled that the prosecutor could do so. Respondent's claims of forfeiture are unpersuasive and must be rejected.

2. Appellant Did Not Invite the Error of the Prosecutor Outlining Appellant's Expected Testimony in Opening Statement and Then Failing to Deliver It.

Respondent's contention that appellant invited the error also fails to persuade. (RB 29-31.) In *People v. Coffman* (2004) 34 Cal.4th 1, this Court explained, "[t]he doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. *If defense counsel intentionally caused the trial court to err*, the appellant cannot be heard to complain on appeal.... [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake." (*Id.* at p. 49, emphasis added.) Similarly, *People v. Russell* (2010) 50 Cal.4th 1228 states, "the doctrine of invited error applies when a defendant, for tactical reasons, *makes a request acceded to by the trial court* and claims on appeal that *the court erred in granting the request.* [Citations.]" (*Id.* at p. 1250, emphasis added.) Respondent fails to satisfy the elements of invited error. Respondent does not cite to any conduct by appellant asking or intentionally causing the trial court to permit the prosecutor to summarize appellant's anticipated testimony in his opening statement. Appellant never advocated in favor of such opening remarks. To the contrary, defense counsel cautioned the prosecutor not to give them to protect against mistrial. (4RT 1788, 14RT 5934-5935.) Nor does respondent cite to defense counsel's articulating any tactical reason for wanting the trial court to allow the prosecutor's opening remarks. This is to be expected since trial counsel did not advocate in favor of such remarks.

Further, the doctrine of invited error focuses on trial court error. The focus of appellant's argument on appeal is the combination of two intertwined events: (1) the prosecutor's detailing appellant's anticipated testimony in opening statement and (2) his failure to deliver on the promise. (*Ouber v. Guarino, supra,* 293 F.3d 19, 27.) Respondent provides no authority extending the doctrine of invited error to prosecutorial error.

First, the prosecutor's decision to outline appellant's expected testimony in his opening statement is attributable solely to the prosecutor. The prosecutor was a free agent. He did not have to mention appellant's expected testimony to the jury. Case law and warnings from appellant's attorneys counseled him against doing so. (See *Ouber v. Guarino, supra,* 293 F.3d 19, 28 [if it is uncertain whether defendant will testify, counsel "must exercise some degree of circumspection"]; *People v. Hinton, supra,* 37 Cal.4th 839, 863 [where the admissibility of witness statements is questionable, a prosecutor should take "'the safer and preferred path'" and refrain from mentioning them in opening statement].) The prosecutor made a tactical choice to reference appellant's testimony. This is plain from the following exchange between the trial court and the prosecutor. The court told the prosecutor that, given the uncertainty that surrounded whether appellant would testify, "you've got to try your case in whatever way you think tactically you must. [¶] ... Now, I do appreciate the fact that you've got some hard decisions to make about what you state in your opening statement." (14RT 5911.) The prosecutor said he understood he had to decide as a matter of tactics whether to mention appellant's expected testimony or not. (*Ibid.*; see also 15RT 6304.)

Second, the prosecutor did not deliver on his promise of appellant's testimony because the prosecutor had no control over appellant's decision to assert his absolute, Fifth Amendment right not to incriminate himself. (*Rock v. Arkansas, supra,* 483 U.S. 44, 49-53.) The prosecutor could not call appellant to the stand as he could any other witness. (*Ibid.*) Appellant had a fundamental right to remain silent at trial without being penalized in any way. (*Griffin v. California* (1965) 380 U.S. 609, 614 [defendant has 5th amend. right to claim privilege without its assertion being made "costly" by serving as the basis for an adverse inference]; *Brooks v. Tennessee, supra,*

406 U.S. 605, 611, fn. 6 [it violates a defendant's 5th amend. privilege against self-incrimination for the government to burden the defendant's exercise of his right to silence by requiring the defendant decide whether to testify without first being able to see how the case progresses].) Appellant chose to assert his Fifth Amendment right to silence.

As the foregoing makes clear, defense counsel did not invite the error. The doctrine of invited error applies to trial court error. Neither the prosecutor's (1) tactical choice to outline appellant's testimony in his opening statement nor (2) failure to deliver appellant's testimony was attributable to the trial court.

Respondent attempts to blame defense counsel for "inducing" the prosecutor's argument by assuring the prosecutor that appellant would testify. (RB 29, 31.) Those assurances came almost entirely from Castro, and they were hardly to be relied upon. Both he and Holmes repeatedly, with the trial court's concurrence, acknowledged that they ultimately had no control over whether appellant would testify since this decision was solely appellant's to make. (4RT 1787-1788, 14RT 5934.) The prosecutor also knew or should have known that the inability of appellant's attorneys to guarantee appellant's testimony was solidly grounded in the Fifth Amendment. (*Rock v. Arkansas, supra,* 483 U.S. 44, 53 & fn. 10 ["defendant has the "'ultimate authority to make certain fundamental decisions regarding the case, as to whether to ... testify in his or her own behalf'"], quoting *Jones v. Barnes* (1983) 463 U.S. 745, 751.) Advocates must frequently decide how to structure their opening statements despite uncertainty about whether a witness might fail to appear for trial, unexpectedly claim privilege or recant. Uncertainty is a given. The

prosecutor was no fool. He knew that detailing appellant's testimony risked mistrial and he made a strategic choice to take that risk.

As the prosecutor acknowledged, without appellant's testimony, the State's case against the Hodges was weak. (2RT 1014-1015, 1020.) The prosecution's main witnesses against the Hodges, Leisey and Banks, both had credibility problems. (2RT 1020-1021.) The prosecutor chose to detail appellant's anticipated testimony in his opening statement, no doubt, because he believed that priming the jurors in this manner would cause them to see Leisey and Banks as more credible than otherwise. He sought to improve the state's odds of convicting the Hodges.

Previewing appellant's anticipated testimony also helped the State's case against appellant because it cast appellant as the shooter. (15RT 6344-6345.) If appellant testified as expected, the prosecutor intended to argue that those parts of his testimony helpful to him were lies whereas those parts harmful to him were true. (E.g., 14RT 5926-5927, 6108 [prosecutor intends to rely on appellant's prior statements that are inconsistent with his expected testimony].) On the other hand, if appellant chose to assert his right to silence rather than testify as outlined, the prosecution could benefit from jurors drawing the adverse inference (discussed more fully in § B.3, *post*) that appellant did not testify because his anticipated testimony was false. (See *Anderson v. Butler* (1st Cir. 1988) 858 F.2d 16, 17). Either scenario benefited the prosecution. The prosecutor must be held accountable for his knowing and voluntary strategic decision to detail appellant's anticipated testimony in his opening statement.

The government suggests that appellant should instead be held accountable for his decision not to testify after the prosecutor told the jurors

that appellant would do so.[6] (RB 63.) Not so. Nothing forced the prosecutor to reference appellant's anticipated testimony when it remained constitutionally uncertain. Although defense counsel advised the prosecutor against doing so, the prosecutor made a tactical choice to tell the jurors about it in his opening statement. Appellant differs from the prosecutor in a crucial respect. Unlike the prosecutor, appellant had an absolute right to not only assert the Fifth Amendment privilege against self-incrimination but to do so unfettered by the danger that its assertion would be made "costly" by serving as the basis for an adverse inference. (*Griffin v. California, supra,* 380 U.S. 609, 614; see also *Brooks v. Tennessee, supra,* 406 U.S. 605, 611, fn. 6.) Having appellant shoulder the adverse consequence of asserting his right to silence in the wake of the prosecutor's promise of appellant's testimony impermissibly penalizes appellant for exercising his Fifth Amendment privilege.

Accordingly, respondent has failed to demonstrate that defense counsel invited the error of the prosecutor's undelivered promise of appellant's testimony. Appellant now turns to discussing the adverse inference that the prosecutor's broken promise of appellant's testimony invited.

B. The Unfulfilled Promise of Appellant's Testimony Adversely Affected Appellant's Invocation of His Right to Silence and Deprived Appellant of a Fundamentally Fair Trial.

In his opening statement, the prosecutor represented that appellant would testify that the Hodges, not appellant robbed McDade, and then they coerced appellant under threat of death to shoot him. (15RT 6344-6345.)

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[6] See footnote 3, *ante,* at page 6.

The prosecutor told the jurors to expect appellant to testify that, as McDade was leaving KFC, appellant went up to him, unarmed, to discuss getting his job back. (15RT 6344.) After 10 to 15 minutes, Terry and John Hodges approached and talked about robbing McDade. (*Ibid.*) John had a derringer and Terry had a short shotgun. (15RT 6344-6345.) Then (*ibid.*),

> John had his derringer out. Terry reached into the car and got the money. Or Keith handed him the money. ... [¶] John handed Carl his gun. Carl Powell could tell there was only one round in it based on its weight. Carl started to point the gun at John. Terry drew down on Carl with a shotgun. Terry said, "Don't even think about it." Carl knew he had only one bullet.
>
> John put the derringer to Carl's chest, said, "We ain't leaving no witnesses." Carl said there was nothing he could do; Carl pointed the gun at Keith and pulled the trigger.

Appellant ultimately chose to rely on his Fifth Amendment right to remain silent at trial. He demonstrated that the prosecutor's unfulfilled promise of his dramatic and highly significant testimony constituted error in three ways. First, in violation of appellant's Fifth Amendment privilege against self-incrimination, it drew the jurors' attention to appellant's failure to testify in a manner which invited them to draw an adverse inference from appellant's silence. (AOB 102-113.) Second, it constituted prosecutorial misconduct. (AOB 113-118.) Third, regardless of who is to blame – the prosecutor, the trial court, defense counsel or a combination thereof -- it deprived appellant of a fundamentally fair trial.[7] (AOB 118-121.) Respondent argues that no error occurred.

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[7] Appellant's reply focuses primarily on violation of his Fifth Amendment right to silence. He submits that, for essentially the same reasons that his Fifth Amendment right was violated, he was also deprived

Again, it bears emphasis that appellant's claim of error is premised on "two inextricably intertwined events" -- (1) the prosecutor's opening statement promise of appellant's testimony that the Hodges coerced him and (2) the failure of this testimony to materialize. (AOB 124-125, citing *Ouber v. Guarino, supra,* 293 F.3d 19, 27; see also AOB 105-108 [discussing "broken promise" cases involving evidence highly significant to the defense].) It is only due to the *combination* of these two events that error occurred. (See *People v. Hinton, supra,* 37 Cal.4th 839, 863 [defendant cannot complain that the prosecutor referenced witness statements whose admissibility was questionable where the statements were eventually admitted].) Together, they invited a "heavy inference" that the promised testimony did not materialize because it was false. (*Anderson v. Butler* (1st Cir. 1988) 858 F.2d 16, 18.) Appellant did not argue that, standing alone, the prosecutor's outlining appellant's expected testimony constituted error. He simply noted this was a risky thing for the prosecutor to do and he did it for strategic reasons knowing full well appellant might not testify and, if so, there would likely be severe consequences to the State's case. (AOB 124.)

Respondent myopically focuses on the reasonableness of the prosecutor's belief that appellant would testify and argues that, because the prosecutor held this belief, he acted in good faith and did not commit misconduct. (E.g., RB 33.) Even if the prosecutor believed that appellant would testify, the prosecutor also unquestionably knew that there was no

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of a fundamentally fair trial under the Fourteenth Amendment and the prosecutor committed misconduct. Appellant relies on his development of his due process and prosecutorial misconduct claims in his opening brief. (AOB, Arg. I, §§ C.2 & 3, 113-121.)

guarantee appellant would do so and he was powerless to compel appellant's testimony. (See § A, *ante.*)

As explained below, the reasonableness of the prosecutor's belief does not necessarily obviate *Griffin* error or prosecutorial misconduct or keep a trial from becoming fundamentally unfair. Moreover, because respondent's truncated approach of focusing on the prosecutor's opening statement promise largely ignores that appellant's testimony never materialized, it fails to respond to the argument that appellant actually made, i.e., that the *combination* of (1) the prosecutor's promise of appellant's testimony and (2) its failure to materialize was prejudicial error. Respondent's side-stepping the full scope of appellant's claim suggests that the government lacks a good response to it.

1. Prosecutorial Misconduct Does Not Depend on Bad Faith

In regards to the truncated issue respondent emphasizes, that the prosecutor reasonably believed appellant would testify and thus acted in good faith in referencing appellant's anticipated testimony, respondent argues that "[c]omments in a prosecutor's opening statement are not misconduct unless the evidence referred to was patently inadmissible." (RB 33.) Respondent cites language in this Court's decisions in *People v. Wrest* (1992) 3 Cal.4th 1088, 1108 and *People v. Dykes* (2009) 46 Cal.4th 731, 762 in support of this proposition. (*Ibid.*) The language, however, is dictum in both opinions. Both rejected the defendants' claims of error not because the prosecutors' references were to clearly admissible or inadmissible evidence. Rather, both found that there was no significant variance between the evidence that the prosecutor outlined and the evidence actually presented. (*Wrest, supra,* at p. 1109; *Dykes, supra,* at p. 762.) "The discussion or determination of a point not necessary to the disposition

of a question that is decisive of the appeal is generally regarded as obiter dictum and not as the law of the case." (*Stockton Theaters Inc. v. Palermo* (1956) 47 Cal.2d 469, 474.)

A court may nevertheless "rely on a dictum where no contrary precedent is controlling and where the view commends itself on principle," such as where the dictum is made "after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 947, p. 989.) The dicta in *Dykes* and *Wrest* does not deserve such treatment. It was not made after careful consideration or review of case law. Rather, both opinions rest on outdated authority requiring that a prosecutor act in bad faith to commit prosecutorial error, or misconduct. *Dykes* cites *Wrest* which cites *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1225, fn. 5. (*Dykes, supra,* at p. 762; *Wrest, supra,* at p. 1108.) *Martinez* cites to intermediate appellate decisions requiring bad faith for a prosecutor's reference to evidence in opening statement which is later excluded to be deemed prosecutorial error. (*Martinez, supra,* at p. 1225, fn. 5, citing *People v. Havenstein* (1970) 4 Cal.App.3d 710, 714 & *People v. Ney* (1965) 238 Cal.App.2d 785, 793.) After these intermediate decisions issued, this Court ruled that bad faith is no longer required to demonstrate prosecutorial misconduct, including misconduct in opening statement. (*People v. Bolton* (1979) 23 Cal.3d 208.)

As appellant demonstrated, this Court made clear in *People v. Hill, supra,* 17 Cal.4th 800, that the no-bad-faith rule applies to prosecutorial misconduct in opening statement. *Hill* explicitly cited this Court's opinion in *People v. Harris* (1989) 47 Cal.3d 1047, 1079, concerning a claim of misconduct during opening statement, for the principle that a showing of

bad faith is not required. (AOB 113-114.) As appellant also pointed out, treatises take the same position. (Witkin, 5 Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 519, p. 741 ["Earlier decisions suggest that bad faith must be shown to establish prejudicial error in the opening statement. However, it is now clear that prosecutorial misconduct need not be intentional to be reversible error"], citations omitted; Millman & Sevilla, Cal. Criminal Defense Practice (2010, Matthew Bender) vol. 4, § 81.22, p. 103 ["Neither the prosecutor nor the defense may ... refer to anticipated testimony that he or she later fails to produce.... Good faith does not negate prejudicial misconduct, as even unintentional misconduct can be reversible error"], fns. omitted.)

In *People v. Barajas* (1983) 145 Cal.App.3d 804, the reviewing court found prejudicial error due to prosecutorial misconduct consisting of the prosecutor's promise of certain witness testimony and the failure to deliver it due to the witness's invocation of his right to remain silent. The prosecutor said in his opening statement that a crucial witness would connect the defendant to the crime despite doubts about whether the witness would deliver this testimony; the prosecutor then propounded leading questions to the witness, including about whether the witness had been threatened, which the witness refused to answer in reliance on his privilege against self-incrimination. (*Id.* at pp. 808-810.) The opinion found that the nature of the prosecutor's opening statement, combined with the circumstances under which the witness asserted his privilege, led jurors to infer that the witness had seen the defendant commit the crime despite the lack of any admissible evidence on this point. (*Id.* at pp. 809-810.) Notably, *Barajas* reached this result while recognizing that "the test for determining prejudice arising from a variance between the opening

statement and the proof is no longer bad faith." (*Id.* at p. 809 & accomp. fn. 7, citing *People v. Bolton, supra,* 23 Cal.3d 208.)

Not only does prosecutorial misconduct in general not require bad faith, but *Griffin* error, a particular kind of prosecutorial error (or court error), does not require it either. Even if a prosecutor's remarks are not deliberately intended to urge jurors to draw an inference of the defendant's guilt from his assertion of his right to silence, they violate the Fifth Amendment if, due to them, jurors would naturally and inevitably draw an inference adverse to the defendant. (*United States v. Thompson* (11th Cir. 2005) 422 F.3d 1285, 1299; *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 912; *United States v. Whitehead* (4th Cir. 1980) 613 F.2d 523, 527.)

2. ***Davenport* Assists Appellant, Not Respondent**

Respondent places heavy emphasis on this Court's decision in *People v. Davenport* (1995) 11 Cal.4th 1171 to contend that there was no Fifth Amendment violation. (RB 33-37.) *Davenport* requires no such conclusion. *Davenport* was an appeal from a penalty phase retrial. (*Id.* at p. 1188.) The prosecutor outlined in his opening statement what he believed the defendant would testify to and what defense he expected the defendant would present. The defendant testified not about what the prosecutor outlined but about certain artwork which he had created while incarcerated. (*Id.* at p. 1192.) In regards to the defendant's testimony which the prosecutor had outlined, the jury heard its substance from a police officer who testified to the defendant's out-of-court statement to him. (*Id.* at p. 1213.) As the opinion observed, "the challenged statements by defendant that the prosecutor referred to in his opening statement were introduced through the testimony of the police officer who interrogated defendant." (*Ibid.*) Under the circumstances, *Davenport* rejected the

defendant's claim that the prosecutor's opening statement invited jurors to draw an adverse inference from the defendant's decision to invoke his Fifth Amendment right to silence. (*Ibid.*)

Davenport is clearly distinguishable from appellant's case. First, jurors were not left with a glaring gap between the defendant's outlined testimony and what the evidence ultimately showed. They heard the essence of the testimony that the prosecutor had outlined through the defendant's own statements offered into evidence by his interrogating police officer. (*People v. Davenport, supra,* 11 Cal.4th 1171, 1213.) Consequently, jurors were unlikely to draw the adverse inference that the defendant did not testify as promised because his outlined testimony was false. This is the inference that jurors naturally and inevitably draw when they are promised important testimony from a key witness in opening statement but that witness does not testify. (*Anderson v. Butler,* 858 F.2d 16, 17; see also AOB 104-109, 119 & cases cited therein.) If Davenport's jurors focused on the discrepancy, they likely concluded that the defendant did not give the anticipated testimony because it was already in evidence, and, therefore he did not need to. Second, it does not appear that the promised testimony was significant. The opinion does not relate what the prosecutor told the jurors to expect. Nor does it relate the interrogating officer's testimony concerning appellant's statements. These omissions suggest that the testimony was of marginal importance and, therefore, jurors would not have fixated on the defendant's failure to specifically testify to it. Third, the defendant actually testified. He did not exercise his Fifth Amendment right to silence. (*Davenport, supra,* at p. 1192.) Jurors would not have drawn an adverse inference from the defendant's exercise of his Fifth Amendment right because the defendant did not invoke it.

In contrast, in appellant's case, there was a glaring dissonance between the prosecutor's description of appellant's expected testimony and what the evidence ultimately showed. The prosecutor promised the jurors highly dramatic and significant testimony from appellant that he was coerced -- testimony that, if believed, precluded appellant's conviction for capital murder. (If believed, it would have precluded conviction for robbery, robbery felony-murder as a theory of first degree murder and the robbery felony-murder special circumstance. It would have also precluded a finding of deliberation and premeditation for first degree murder. At most, appellant could have been convicted of second-degree murder. (See *People v. Anderson* (2002) 28 Cal.4th 767, 784.)) This testimony never materialized. It was not directly replicated by other evidence of coercion. Instead, defense counsel argued that jurors could infer from the evidence otherwise presented that appellant acted under fear and pressure from the Hodges and this clouded his mental state to the degree that he did not actually form the mental state elements of the charged crimes. (See AOB 131-137, Arg. I, § C.5.a [summarizing the fear and pressure defense that counsel argued].) The trial court concluded that the evidence presented did not warrant an inference that appellant acted under duress, and it refused to instruct on the defense. (30RT 11023, 11048, 31RT 11051; see generally, Arg. VI, *post* [arguing trial court erred in failing to instruct on duress].) In contrast to *Davenport,* jurors would have naturally wondered why appellant did not testify to this extremely important defense evidence after they heard the promise of his testimony. "[T]he first thing the ultimately disappointed jurors would believe ... would be that" appellant was "unwilling, viz., unable, to live up to [his] billing. This they would not forget." (*Anderson v. Butler, supra,* 858 F.2d 16, 17.) This is especially so since, unlike in *Davenport,* appellant did not take the stand but exercised his constitutional

right to remain silent. Because *Davenport* is readily distinguishable from appellant's case, its holding does not govern.

Indeed, *Davenport* is significant because it illustrates circumstances under which jurors are *unlikely* to draw an adverse inference form an unfilled promise of a witness's testimony: the witness testifies, there is no evidentiary gap between the promised testimony and the evidence presented, and the testimony is insignificant. All these factors are missing in appellant's case. Therefore, *Davenport's* conclusion that jurors were unlikely to draw an adverse inference from the defendant's decision to remain silent does not apply.

3. Jurors Would Have Drawn an Inference Adverse to Appellant from the Broken Promise of His Testimony.

Appellant's case closely resembles decisions finding jurors likely to infer from a broken promise of witness testimony that the testimony did not materialize because it is false. (*Saesee v. McDonald* (9th Cir. 2013) 725 F.3d 1045, 1048-1049; *Ouber v. Guarino, supra,* 293 F.3d 19; *United States v. Gonzalez-Maldonado* (1st Cir. 1997) 115 F.3d 9; *Anderson v. Butler, supra,* 858 F.2d 16; *McAleese v. Mazurkiewicz* (3rd Cir. 1993) 1 F.3d 159, 166-167; *Harris v. Reed* (7th Cir. 1990) 894 F.2d 871; *State v. Moorman* (1987) 358 S.E.2d 502 [320 N.C. 837].) For example, *Harris v. Reed* explains that when counsel's opening statement "prime[s] the jury to hear" a particular version of the incident but the witnesses to support it do not testify, the jury will likely conclude that they "could not live up to the claims made in the opening." (*Harris v. Reed, supra,* at p. 879.) Similarly, *Anderson v. Butler* provides that "little is more damaging than to fail to produce important evidence that had been promised in an opening.... [t]he first thing that the ultimately disappointed jurors would believe ... would

be that the [promised witnesses] were unwilling, viz., unable, to live up to their billing." (*Anderson v. Butler, supra,* at p. 17.) In these cases, certain factors encourage jurors to draw this damaging inference. Paramount among them is that the promised testimony is "specific, significant and dramatic" (*Yeboah-Sefah v. Ficco* (1st Cir. 2009) 556 F.3d 53, 78), "critical to the defense strategy" (*Gonzalez-Maldonado, supra,* at p. 115), the defense continues to pursue the same or a closely related strategy even in the evidence's omission, as if the omission never happened (*Yancey v. Hall* (D.C. Mass. 2002) 237 F.Supp.2d 128, 134; *Williams v. Woodford* (E.D. Cal. 2012) 859 F.Supp.2d 1154, 1170), and the failure to call the witness(es) remains unexplained (*Saesee v. McDonald, supra,* at p. 1049). Additionally, if the promised testimony is the defendant's, it takes on special significance. When the defendant testifies on his own behalf, "the impact on the jury can hardly be overestimated. ... When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered." (*Ouber v. Guarino, supra,* at p. 28.) Each of these circumstances is present in appellant's case. It follows that jurors would have inferred that appellant did not testify because his anticipated testimony that he was coerced was false.[8]

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[8] The jurors' convicting appellant as charged is inconsistent with their believing that appellant's outlined testimony was true and appellant remained silent out of fear of testifying to duress or because he was simply too nervous to testify. (See e.g., *People v. Barajas, supra,* 145 Cal.App.3d 804, 809-810 [jurors would have accepted as true prosecutor's opening statement outline of testimony of witness who later invoked his right to silence in reply to leading questions by the prosecutor implying the truth of the outlined testimony].) As appellant has demonstrated, his defense that he acted out of fear and under pressure from the Hodges was a watered-

Respondent contends that these "broken promise" cases are distinguishable because they were decided in the context of claims of ineffective assistance of counsel, not prosecutorial comment on a defendant's failure to testify. (RB 37-38.) Respondent, however, fails to explain why this should rob them of their persuasive force. Appellant cited them as examples of when jurors are likely to draw adverse inferences against a defendant because promised testimony never materializes. The circumstances these cases highlight as encouraging jurors to draw an adverse inference were present in appellant's case even though the prosecutor, not defense counsel, promised appellant's testimony in opening statement. Under the unusual circumstances of this case, the testimony that the prosecutor promised from appellant was, on its face, extremely helpful to appellant's defense while, at the same time, it was devastating to the Hodges. Respondent fails to explain why the prosecutor's promising appellant's testimony rather than defense counsel's doing so compels the conclusion that jurors would not have drawn an adverse inference against appellant due to his assertion of his right to silence. It should not.

In *Lockett v. Ohio* (1978) 438 U.S. 586, the United States Supreme Court analogized defense counsel's broken promise of his client's testimony to prosecutorial *Griffin* error. There, the defendant complained that the prosecutor's comments that certain government evidence was "unrefuted" and "uncontradicted" constituted *Griffin* error. The high court refused to grant relief because defense counsel's conduct had already drawn

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down version of a duress defense. (AOB, Arg. I, § C.5.b, 137-140.) If jurors tended to believe appellant's promised testimony, they would have presumably credited his fear and pressure defense. The verdict shows that they did not.

the jury's attention to the defendant's decision not to testify in a way that was sure to encourage jurors to draw a negative inference from the defendant's silence. *Lockett* observed that defense counsel "clearly focused the jury attention on [the defendant's] silence" by "outlining her contemplated defense in his opening statement and ... stating to the court and jury near the close of the case, that Lockett would be the 'next witness.'" (*Id.* at p. 595.) The defendant did not testify. (*Ibid.*) The opinion analogized defense counsel's broken promise of the defendant's testimony to *Griffin* error by the prosecutor. It stated, "the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand."[9] (*Ibid.*)

In *Williams v. Woodford*, *supra,* 859 F.Supp.2d 1154, the federal district court also found a defense attorney's broken promise of his client's testimony comparable to *Griffin* error committed by a prosecutor. The court held that defense counsel's promise of the defendant's testimony confirming his alibi and refuting certain government evidence constituted ineffective assistance of counsel. It stated, "[b]y shining a light on [the defendant's] failure to testify, counsel undermined the presumption of innocence and made it much harder for jurors not to hold defendant's silence against him." (*Id.* at p. 1164.) *Williams* then explicitly drew an

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[9] Appellant relied on *Lockett* in his opening brief to assert that a broken promise of a defendant's testimony can be tantamount to *Griffin* error. (AOB 109-110.) Respondent distinguishes *Lockett* as "too general" a case to warrant a grant of relief. (RB, pp. 38-39.) Appellant did not rely on *Lockett,* standing alone, but cited it to show how "broken promise" and *Griffin* error cases relate. He maintains that, together, these two lines of authority establish prejudicial error.

analogy between defense counsel's ineffective assistance and a prosecutor's commission of *Griffin* error. It continued, "[h]ad the prosecutor called attention to Williams's failure to testify, he would clearly have violated Williams's Fifth Amendment privilege against incrimination." (*Ibid.*, citing *Griffin v. California, supra,* 380 U.S. 609.) *Lockett* and *Williams* indicate that a defense attorney's broken promise of the defendant's testimony encourages the same negative inference invited by a prosecutor's impermissible comment on a defendant's decision to remain silent.

United States v. Gonzalez-Maldonado, supra, 115 F.3d 9 is also instructive. As appellant explained (see AOB 119), there, the trial court made a pretrial ruling that certain psychiatric testimony was admissible. Defense counsel relied on the ruling and mentioned the anticipated testimony in opening statement. Subsequently, the trial court reversed its ruling and excluded the evidence. (*Id.* at p. 14.) *Gonzalez-Maldonado* granted relief due to the broken promise of this testimony even though the error was attributable to the trial court, not defense counsel's ineffective assistance. (*Id.* at pp. 14-15.) It found *Anderson v. Butler, supra,* 858 F.2d 15, an ineffective assistance of counsel case, persuasive. Regardless of who was to blame, reasoned *Gonzalez-Maldonado,* the effect on the jurors was the same as in *Anderson v. Butler*: the jurors were apt to draw the adverse inference that the witness did not appear because the promised testimony was false, and, thus, "the defense was flawed." (*Id.* at p. 15.) Therefore, it is appropriate to consider "broken promise" cases as bearing on the nature of the inference that jurors would have drawn from the broken promise of appellant's testimony.

Appellant does not argue that, standing alone, his silence encouraged jurors to draw an adverse inference against him. But because appellant

invoked his absolute right to remain silent burdened by the prosecutor's promise of his testimony, it did. The prosecutor's claim that appellant would testify to dramatic and highly significant events drew the jurors' attention to appellant's decision to remain silent in a manner that encouraged jurors to draw a negative inference against appellant. (*Williams v. Woodford, supra,* 859 F.Supp.2d 1154, 1164; *Ouber v. Guarino, supra,* 293 F.3d 19, 27.) It invited the inference that appellant did not testify as expected because his testimony was false. (*Williams, supra,* at p. 1164.) When a prosecutor's remarks encourage jurors to draw an inference adverse to a defendant due to his invocation of his right to silence, this violates the Fifth Amendment. Part and parcel of the Fifth Amendment guarantee is the right to invoke it freely, unburdened by adverse consequences. (*Griffin v. California, supra,* 380 U.S. 609, 614 [it is impermissible to penalize a defendant for his right to silence "by making its assertion costly"]; see also *Salinas v. Texas* (2013) 133 S.Ct. 2174, 2190 (Breyer, J., dissenting) [5th amend. prohibits "forcing [the defendant] to choose between incrimination through speech and incrimination through silence"]; *Brooks v. Tennessee* (1972) 406 U.S. 605 [government cannot "cast[] a heavy burden" on defendant's right to remain silent by requiring defendant to testify first or not at all].) The prosecutor's promise of appellant's testimony burdened appellant's assertion of his right to silence by inviting jurors to use his silence against him.

Respondent emphasizes that the prosecutor did not explicitly comment on appellant's exercise of his right to remain silent. (RB 35, 38.) The prosecutor did not need to. An indirect comment inviting an adverse inference is constitutionally impermissible. (*People v. Taylor* (2010) 48 Cal.4th 574, 632 [5th amend. "prohibits a prosecutor from commenting, directly or indirectly, on a defendant's decision not to testify"].) The

prosecutor's broken promise of appellant's testimony was a "speaking silence" that was the functional equivalent of an adverse comment on appellant's assertion of his Fifth Amendment right. (See *Anderson v. Butler, supra,* 858 F.2d 16, 18 [promised witnesses' failure to testify was "surely a speaking silence" which caused jurors to draw a "heavy inference" against the defense]; see also *Lockett v. Ohio, supra,* 438 U.S. 586, 595; *Williams v. Woodford, supra,* 859 F.Supp.2d 1154, 1164.)

4. The Court's Limiting Instructions Were Inadequate to Prevent Jurors from Drawing a Negative Inference from Appellant's Exercise of His Right to Silence.

Respondent also argues that there was no reasonable likelihood jurors would have drawn an adverse inference against appellant because they were instructed not to under a modified version of CALJIC No. 2.60. (RB 35-36.) Appellant explained at length in his opening brief why CALJIC No. 2.60 was insufficient to stop jurors from drawing an inference harmful to appellant from his decision to remain silent. (AOB 140-147.) As appellant argued, the pattern version of CALJIC No. 2.60 is not designed to cure *Griffin* error but to instruct jurors not to draw any adverse inference when a defendant remains silent in the absence of such error. When jurors are encouraged to draw an adverse inference from the defendant's invocation of silence, more is at issue, i.e., "the totality of the opening and the failure to follow through." (*Ouber v. Guarino, supra,* 293 F.3d 19, 35.) The pattern instruction does not address this. (*Ibid.*; AOB 141-142.)

The first sentence of the paragraph added to modify the pattern instruction did, however. It told jurors, "[y]ou are further instructed that any references in the prosecutor's opening statement concerning the

expected content of the testimony of the defendant is to be disregarded and not enter into your deliberations in any way." (31RT 11112; 2CT 587.) This sentence, however, was inadequate to accomplish its objective for a number of reasons.

It was given two and one-half days after both sides rested without appellant taking the stand. (2CT 518, 31RT 11112.) This period gave jurors plenty of time to draw an adverse inference from appellant's silence and to have the inference solidify in their minds. The time lapse significantly diminished the instruction's palliative effect. (See *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, 1546-1547 [because cautionary instruction was not "immediate," it did not render harmless the prosecutor's improper remarks].) Respondent argues that the time lapse does not matter because, prior to the prosecutor's opening statement, the court instructed the jurors that opening statements are not evidence. (RB 44, citing 15RT 6297.) That the prosecutor's remarks in opening statement were not evidence did not block the jurors from drawing an adverse inference. Jurors would have drawn it due to the chasm between the evidence that the prosecutor promised and the properly admitted evidence that was actually presented. Drawing the inference did not depend on jurors viewing the prosecutor's description of appellant's testimony as actual evidence. To the contrary, it involved jurors drawing an inference *extraneous* to the evidence from the *lack* of evidence presented: because appellant did not testify to coercion as promised, the promised testimony must be false.

Additionally, because appellant's promised testimony was both dramatic and highly relevant, jurors would have eagerly anticipated it and been severely disappointed when it did not materialize. This is especially so because appellant was one of only three people (the other two being the

Hodges) who could testify about what happened. (See *Williams v. Woodford, supra,* 859 F.Supp.2d 1154, 1172-1173 [where promised testimony is of witness in key position to view events, jurors are more apt to draw negative inferences from its absence].) His testimony was key to answering numerous questions raised by the evidence throughout the proceedings, including, *inter alia,* why was appellant so afraid of the Hodges? (31CCT 9006, 9012.) What happened during the half hour between when appellant approached McDade and when McDade was shot? (19RT 7583-7586; 31CCT 9020; 16RT 6521, 6558-6559, 6562-6563.) What did John Hodges do to manipulate appellant? (31CCT 9144-9146, 9154-9156.) How did Terry Hodges make appellant "kill the motherfucker" (28RT 10195; 32 CCT 9314) even though appellant was "chickenshit" and "didn't have no heart?" (25RT 9498; 32 CCT 9315). Jurors would have naturally wanted to hear appellant's testimony, as promised, to shed light on these and other matters. They would have been frustrated by appellant's invocation of his right to silence after they had been led to believe he would testify.

Moreover, the testimony that the prosecutor outlined in his opening statement bore a very close resemblance to the evidence that defense counsel emphasized for appellant's mental state defense of fear and pressure. Jurors would have been constantly reminded of the undelivered testimony when evaluating appellant's actual defense. They were more likely to draw an inference adverse to appellant from his failure to testify because his promised testimony resembled the defense which counsel pursued. (See, e.g., *Williams v. Woodford, supra,* 859 F.Supp.2d 1154, 1170 [having been told defendant's girlfriend would testify she spent the night with him at his residence and no crime occurred there, jurors would naturally wonder why the girlfriend did not testify when they heard

testimony from neighbors, who were further from the scene, that they did not hear any loud noises].) For example, when defense counsel argued that appellant was referencing the Hodges when he told detective Lee he was still scared (31RT 11287), jurors would have naturally seen the image, painted by the prosecutor's opening statement, of Terry Hodges bearing down on appellant with a shotgun while John Hodges put a derringer to appellant's chest and told him, "[w]e ain't leaving no witnesses." (15RT 6344-6345). They would have seen the same scene when evaluating whether Terry Hodges walked away from appellant and McDade, as he told Leisey, or stayed on the scene to ensure appellant killed. (31RT 11314.) It was an impossible mental gymnastic for jurors to so frequently encounter evidence and argument reminiscent of appellant's promised testimony that he was coerced without then considering appellant's failure to testify as promised. As *Williams v. Woodford, supra,* 859 F.Supp.2d 1154 observed, "the promise that [the defendant] would testify and speak extensively about the circumstances of the case would have made it nearly impossible for the jurors to put out of their minds the fact that he did not testify." (*Id.* at p. 1173; see also *Bruton v. United States, supra,* 391 U.S. 123, 131 ["A jury cannot 'segregate evidence into separate intellectual boxes'"].) Appellant argued these points in his opening brief (AOB 141-147), but respondent does not address them. Respondent offers only the conclusory assertion that jurors would have heeded the court's instruction. (RB 35, 44.) For the reasons set forth in appellant's opening brief, they would not have done so.

Therefore, the prosecutor's broken promise that appellant would testify he killed under duress from the Hodges encouraged jurors to draw the negative inference that a claim of coercion was false. This violated appellant's Fifth Amendment privilege against self-incrimination and due process right to a fundamentally fair trial.

C. The Error Prejudiced Appellant

Respondent argues that appellant was not prejudiced by the prosecutor's broken promise of appellant's testimony by analogizing appellant's case to *Davenport* and contending that there was no reasonable likelihood jurors construed the prosecutor's remarks in a prejudicial way, the trial court's instructions dissipated any harm and overwhelming evidence supports the judgment. (RB 41-54.) Respondent's position fails to carry the government's heavy burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Low* (2010) 49 Cal.4th 372, 392-393 [a constitutional violation does not contribute to the verdict under *Chapman* if it is "'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record'"], citation omitted.)

1. *Davenport* Does Not Aid Respondent

In *People v. Davenport, supra,* 11 Cal.4th 1171, this Court rejected the defendant's argument that the prosecutor's "prediction" in opening statement about the defendant's testimony and what the defense would be violated, *inter alia,* the defendant's Fifth Amendment right to remain silent by setting jurors up to draw an inference adverse to the defendant if he remained silent. (*Id.* at p. 1213.) *Davenport* addresses this issue in only a short paragraph. Nowhere does the opinion use any term or legal standard (such as *Chapman*) relating to prejudice. (*Ibid.*) In concluding that *Davenport* found any error harmless, respondent reads too much into the opinion.

Davenport held that no Fifth Amendment violation (error) occurred without reaching the question of prejudice. *Davenport* makes three points: (1) the prosecutor's remarks were a fair comment on the expected evidence, (2) there is no reasonable likelihood jurors construed them in an objectionable way, and (3) jurors heard the substance of the defendant's testimony from an interrogating police officer who testified to appellant's extrajudicial statements. (*People v. Davenport, supra,* 11 Cal.4th 1171, 1213.) Although this portion of *Davenport* did not so note, there is also a fourth salient point that the opinion notes elsewhere: the defendant testified, just not about what the prosecutor predicted. (*Id.* at p. 1192.) All these points are most consistent with the opinion simply rejecting that any error occurred – i.e., rejecting that jurors drew any adverse inference -- without reaching the issue of prejudice.

First, if a prosecutor makes a "fair comment" on the evidence, he does not make a comment that is constitutionally impermissible, i.e., a comment that is erroneous. Second, case law recognizes that the "reasonable likelihood" standard goes to assessing whether arguably ambiguous conduct or instruction constitutes error. It does not go to prejudice. (See *People v. Frye* (1998) 18 Cal.4th 894, 962, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [finding no reasonable likelihood jurors applied instruction in manner that violates the constitution and, therefore, there was no error]; *id.* at p. 970 ["To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in *an improper or erroneous* manner"], italics added; *People v. Clair* (1992) 2 Cal.4th 629, 662-663 [same].) Third, since jurors heard the substance of the defendant's testimony from evidence of the defendant's statements, they were unlikely

to draw an adverse inference from the discrepancy between what they were promised and what they heard. Indeed, since the defendant testified, there was no adverse inference for jurors to draw from his silence.

Davenport's structure also supports that the opinion only addresses error. After discussing the points addressed above, the opinion shifts to rejecting two other asserted constitutional violations (errors) alleged in connection with the prosecutor's opening remarks, whether the prosecutor's statements shifted the burden of proof or presented the prosecutor as knowledge of special facts...." (*Davenport, supra,* 11 Cal.4th 1171, 1213.) This indicates that the points discussed above are part of *Davenport's* discussion of whether error occurred. Therefore, because it discussed only error, not prejudice, *Davenport* does not support respondent's claim of harmlessness.

Even if assuming, for the sake of argument, that *Davenport* is relevant to prejudice, appellant has demonstrated above (§ B, *ante*) that the factors which distinguish it from appellant's case lead to the conclusion, by way of contrast, that the defendant there was not entitled to relief whereas appellant is.

2. The Reasonable Likelihood Standard Goes to Error, Not Prejudice.

Respondent's next contention is that there was no reasonable likelihood that jurors construed the prosecutor's remarks in a prejudicial way. (RB 41-42.) As appellant has explained above, the reasonable likelihood standard goes to assessing whether error occurred, not whether it was prejudicial.

In any case, respondent's point is unpersuasive. Respondent argues that because the prosecutor billed his opening statement as a "preview" of the evidence (15RT 6304), jurors would have believed that it was "not infallible" and would not have accorded it "evidentiary weight." (RB 42.) The contention misconstrues appellant's claim. The prosecutor's broken promise of appellant's testimony caused jurors to draw an inference adverse to the properly admitted evidence which was *extraneous* to it. Respondent's point that jurors would not have seen the prosecutor's comments as evidence does not address appellant's claim. Therefore, it fails to refute it.

3. The Harm Was Not Cured by the Trial Court's Limiting Instruction

Respondent next argues that the court's directive to jurors to disregard the prosecutor's opening statement remarks dispelled any prejudice that might have resulted from them. Appellant has already addressed this claim at length in his opening brief (AOB 140-147) and above (§ B, *ante*). The instruction was given two and one-half days after the close of evidence, which left jurors plenty of time to draw a negative inference about appellant's failure to testify; jurors would have been seriously disappointed by appellant's failure to testify because his promised testimony was dramatic and highly relevant; also, it would have been impossible for jurors to consider the mental state defense of fear and pressure which appellant actually presented without also considering the adverse inference that appellant was not coerced. (AOB 140-147.) In light of these circumstances, it is unrealistic to expect jurors to have successfully applied the modification to CALJIC No. 2.60. (See *Williams v. Woodford, supra,* 859 F.Supp.2d 1154, 1173 [jurors could not have put out of their minds the broken promise that the defendant would give extensive].)

4. The Effect on the Defense Theory and the Strength of the Evidence

Respondent's main point regarding prejudice is that the evidence of appellant's guilt was so strong that even if jurors drew the negative inference that appellant was not coerced, it would have made no difference. (RB 45-54.) Respondent's position must be rejected. The trial court precluded defense counsel from arguing duress because it believed there was legally insufficient evidence to warrant an instruction on it. (31RT 11052, 11055.) Instead, appellant presented a mental state defense closely related to coercion. Counsel argued that the Hodges brothers caused appellant to experience such fear and feel such pressure that these emotions clouded appellant's mind to the degree that appellant did not actually form the mental state elements of specific intent to rob and deliberation and premeditation. (E.g., 31RT 11249-11250.) The evidence gave jurors a solid basis for entertaining a reasonable doubt concerning appellant's mental state as necessary for conviction for robbery and first degree murder. Fear and pressure are what a person acting under duress would experience. Because appellant's defense theory was so closely related to duress, jurors' drawing an adverse inference that appellant did not act under duress undermined appellant's efforts to raise a reasonable doubt concerning his mental state.

Respondent barely acknowledges appellant's position even though appellant clearly articulated it in his opening brief. (RB 54, citing AOB 137-140.) Respondent replies that jurors would not have drawn any adverse inference due to the court's limiting instruction. (RB 54.) Appellant has already demonstrated above why this is incorrect. (See §§ B.4 & C.3, *ante*.) Additionally, respondent contends that overwhelming evidence of appellant's guilt rendered any error inconsequential. (RB 54.)

The claim is unpersuasive. There was a solid basis for jurors to entertain a reasonable doubt about appellant's mental state.

Appellant told detective Lee that he could not reveal everything that happened out of deep fear that the Hodges would harm his family. He said, "I'm not, not gonna give everything I know" because "I don't' want my family ... done up..." (30CCT 8978.) He also said, "I don't want nothing done to my family .... I'm not, not gonna give everything I know....." (30CCT 8981.)

Additionally, appellant repeatedly told Lee that he was scared when he shot McDade. (31CCT 9001 ["I'm scared. I'm, I'm like this. I don't know what, I don't know what to do"]; 31CCT 9002 ["I was scared ... [¶s] I was like, just scared ... [¶] I was already just scared.... I was just scared"]; 9003 ["I was scared"].) Appellant also stated multiple times that he was under pressure. (30CCT 9000, 31CCT 9002, 9003, 9019.) Defense counsel argued that although appellant told Lee he was scared of and felt pressure from McDade, this made no sense; appellant was really scared of and pressured by the Hodges, whom he shielded out of fear. (31RT 11255-11257, 11285-11286, 11334.) John Hodges told Banks that the youngster "took it," which meant that appellant accepted all blame for the crimes. (31CCT 9142.) Appellant told Lee that even as he spoke with him, he was "still scared." (31CCT 9006.) Defense counsel argued that appellant's being "still scared" pointed to the Hodges as the source of his fear. (31RT 11285-11286, 11334.)

The evidence revealed an obvious basis for appellant's fear. The Hodges were older and bigger than appellant. Appellant was only 18 years old and weighed 130 pounds, and one of his typical associates was even younger, a boy who was only 15. (23RT 8850, 31CCT 9022.) John

appeared around 36 and weighed 200 pounds, and Terry appeared in his early 20's and weighted 250 to 300 pounds. (30CCT 8967, 8980, 31CCT 9295; People's Ex. No. T-49A.) The Hodges were also more criminally sophisticated than appellant. Appellant told Lee that he had never been involved in anything like the charged crimes and he did not know what to do. (31CCT 9001-9002.) In contrast, John had been to prison at least twice. (25RT 9471, 9472.) Terry was a drug dealer who was customarily armed and owned a shotgun. (32CCT 9303, 9311.) This supported that Terry had a shotgun on the night of the crimes. Banks believed that John was armed as well. (31CCT 9155.) The brothers had a reputation for committing drive-by shootings, and Terry was known as an "enforcer." (32CCT 9311.) He told Leisey, "we don't play." (28RT 10195; 32CCT 9314.)

Respondent argues that appellant's incriminating the Hodges to the extent that he did showed that he did not really fear them. (RB 52.) This overlooks that appellant was easily led by others, including Detective Lee. (See 31CCT 9270.) Further, although appellant did incriminate the Hodges, he held back *additional* information *further* incriminating them. (30CCT 8978, 8981, 31CCT 9012.) It did not serve appellant to merely hint at its existence. This supports that appellant truly feared them, as he said.

Not only did appellant tell Lee he was withholding information, appellant made similar remarks to Littlejohn. According to Littlejohn, appellant said that there was more to the story than anyone knew. He said, "'nobody really know the truth about why I killed him, the papers got it all wrong.'" (31CCT 9263.) He also said, "'nobody knew nothing, he was under pressure.'" (31 CCT 9269.) Respondent fails to address these

remarks. Indeed, respondent argues that Littlejohn was a generally credible witness. (RB 46.)

The evidence also supported that John and Terry Hodges manipulated appellant and bent him to their will. Plenty of evidence supported that appellant did not want to kill McDade. (25RT 9426; 30RT 8983-8984, 32CCT 9315 [appellant was a "wimp" and "chicken-shit" and "didn't have no heart" when it came time to commit the crimes]; see also 31CCT 9015, 9018-9019, 9146, 9151.) According to Banks, John admitted that he had manipulated a "youngster" into doing his dirty work (31CCT 9146, 9151, 9154, 25RT 9426.) The youngster did not want to kill, but John gave the order. (31CCT 9146; see also 31CCT 9151, 25RT 9426.) Terry told Leisey he was the "Big Daddy" on the scene and he had to lead appellant like a child to "just whack the motherfucker." (25RT 9494, 27RT 10034; see also 25RT 9498 & 32CCT 9315.)

As the foregoing shows, appellant's efforts to raise a reasonable doubt that he harbored the necessary mental state for robbery and first degree murder were grounded in the evidence. Contrary to respondent's claims, this was not an open and shut case.

This is so even though there was substantial evidence that appellant was the shooter and he considered robbing McDade[10] before he associated

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[10] Respondent asserts that appellant's intent to rob McDade was demonstrated by evidence that (1) appellant warned KFC employee Martinez to be careful about making a deposit on Halloween because it was a wild night and something could happen, and (2) appellant stopped calling Kim Scott after telling her that he would not want her present if he robbed KFC. (RB, pp. 50.) The inference that appellant was contemplating robbing KFC cannot logically be drawn from this evidence. Warning

with the Hodges. Appellant told Lee and Littlejohn that he was the shooter. (31CCT 9003, 9263.) He was linked to the gun recovered through Littlejohn, which was likely used in the crimes. (19RT 7543-7545, 28RT 10403-10405, 10148-10151.) In November and December of 1991, appellant also told Kim Scott that he wanted to "get y'all" and rob KFC. (18RT 7255-7258, 7286, 7350.) After he began associating with Terry and John, appellant continued to harbor interest in robbing KFC. (31CCT 9015.) Even so, appellant never wanted to kill McDade. (25RT 9426; 30RT 8983-8984.) He looked up to McDade and respected him and hoped one day to get his job back. (18RT 7290-7291.)

Appellant was a mentally slow, immature 18 year-old at the time of the events at issue. (23RT 8850, 28RT 10412, 10431; see also 31RT 11255-11256 [counsel's argument].) Rational jurors could have seen appellant as full of bravado and much more of a talker than an actor. (18RT 7286, 7288-7289; 31CCT 9261, 9263 [appellant brags to girls after crime]; see also 31RT 11275, 11331 [counsel's closing remarks].) As defense counsel argued, appellant was a "sneak thief," i.e., he was willing to steal from the KFC safe, but nothing indicated he was a violent individual willing to confront someone and rob him at gunpoint. (31RT 11276, 11326-11327.) Although appellant talked about robbing KFC to Kim Scott a couple of months before the charged crimes, appellant did not put his words into action. Scott testified that she thought he was joking and did not take him seriously. (18RT 7327-28; 21RT 8288-89.) The arrival of

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someone to be careful does not mean the person giving the warning is considering victimizing the person he warns. Further, if appellant did not want Scott present, he would have called to find out her whereabouts or warn her rather than breaking off contact.

the Hodges changed things. It was only after they were on the scene that appellant confronted McDade. (30CCT 8979-8981, 31CCT 9012.) As Littlejohn testified, appellant was "weak" and "follower" and the other guys must have forced him to do it. (31CCT 9270, 9288.) The Hodges' manipulating appellant, coaching him, leading him like a child, putting him into a state of fear and under pressure is what it took to make appellant commit the crimes.

Rational jurors could have seen appellant as an immature, unsophisticated youth who was ambivalent about what to do even when he approached McDade. Appellant had one foot in the law-abiding world, as represented by KFC. He desperately wanted his job back because, as he said, it was the only job he was ever good at. (30CCT 8992, 8999.) He looked up to and respected McDade. (18RT 7290-7291.) When Detective Lee suggested appellant wanted to work at KFC again to steal from it, appellant vehemently denied the accusation. (30CCT 8991-8992.) Instead, he stressed how hard and well he worked. (30CCT 8996.) Calvin, his brother, was also pressuring him to get a job. (30CCT 8999.)

On the other hand, appellant was attracted to the criminal lifestyle as represented by the Hodges. He showed off a gun to Ruben Martinez and Junnell Rodriquez as they worked at KFC around Halloween of 1991.[11] (16RT 6570-6571, 6616-6617, 6722-6723.) He displayed a gun and threw bullets at a park trashcan in the company of Eversole and Brogdon. (17RT

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[11] Respondent claims that the gun appellant displayed could have been the gun used in the charged crimes. (RB 47.) For the reasons advanced in his opening brief (AOB, Arg. V, 266-267, 272) and herein (see Arg. VII, *post*), this is wrong. The evidence shows that the gun appellant displayed was not used in the charged crimes.

6853, 6918-6919.) He talked about robbing KFC to Kim Scott. (18RT 7255-7258, 7286, 7350.) He associated with Terry Hodges, a drug dealer and "enforcer," and eventually John Hodges, who had been to prison multiple times. (18RT 7255-7258, 7286, 7350, 25RT 9471, 9472; 32CCT 9303, 9311.)

Jurors bring their life experiences to deliberations. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1414.) They had cause to see appellant as a youth who was struggling to form his identity amidst these conflicting worlds. In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court banned imposition of the death penalty on juvenile killers.[12] (*Id.* at pp. 568, 578.) In reaching this conclusion, the court recounted certain signature qualities of youth and observed that they "do not disappear when an individual turns 18 but instead gradually subside over time. (*Id.* at pp. 570, 574.) Key among these is a search for identity. (*Id.* at p. 570.) Youths also lack maturity, have a diminished sense of responsibility and are prone to reckless behavior. (*Ibid.*) Additionally, youths are especially vulnerable to outside influences, particularly peer pressure, and lack the resources to extricate themselves from harmful environments. (*Ibid.*) Because jurors bring their life experiences and common sense to their roles as fact-finders, they could have easily seen appellant as searching for his identity and as undecided about what to do when he encountered McDade – go down the straight or the criminal path? Being undecided about whether to rob and kill is different from actually harboring the specific intent to commit these crimes.

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[12] Had appellant been born only one year later, *Roper v. Simmons* would prohibit the State from sentencing him to death.

Reasonable, fair-minded jurors could have seen the evidence in this nuanced light rather than in respondent's simplistic view. If the jurors did, they had solid cause to question whether appellant's mind became so clouded with fear and pressure from the Hodges that appellant did not necessarily form the mental states required for the robbery and first degree murder of McDade. While the evidence of appellant's guilt for the crimes was certainly substantial, it was not so "overwhelming" that this Court can say beyond a reasonable doubt that a verdict more favorable to appellant was out of the question.

The adverse inference jurors would have drawn concerning appellant's undelivered testimony, that appellant's claim that he acted due to duress was false, would have severely hampered to effectiveness of appellant's mental state defense. Appellant's efforts to raise a reasonable doubt about whether he harbored the mental state for robbery and murder was but a shadow of an actual duress defense such as outlined in appellant's promised testimony.[13] Jurors notice when they are promised significant and dramatic defense testimony but it never materializes. They also notice when the defense actually presented is a weaker substitute for the promised testimony which they fail to hear.

The court made these points in *Williams v. Woodford, supra,* 859 F.Supp.2d 1154. There, defense counsel promised jurors that the defendant

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[13] Appellant disagrees with respondent's conclusion that the record is devoid of evidence that appellant acted under duress. (RB 46-47, 54.) He maintains that the evidence was legally sufficient to require instruction on the defense. (AOB, Arg. VI, 241-263; see also Arg. VI, *post.*) Respondent's point, however, underscores the gap between what the jurors were promised and the evidence that was actually presented.

and his girlfriend would testify to alibi and the defendant's testimony would also explain certain prosecution evidence. (*Id.* at pp. 1162-1163.) Counsel failed to call either to the stand. (*Id.* at p. 1163.) Then, "[i]n marked contrast to counsel's opening statement, which consists largely of promises of ... exculpatory evidence, his summation consists entirely of trying to poke holes in the prosecution's case. ... But priming the jury for the former and delivering only the latter is a recipe for disaster." (*Id.* at p. 1170.) The court explained that once a jury has heard a promise of affirmative exculpatory evidence, then, if all that is presented is an argument that the government has failed to carry its burden of proof, it becomes very difficult for jurors to accept that argument. (*Ibid.*) "The jury will draw negative inferences form the unexplained absence of the promised testimony, and these inferences will fill any gaps that might otherwise exist in the prosecution's case." (*Ibid.*)

Here, once jurors drew the inference that appellant did not act in duress, i.e., in response to immediate threats against his life by the Hodges, it was highly likely that they would also infer that appellant did not act out of fear and under pressure from the Hodges. The claim of duress about which jurors drew a negative inference was quite closely related to the mental state defense which appellant presented. The government fails to show beyond a reasonable doubt that jurors' rejection of the former had no effect on their rejection of the latter. As noted, a person who acts under duress will almost invariably feel fear and pressure. Jurors could well have reasoned that because appellant did not act under duress, he did not feel overwhelming fear and pressure when he encountered McDade. It cannot be said beyond a reasonable doubt that, in the absence of the adverse inference jurors drew from appellant's silence, the defense's and prosecution's cases would have remained essentially the same. (*United*

States v. Inzunza (9th Cir. 2011) 638 F.3d 1006, 1023.) Appellant's efforts to raise a reasonable doubt were greatly hampered, and this made it easier for the State to prove its case. The government offers a simplistic, black and white view of the evidence which turns a blind eye to this dynamic. While simplicity has its appeal, in this case it is unpersuasive and fails to prove that the broken promise of appellant's testimony was harmless beyond a reasonable doubt.

II.

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT CONDUCTED AN INADEQUATE INQUIRY INTO THE EXISTENCE OF AN IRRECONCILABLE CONFLICT BETWEEN APPELLANT AND TRIAL COUNSEL.

Appellant demonstrated in his opening brief that the trial court erred in failing to conduct an adequate inquiry during his *Marsden* hearings (*People v. Marsden* (1970) 2 Cal.3d 118) into whether appellant and counsel were embroiled in an irreconcilable conflict despite strong indications that they were. Appellant's complaints at the *Marsden* hearings, combined with trial developments of which the court was well aware, clearly suggested that the attorney-client relationship had broken down over whether appellant would testify against the Hodges brothers and appellant's perception that his defense attorneys were siding with the prosecution. Because the trial court's inquiry into this matter was insufficient, the judgment must be reversed. (AOB 149-167.) Respondent disagrees. (RB 55-65.)

"To compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in [an] irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." (*Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170.) Respondent downplays or simply ignores numerous indications in the record suggesting that appellant, who was on trial for his life, did not trust his attorneys and had grounds to question their loyalty.

Appellant repeatedly complained to the trial court that his attorneys had sided with the prosecution. (27RT 10134, 10136, 10628.) He stated that Castro "threw the case" and had "given the case to the D.A." (27RT

10136.) Appellant explained that he felt "very uncomfortable" with how close Castro was to the prosecutor. (27RT 10134.) Appellant expressed his mistrust of the cozy relationship between defense counsel and the district attorney: "[T]his don't seem like they doing they – The defense job. They prosecuting; I mean, I see that he stipulate and agree with everything that [the prosecutor] says, and how do I know that if [the prosecutor] say do something wrong to me, he won't stipulate to that? That's chances I can't take." (27RT 10628.) Appellant voiced repeated complaints that counsel had not filed any motions on his behalf or voiced proper objections. (27RT 10136, 29RT 10572, 10631, 30RT 10886.) Castro himself acknowledged that appellant had expressed his "misgivings" to him on "a number of occasions" and this caused Castro to feel "very ... worried" that appellant mistrusted him. (27RT 10135.)

The attorneys for the Hodges brothers certainly helped fuel appellant's perceptions. Appellant heard them frequently call his counsel an additional prosecutor (5RT 2059-2060, 27RT 9966, 29RT 10562) and accused the prosecutor and defense counsel of collusion (17RT 6807, 15RT 6274, 29RT 10695). For example, Sherriff noted that Castro's actions were detrimental to appellant and would work to "secure the death penalty" for appellant and for the Hodges. He said, "if Mr. Castro continues to try to be a prosecutor and work with the State of California to try to secure ... the death penalty for all three of these individuals, I'm not going to participate in it. [¶] And what I see him doing is doing that to his client, and that is what I told him." (27RT 9966.)

Respondent points out that "an irreconcilable conflict is rarely established" and cites this Court's observation that a defendant's mistrust in or inability to get along with his attorney cannot give him "veto power"

over who his appointed counsel is. (RB 60, citing *People v. Jackson* (2009) 45 Cal.4th 662, 688.) While this may be so, it does not address appellant's argument. Appellant contended not that the trial court had to appoint substitute counsel due to an irreconcilable conflict but, rather, that it needed to conduct an appropriate inquiry into whether such a conflict existed in order to intelligently rule on whether substitute counsel was necessary. Simply because irreconcilable conflicts may be rare does not excuse a trial court's duty to inquire into whether one exists in the case before it. Likewise, a general concern that criminal defendants not be given "veto power" over appointment of counsel should not thwart legitimate inquiry into whether the constitutional right to effective assistance has been compromised in a specific case.

Respondent's attempt to dismiss the distrust which appellant voiced about his counsel as merely a disagreement over trial tactics is unpersuasive. (RB 61.) An attorney and a client may disagree about how to approach a case without the disagreement blossoming into an irreconcilable conflict. On the other hand, a disagreement about tactics may be severe enough to signal a complete breakdown of the attorney-client relationship. (*People v. Cole* (2004) 33 Cal.4th 1168, 1193; *People v. Robles* (1970) 2 Cal.3d 205, 215 [same, in context of disagreement about defendant's testifying].) Here, several highly unusual circumstances, affecting fundamental aspects of the attorney-client relationship, combined to threaten to irrevocably poison appellant's relationship with his attorneys.

One of counsel's most fundamental duties is to safeguard client confidences. (*People v. Navarro* (2006) 138 Cal.App.4th 146, 156-157.) As the trial court was aware, Castro turned over appellant's statement about what happened on the night at issue to appellant's adversary, the

prosecutor, who was intent on convicting appellant and sentencing him to death. (15RT 6267, 31RT 11340; 29CCT 8486.) Castro did so without obtaining any consideration for appellant. (14RT 5954-5956.) Counsel's conduct raised serious concerns about whether counsel was acting as a zealous advocate on appellant's behalf. Although young, mentally slow and uneducated (23RT 8850, 28RT 10412, 10431, 31RT 11960-11962), appellant sensed that counsel was not protecting his interests. The trial court should have realized that something much deeper than a mere disagreement about trial tactics brewed underneath appellant's complaints. Appellant had understandable reasons to fear that his attorneys were disloyal to him. It should have inquired to determine if appellant's trust in them had been so shattered that effective representation had been compromised.

Respondent attempts to blame appellant for the situation by contending that appellant first promised counsel he would testify and then backed out of his "agreement," thereby causing friction with his attorneys. (RB 62-62.) Respondent argues that if appellant's own "intransigence and failure to cooperate" caused his difficulties with counsel, appellant deserved the consequences of his behavior. (RB 62.) Respondent's assumption that if a defendant contributes to his problems with counsel he must suffer the consequence of being represented by counsel with whom he has become embroiled in an irreconcilable conflict is questionable. For example, in *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, the defendant's paranoid mental state contributed to the breakdown of the attorney-client relationship. (*Id.* at p. 1197.) Nevertheless, the reviewing court observed, "Daniels's paranoia led him particularly to distrust a lawyer who had spent most of his career as a prosecutor and whom he thought was appointed to see that he was convicted and sentenced to death. Although

Daniels's belief may have been unwarranted, the court still had an obligation to try to provide counsel that Daniels would trust." (*Id.* at p. 1199.)

Respondent's claim that appellant was to blame for his difficulties with counsel should be rejected. Respondent fails to point to any statement *by appellant* acknowledging that he unequivocally agreed to testify. Instead, respondent relies on statements *by his attorneys* reflecting their belief and desire that he would take the stand. (RB 62, citing 30RT 10886-10888.) Castro's remarks are particularly telling of how he and Holmes approached the issue of appellant's testifying. Castro told the court that he and Holmes adopted a defense strategy which depended on appellant's testifying "*regardless* of what [appellant's] desires were" because this was "the only possible defense" which they could imagine. (30RT 10887, emphasis added.) Castro's cavalier attitude regarding appellant's right to remain silent so obvious that Macias criticized defense counsel by telling the court, "I believe that the prosecutor and counsel to Mr. Powell have agreed among themselves, not necessarily to the inclusion of Mr. Powell, that he would testify." (17RT 6807.) Appellant's attorneys apparently believed that they could make appellant to testify even if he did not want to.

Counsel knew that appellant was mentally slow, uneducated and, not only young, but especially young for his age. (23RT 8850, 28RT 10412, 10431, 31RT 11960-11962; 31CCT 9022; see 31RT 11256 [Castro argues that appellant was a "boy" who acted younger and associated with Coleman, who was younger than he was].) They also characterized him as someone who wanted to please others and easily succumbed to more forceful personalities. (31RT 11294, 11327 [Castro's closing argument]). Indeed, the defense they presented was premised on portraying appellant as

a "youngster" who had been manipulated by older, more sophisticated individuals. (31RT 11300-11301, 11309-11310, 11313-11314, 11318 11327, 11334 [Castro's closing argument].)[14] Appellant was simply no match for his older, more intelligent and more experienced attorneys. Any notion that appellant caused his own difficulties or sought to manipulate the proceedings by vacillating about whether he would testify must be soundly rejected.

The very characteristics that would have caused counsel to believe that they could convince appellant to testify "regardless of his wishes" (30RT 10887) were also those that should have also alerted counsel that appellant might vacillate about his decision. As a young person, appellant was prone to exhibit poor judgment and make rash decisions in his search for his identity. His ability to plan and foresee the consequences of his actions was undeveloped. (*Roper v. Simmons* (2005) 543 U.S. 551, 569-570; *Miller v. Alabama* (2012) ___ U.S. ___ [132 S.Ct. 2455, 2464-2465]; see also *id.* at p. 2464 [decisions recognizing the reduced culpability of youthful offenders rest largely on common sense and "what every parent knows"].) One can expect that these characteristics would have been

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[14] Appellant's *Marsden* motions were brought towards the close of the guilt phase conducted primarily by attorney Castro. Holmes, who was in charge of the penalty phase, also drove home these same points during the penalty phase. There, Doctor Nicolas testified for the defense that appellant had an I.Q. of 75, which means that 96 percent of the population was more intellectually capable than appellant was. (34RT 12002, 12006-12007.) Holmes also argued that appellant associated with teenage boys a few years younger than he was, indicating that appellant's developmental age was lower than his actual age (36RT 12582-12583), and that he was easily led (35RT 12549, 36RT 12592).

exacerbated, not ameliorated, by appellant's intellectual deficiencies. Additionally, appellant's trait of wanting to please others and his tendency to let more forceful personalities manipulate him suggested that he would acquiesce to whoever made the strongest demands upon him in the moment at hand.

While appellant's attorneys no doubt believed they could influence appellant to testify, they also knew full well, as did the trial court and the other parties, that appellant was terrified of the Hodges brothers, whom he would devastatingly incriminate if he testified to the anticipated defense of duress. Appellant's testifying against the Hodges would have been the ultimate betrayal which, in appellant's mind, would have labeled him a snitch and put his and his family's safety in danger.[15] (See 30CCT 8978, 8981, 31CCT 8997, 9012 [appellant's statements to Det. Lee regarding fear for self and family if he incriminated the Hodges]; 15RT 6268 [Macias argues that appellant's testimony serves no purpose other than getting appellant a snitch jacket]; *People v. Sisneros* (2009) 174 Cal.App.4th 142,

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[15] Notably, evidence presented at the penalty phase demonstrated that appellant's fear of testifying against the Hodges's brothers was well-founded. Gang expert Reverend Robert E. Lee testified that older gangsters "prime" younger gang members not to give them up if arrested. (33RT 11889-11890.) As Reverend Lee explained, talking would put the lives of the younger gang member and his family at risk. (*Id.* at pp. 11890-11892.) Reverend Lee also testified that it is especially dangerous for someone who is considered a "rat" or "snitch" to go to prison because he will be subject to sexual assault and assassination there. (*Id.* at pp. 11890-11891.) The testimony of Dr. Nicholas, the defense mental health expert who had worked with California Youth Authority inmates for many years, also confirmed that once an individual testifies against another, his reputation as a "snitch" follows him everywhere – into CYA and the CDC. (34RT 12050.)

147 [snitches are in danger of retribution].) Although appellant had already incriminated the Hodges in his statement to Detective Lee, actually testifying against them would have been far worse. Appellant held back information from Lee so as not to incriminate the Hodges as fully as he could. (31CCT 9012.) Also, to the extent he did incriminate them in his statement to Lee, so long as he remained silent at trial, the prosecution could not introduce the statement against the Hodges under *Aranda-Bruton.* (17RT 6941-6942, 20RT 7726-7727.) This protected the Hodges and, as a result, protected appellant from the worst consequences of snitching. (See 2RT 1014-1015, 1020 [prosecutor admits that without appellant's statement, the state's case against the Hodges was weak].)

Appellant cannot be faulted for exercising his "'absolute right not to testify'" as guaranteed by the Fifth Amendment privilege against self-incrimination. (*Salinas v. Texas* (2013) ___ U.S. ___ [133 S.Ct. 2174, 2179], citation omitted.) The right is personal to a criminal defendant, who may choose to either testify or remain silent even over his attorney's objection (*Rock v. Arkansas* (1987) 483 U.S. 44, 49-53) and may do so up until the close of evidence. (*Brooks v. Tennessee* (1972) 406 U.S. 605). Despite Castro's representations that appellant would testify (e.g., 2RT 1018-1023), everyone, even Castro, recognized there was no way to ensure that appellant would do so given that he had an absolute right to personally choose to assert his right to silence. (2RT 1022, 4RT 1787, 1788). Even if appellant may have initially agreed to testify (see 2RT 1018-1023, 30RT 10819), counsel knew or should have anticipated that appellant might exercise his right to change his mind.

Although uncertainty about whether appellant would testify complicated defense counsel's representation of appellant, appellant's

attorneys had a duty to zealously protect appellant's rights with undivided loyalty, including his right not to testify if he chose to assert it. Difficulties with clients are to be expected in the capital arena, and they do not relieve an attorney's duty to protect his client's rights. (See, e.g., *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100, 1118-1119 [unless defendant actively tries to thwart counsel, counsel must investigate penalty phase mitigating evidence of even an uncooperative client]; ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) pp. 1007-1008 [mental impairments among capital clients are to be expected, and competent counsel must take appropriate measures to work around them]; *id.* at p. 1009 ["Often, so called 'difficult' clients are the consequence of bad lawyering..."].)[16] Instead, appellant's attorneys dug in their heels and stubbornly insisted until the end of trial that appellant would acquiesce to their wishes and take the stand. Counsel inflexibly adopted this approach and candidly admitted doing so "*regardless* of what [appellant's] desires were." (30RT 10887, emphasis added.) These dynamics – appellant's continuing to assert his right to silence while his attorneys continued to assert that he would testify – should have alerted the trial court that the attorney-client relationship may have broken down and that there was a need for inquiry into the matter.

Respondent asserts that the trial court did conduct an adequate inquiry into the existence of an irreconcilable conflict because it allowed appellant to state his grievances and counsel to respond. (RB 59, 63-64.)

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[16] Appellant's case was consistent with the expectation that mental impairments amongst capital clients are to be expected. In addition to testifying to appellant's very low I.Q., Doctor Nicolas testified that appellant tested high on the anxiety scale (34RT 12030) and on the paranoid scale. (34RT 12027).

Appellant disagrees that merely letting appellant and his attorneys talk was sufficient. As this Court has observed, when a defendant requests substitution of counsel, the trial court shall not only permit the defendant to air his grievances and counsel to respond, it shall itself also conduct an inquiry sufficient to permit it to intelligently rule on whether substitution is required. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1128; *People v. Valdez* (2004) 32 Cal.4th 73, 95-96.) A fundamental break down in the attorney-client relationship is cause for appointment of substitute counsel. (*Valdez, supra,* at pp. 95-96; *People v. Smith* (1993) 6 Cal.4th 684, 696.) Appellant repeatedly told the court that his trust in his attorneys had been shattered because his attorneys were siding with the prosecutor and not defending him, and Castro admitted having serious concerns about whether appellant trusted the defense team. This was sufficient to trigger the trial court's duty of inquiry into whether an irreconcilable conflict existed. (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695-696 [defendant's complaint that counsel "was acting in cahoots with the district attorney" signaled a potential breakdown in the attorney-client relationship].) Respondent fails to cite to anywhere in the record where the trial court actually probed whether the attorney-client relationship had broken down. The trial court did not do so. (See AOB 162-163.) This was error.

Respondent attempts to distinguish several cases which appellant cited in his opening brief: *People v. Eastman, supra,* 146 Cal.App.4th 688, *People v. Munoz* (1974) 41 Cal.App.3d 62, *United States v. Adelzo-Gonzalez* (9th Cir. 2001) 268 F.3d 772 and *United States v. Walker* (9th Cir. 1990) 915 F.2d 480. (RB 63-65.) Since it is extremely rare for any two cases to ever be factually identical, respondent manages to point out factual differences between these decisions and appellant's case. This misses the mark. Appellant cited these decisions as examples of when a trial court is

or should be aware of circumstances that trigger its duty of inquiry into an irreconcilable conflict and analogized the circumstances of his case to them. For example, in *Eastman, supra,* the defendant complained that trial counsel "was acting in cahoots with the district attorney" and the reviewing court held that this "set forth an arguable case that a fundamental breakdown had occurred in the attorney-client relationship that required replacement of counsel." (146 Cal.App.4th 688, 696-696.) The trial court erred because it did not hold a *Marsden* hearing and thus did not inquire into the matter. (*Id.* at p. 696.) Here, appellant's complaints that suggested an irreconcilable breakdown in the attorney-client relationship that required further inquiry. Appellant likewise complained that his attorneys were not doing their job and were siding with the prosecution. (E.g., 27RT 10124-10125, 29RT 10628.) Although the trial court held *Marsden* hearings where appellant and defense counsel were allowed to speak, the court never inquired into whether an irreconcilable conflict existed between them. As in *Eastman,* this was error.

In *Munoz, supra,* the defendant made a general complaint that his attorney was not fighting for him and asked for substitute counsel. (41 Cal.3d 62, 64-65.) While the trial court listened to the defendant air his general complaint, it failed to inquire into the matter to flesh it out. (*Ibid.*) The reviewing court rejected the Attorney General's contention that the trial court discharged its duty. It ruled that the trial court erred by failing to conduct an inquiry sufficient to permit it to rule intelligently on whether substitute counsel was required. (*Id.* at pp. 66-67.) Here, similar to *Munoz,* appellant's complaints against his attorneys were sufficient to trigger the trial court's duty of further inquiry. As explained above, the inquiry should have gone to whether appellant and counsel were embroiled in an

irreconcilable conflict. The trial court likewise erred in failing to conduct an inquiry permitting it to intelligently rule on the matter.

In *United States v. Adelzo-Gonzalez, supra,* 268 F.3d 772, the Ninth Circuit found that there were "striking signs of a serious conflict" between the defendant and his attorney. (*Id.* at p. 778.) The defendant's attorney was openly hostile to the defendant and tried to block him from seeking substitute counsel. The reviewing court found that the district court erred in only inquiring into whether counsel's level of representation was competent and neglecting to inquire into whether there was a fundamental breakdown in the attorney-client relationship. (*Ibid.*) The Ninth Circuit ruled similarly in *United States v. Walker, supra,* 915 F.2d 480, 482-483. There, the defendant's complaints and trial court's dissatisfaction with the attorney-client relationship warranted inquiry into not simply counsel's competence but also whether the attorney-client relationship had broken down. Here, there were also striking signs of a conflict between appellant and his counsel. Appellant voiced mistrust of counsel and a belief that counsel had sided with the prosecutor. Castro acknowledged appellant's mistrust of him. The trial court was aware of highly unusual circumstances which supported appellant's distrust of counsel: without obtaining any consideration in return, Castro had made appellant available as a prosecution witness and had turned over appellant's confidences to the prosecutor bent on appellant's annihilation. Nevertheless, as in *Adelzo-Gonzalez,* the trial court inquired only into the effectiveness of counsel's representation (see AOB 151-152, citing 29RT 10628-10630, 10633) but neglected to inquire into whether the attorney-client relationship had irreparably broken down.

Respondent argues that any error was harmless because it was unlikely that an inquiry by the trial court would have revealed that appellant and his attorneys were embroiled in an irreconcilable conflict. (RB 65.) Respondent points out that neither appellant nor his attorneys established such a conflict when they addressed the court during the *Marsden* hearings. (*Ibid.*) The claim must be rejected. The erroneous failure to inquire into an irreconcilable conflict between a defendant and his appointed counsel is subject to *Chapman's* stringent prejudice analysis for federal constitutional error: reversal is required unless the government proves the error harmless beyond a reasonable doubt. (*People v. Marsden, supra,* 2 Cal.3d 118, 126; *People v. Eastman, supra,* 146 Cal.App.4th 688, 697.) As noted, there was cause to conclude that the attorney-client relationship had broken down. The trial court did not inquire into the matter. We can only speculate about what the omitted inquiry would have revealed. Such speculation cannot establish to a near certitude that an inquiry would not have revealed an irreconcilable conflict. Accordingly, the government has failed to satisfy its heavy burden of proving the error harmless beyond a reasonable doubt.

III.

APPELLANT'S TRIAL WITH THE HODGES BROTHERS USING DUAL JURIES RESULTED IN IDENTIFIABLE PREJUDICE AND GROSS UNFAIRNESS IN VIOLATION OF DUE PROCESS AND REQUIRES REVERSAL OF THE JUDGMENT.

In his opening brief, appellant demonstrated that appellant's trial with the Hodges brothers by way of dual juries was prejudicial and grossly unfair to him. Not only did the dual jury procedure result in logistical difficulties (trouble seeing, hearing and remembering the evidence) (see AOB 197-201), it was the root cause of multiple factors which combined to undermine appellant's defense: the prosecutor's unfulfilled promise that appellant would testify to acting under duress from the Hodges, the presentation of antagonistic defenses by appellant and the Hodges, severe antagonism between counsel, and the Hodges's mysterious disappearance form the case. (AOB 180-196). These factors, extraneous to the properly presented evidence, invited jurors to infer that appellant's mental state defense was false. As a result, the judgment must be reversed. (AOB 168-201.) Respondent argues that any error was forfeited and no prejudice or gross unfairness resulted. (RB 65-81.)

A. Appellant's Claim Has Been Preserved for Review

Respondent argues that appellant did not adequately object to the employment of dual juries so as to preserve his challenge to their use for review. (RB 68-69.) Respondent emphasizes that defense counsel Castro expressed the desire that appellant be tried jointly with the Hodges brothers with one or two juries. (*Ibid.*) The claim must be rejected.

The record reflects that appellant unsuccessfully objected to having his trial severed from that of the Hodges brothers. (1RT 81-84.) Trial by dual juries is an alternative form of severance. (*People v. Cummings* (1994) 4 Cal.4th 1233, 1287.) Respondent treats it in this fashion. (E.g., RB 70-71.) Therefore, appellant's objection to severance encompassed an objection to trial by dual juries.

Terry Hodges moved to sever his trial from appellant's. (1RT 80.) The issue was addressed at a pretrial hearing conducted on January 21, 1994. (1RT 80, et seq.) The prosecutor indicated that he sought to introduce appellant's statement to Detective Lee, which substantially incriminates both Hodges. (1RT 81-82.) The court found that the statement could not be effectively redacted to protect the Hodges' *Aranda-Bruton* rights. (1RT 82.) Once it confirmed the prosecutor's intention to introduce appellant's statement, the court ordered severance. (1RT 81.) This exchange occurred (*ibid.*):

> THE COURT: All right. Then I would grant the motion to sever based on that. There are Aranda problems and he's [Terry Hodges] entitled to have the trials severed.
>
> Mr. – Mr. Castro, do you have an objection to that?
>
> MR. CASTRO: Oh, yes.

Castro then argued that appellant's statement could be sanitized to comply with the Hodges's *Aranda-Bruton* concerns. He offered to retrieve a recent case for the court which he claimed supported his position. (1RT 81-83.) The prosecutor explained that the State sought to admit additional statements by appellant which incriminated the Hodges. (1RT 83-84.) The court declined Castro's offer to present the recent authority and reiterated its ruling. (1RT 84.) "No, I'm going to grant the motion to sever." (*Ibid.*)

Thus, the record reflects that defense counsel Castro objected to appellant's trial being severed from that of the Hodges.

Respondent argues that Castro's objection to severance does not count when it comes to appellant's challenge to trial by way of dual juries. (RB 69.) Respondent is mistaken. When the pretrial judge granted severance, he did not rule on how it would be put into effect; he left this decision to the trial judge. (1RT 84-85.) Once severance was granted, it was necessary to choose from among several possibilities for how it would be effectuated: (1) appellant would be tried alone first, and, after his trial, the Hodges would be tried together; (2) appellant, Terry Hodges and John Hodges would be tried in a single proceeding with one jury for appellant and one jury for the Hodges brothers; or (3) appellant and the Hodges would be tried together by three juries, one for each defendant. (1RT 80-81, 84-85.)

None of these three options would have been possible had the pretrial judge sustained defense counsel's objection to severance. Severance was like a grand river and the three options described above were like its tributaries. Defense counsel objected to severance unsuccessfully. Had the court ruled in his favor, dual juries would not have been employed to try appellant and the Hodges. Appellant's objection to the greater (severance) encompasses an objection to the lesser (trial by way of dual juries).

While respondent is correct in pointing out that Castro argued in favor of dual juries (RB 68-69), this was *only after* severance had been granted. After appellant's objection to severance was overruled, the defense had to decide what position to take about how severance should be effectuated. Simply because it chose one option (trial by dual juries) out of

several available (trial by dual juries, trial by triple juries or a separate trial for appellant and a separate trial for the Hodges) after it had lost on severance does not mean its challenge to trial by dual juries has been forfeited. An objection "endeavoring to make the best of a bad situation for which [a party] is not responsible" does not waive a claim of error in regards to the ruling creating it. (*People v. Calio* (1986) 42 Cal.3d 639, 643.) Respondent argues that appellant's stated preference for one trial by dual juries was not a "defensive move" because counsel consistently stated that they wanted appellant tried with the Hodges brothers. (RB 69.) The record shows that defense counsel wanted appellant tried with the Hodges in a single trial with one jury. (1RT 81-84.) Appellant expressed a preference for a single trial by way of dual juries over totally separate trials for appellant and for the Hodges only after he lost having a single trial with one jury. Thus, defense counsel's stated preference for dual juries was a defensive move which does not forfeit appellant's challenge to the dual jury procedure for review.

Appellant also argued that a specific, pretrial objection to use of dual juries should be excused because if appellant had made such an objection, it would have been overruled. Other than the expectation that the defendants would present antagonistic defenses, appellant could not have pointed pretrial to any of the defects resulting from use of dual juries which appellant urges on review. Such harm only became apparent as the proceedings progressed. (*United States v Lewis* (D.C. Cir. 1983) 716 F.2d 16, 20.) As respondent notes, antagonistic defense, standing alone, do not ordinarily warrant any remedy. (RB 72.) Thus, appellant would have been basically relegated to making a general objection to the use of dual juries. As appellant observed, this Court had approved of use of dual juries in general in *People v. Harris* (1989) 47 Cal.3d 1047, 1075, which was

decided several years before appellant's trial. (AOB 176-177.) Respondent's assertion that appellant should have still objected to use of dual juries despite *Harris's* general approval of the procedure, misses the mark. An objection is required to call an error to the superior court's attention in order to give the court a chance to correct it. (Cf. *People v. Scott* (1994) 9 Cal.4th 331, 351 [in context of imposing sentence].) Respondent fails to persuade that the superior court would have ruled differently had appellant made a general, pretrial objection to use dual juries.

Respondent also asserts that defense counsel not only could have but actually did make a prejudice assessment pretrial and this is why counsel adopted his specific position concerning severance and dual juries. (RB 69.) Respondent confuses counsel's tactical assessment (to oppose severance but, upon losing that issue, accept dual juries) with an assessment of prejudice. As appellant noted, trial using dual juries is not inherently prejudicial. (See. e.g. *People v. Harris, supra,* 47 Cal.3d 1047, 1071; AOB 178 & fn. 68 and cases cited therein.) Pretrial, inherent prejudice is all that defense counsel could have argued. The superior court would have overruled such an objection. (*Ibid.*) Appellant's failure to raise it should, therefore, be excused as futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

In pressing for forfeiture, respondent ignores appellant's reliance on *People v. Cummings, supra,* 4 Cal.4th 1233. (AOB 179.) *Cummings* recognizes that even if a trial court's ruling concerning use of dual juries was proper when it was made, the defendant may still obtain relief by showing that the dual jury procedure resulted in "identifiable prejudice or 'gross unfairness ... such as to deprive the defendant of a fair trial or due process of law.' [Citations.]" (4 Cal.4th 1233, 1287.) Because dual juries

are not inherently prejudicial and appellant could have only lodged a general, pretrial objection to them, the superior court would have properly denied appellant's objection. Under *Cummings,* this does not block appellant from obtaining relief by later showing "identifiable prejudice" or "gross unfairness." Accordingly, this Court should reach the merits of appellant's claim to determine if the employment of one jury for appellant and another jury for the Hodges brothers violated due process.

Appellant also demonstrated that, even if his objection was inadequate, this Court could still reach the merits of his challenge to the use of dual juries because it raises a due process challenge to the fundamental fairness of the proceedings. (AOB 175.) Respondent asserts that the authority on which appellant relied for this proposition is outdated and cites this Court's 1993 decision in *People v. Saunders* (1993) 5 Cal.4th 580, 590 for what respondent claims is the current rule: a constitutional right may be forfeited by failure to object. (RB 68-69.) Post-*Saunders* authority makes clear that a reviewing court may reach the merits of a fundamental, federal constitutional issue despite lack of objection. (E.g., *People v. Hill, supra,* 17 Cal.4th 800, 843, fn. 8; *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Bradford* (2007) 154 Cal.App.4th 1390,1411; *People v. Sanborn* (2005) 133 Cal.App.4th 1462, 1466.) "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. [Citations.]" (*Vera, supra,* at p. 276.) This includes claims that he defendant has been deprived of a fundamentally fair proceeding. (*Hill, supra,* at p. 843, fn. 8 [rejecting Attorney General's claim that defendant's failure to object resulted in forfeiture of claims that implicate defendant's fundamental right to a fair trial.].)

Therefore, appellant's challenge to use of dual juries is properly before this Court.

B. Identifiable Prejudice and Gross Unfairness

In addressing appellant's claim on the merits, the Attorney General stresses two points: (1) there is a Legislative preference for and overall value to joint trials of multiple defendants, whether by single or multiple juries; and (2) the presentation of antagonistic defenses by codefendants does not by itself merit severance. (RB 68-73.) These are general points. Appellant acknowledged them in his opening brief. (AOB 177, 183-184.) These general points do not defeat his claim because his showing was highly specific. Appellant demonstrated that, notwithstanding these points, he was entitled to reversal due to the presence and cumulative effect of several factors which would not have occurred had appellant and the Hodges been tried separately rather than by dual juries. (AOB 179-201.) Appellant showed that these factors combined to encourage jurors to draw inferences, adverse to appellant's theory of defense, which were based on matters extraneous to the properly admitted evidence. (*Ibid.*)

Had the trial court granted complete severance so that appellant and the Hodges were each tried at different proceedings, the prosecutor's highly damaging, unfulfilled promise of appellant's testimony that the Hodges robbed McDade without his participation and then coerced appellant to shoot McDade would not have happened. (See Arg. I, *ante.*) Recently, in *Saesee v. McDonald* (9th Cir. 2013) 725 F.3d 1045, the Ninth Circuit Court of Appeals joined the First, Third and Seventh Circuit Courts of Appeals in recognizing the deep harm created by a broken promise of witness testimony. *Saesee* explains, "[i]f the promised witness never takes the stand, the juror is left to wonder why. The juror will naturally speculate

why the witness backed out, and whether the absence of that witness leaves a gaping hole in the defense theory. Having waited vigilantly for the promised testimony, counting on it to verify the defense theory, the juror may resolve his confusion through negative inferences." (*Id.* at p. 1049.) This is especially likely to occur if the promised witness is "key to the defense theory" and his "absence goes unexplained...." (*Ibid.*)

In response, respondent cites to the government's earlier reply to appellant's claim that the prosecutor's broken promise that appellant would testify to duress invited jurors to draw an inference adverse to appellant due to his invocation of his right to silence. (RB 73.) Appellant has already addressed this claim and respectfully directs this Court to that portion of his brief. (See Arg. I, *ante.*) Otherwise, respondent dismisses appellant's assertion as "speculative" without offering any supporting argument. (RB 73.) The assertion must be rejected.

It is only because the Hodges remained in trial with appellant that the extremely unusual circumstances leading to the broken promise of appellant's testimony arose. Defense counsel's offering appellant as a witness to the prosecution at appellant's own trial for capital murder, without any consideration in return, and furnishing the prosecutor with appellant's otherwise confidential statement outlining his expected testimony, was completely unprecedented. Defense counsel's stated purpose for doing so was to "make sure that the Hodges brothers don't get away." (2RT 1019.) Had the Hodges been *absent* from appellant's separate trial, appellant's testimony could not ensure that the Hodges "don't get way." (*Ibid.*) Counsel would not have had a reason to offer appellant's testimony to the prosecution.

Likewise, the prosecutor would have lacked the motivation to decide to call appellant as his own witness and, thus, to tell the jurors to expect his testimony. The prosecutor did not need appellant's anticipated testimony to prove the state's case against appellant. The prosecution already had appellant's damaging statement to Detective Lee, which was admissible against appellant as a party admission. (1CCT 440-446 [summary of appellant's statement to Det. Lee attached to Terry Hodges's motion to sever]; 23RT 8891-8894 [People's Ex. No. T-51, videotape of interview, played at trial]; Evid. Code, § 1220 [party admission exception to hearsay rule].) Rather, the prosecutor needed appellant's testimony to bolster the State's weak case against the Hodges. (2RT 1014-1015, 1020 [prosecutor admits his case against the Hodges is weak "[u]nless Powell testifies], 1021 [prosecutor states, "if Carl Powell testifies, I see the case as fairly good against both the Hodges brothers"]; 14RT 5905-5906 [prosecutor seeks appellant's testimony to guard against Hodges's acquittal motion].) Appellant's anticipated testimony added to the state's case, beyond the testimony and statements of Banks and Leisey, by clearly placing both brothers at the crime scene with guns, making them participants in McDade's robbery and making them responsible for his murder. (15RT 6343-6345.) In addition to its substantive value against the Hodges, appellant's testimony would have eliminated any *Aranda-Bruton* barrier to admission against the Hodges of appellant's statement to Lee, which severely incriminated them. *Aranda-Bruton* protections only apply if the prosecution seeks to admit the extrajudicial statement of a *non-testifying* defendant against a codefendant. (*Aranda, supra,* 63 Cal.2d 518, 528-531; *Bruton v. United States, supra,* 391 U.S. 123, 135-137.) The prosecutor's motivation to call appellant as a witness and to tell jurors he would do so in opening statement would have been absent at appellant's separate trial. By

keeping appellant's trial linked with the Hodges's, the dual jury procedure set the stage for the prosecutor's broken promise of appellant's testimony.

As appellant has demonstrated, that appellant chose to assert his right to remain silent after the prosecutor promised jurors they would hear him testify to acting under duress severely prejudiced appellant's mental state defense that appellant did not actually form the mental state required for robbery and first degree murder because his mind was so clouded by fear and pressure from the Hodges. Because appellant's defense theory was just one step removed from his promised testimony that he acted under duress, the negative inference jurors would have drawn when appellant did not testify – that appellant's promised testimony about duress was false – would have naturally extended to appellant's mental state defense as well. (See Arg. I, § C.4, *ante*; AOB, Arg. I, § C.5.) The use of dual juries, therefore, made this prejudice. Without dual juries, the prosecutor's broken promise of appellant's testimony would not have occurred.

The dual jury procedure also "'caused specific prejudice to [appellant's] defense at trial'" in additional ways. (*People v. Harris, supra,* 47 Cal.3d 1047, 1076, quoting *United States v. Lewis* (D.C. Cir. 1983) 716 F.2d 16, 19.) As appellant argued, his defense theory was irreconcilable with that of the Hodges brothers. (AOB 183-189.) Based on the testimony and statements of Banks and Leisey, he maintained that the Hodges manipulated him into shooting McDade and, due to the intense fear and pressure he felt from them, he did not form the mental state necessary for robbery and first degree murder. (See, AOB, Arg., I, § C.5 [outlining defense theory]; see also 31RT 11258, 11299-11320 [defense counsel argues in favor of Banks's and Leisey's credibility].) The Hodges, in contrast, sought to raise a reasonable doubt about their involvement, and

they maintained they were not involved and appellant lied about their involvement to protect his buddies, Bruce Goulding and the youngsters with whom appellant went to Los Angeles. (See, e.g., 15RT 6457-6458, 6461-6463, 6471, 6473-6475 [opening statements by attorneys for the Hodges].) The Hodges vigorously sought to undermine Banks's and Leisey's credibility. (23RT 8761-8806, 24RT 9025-9036, 9045-9081, 9115-9130 [John Hodges's cross-examination of Banks]; 25RT 9503-9526, 25-26RT 9534-9586, 26RT 9590-9627, 9652-9706, 9720-9737, 9769-9818 [Terry Hodges's cross-examination of Leisey].) Appellant's and the Hodges's defenses were irreconcilable: if jurors accepted appellant's defense, they had to find the Hodges guilty; if jurors accepted the Hodges's defense, they would find appellant guilty. Because of this, appellant had to endure a trial where he had to defend against not only the prosecutor's assertions, but also against those of his two codefendants. This severe conflict made it difficult for jurors to accept appellant's defense and threatened to make the prosecution's case look more attractive than otherwise.

It did not help that contentiousness between the attorneys sprung from this conflict. (AOB 193-196.) For example, Castro complained that Terry Hodges's attorney, Sherriff, threatened to "hang or crucify" him and his client if Castro continued attempting to rehabilitate Leisey. (27RT 9965.) Sherriff and John Hodges's attorney, Macias, both frequently accused appellant's attorneys of being a "second prosecutor." (E.g., 17RT 6808, 27RT 9965-9966.)

Appellant cited a number of decisions recognizing that forcing a defendant to endure a single trial wherein he and one or more codefendants present irreconcilable or antagonistic defenses can create a serious risk that

jurors will be unable to make a reliable judgment about guilt or innocence. (*Zafiro v. United States* (1991) 506 U.S. 534, 539; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082; *People v. Hardy* (1992) 2 Cal.4th 86, 168; *People v. Carasi* (2008) 44 Cal.4th 1263, 1296; *People v. Massie* (1967) 66 Cal.2d 899, 917; *People v. Rodriguez* (Ill.Ct.App. 1997) 680 N.E.2d 757, 759-762, 766-767.) The net result of the logical inconsistency in the defenses and antagonism may be that jurors will hold the government to a lower burden of proof. (*Zafiro, supra,* at pp. 543-544 (Stevens, J., conc.); *Tootick, supra,* at p. 1081-1082; *Hardy, supra,* at p. 168.)

Respondent replies that mutually antagonistic defenses, *standing alone*, do not mandate complete severance or render a trial fundamentally unfair. (RB 71-72, 74, 76.) For example, respondent quotes a portion of *People v. Letner* (2010) 50 Cal.4th 99, which states, "the conflict between defendants did not lead *by itself* to Letner's conviction, and therefore severance was not required." (*Id.* at p. 153, emphasis added.) (RB 74.) Similarly, respondent quotes *People v. Turner* (1984) 37 Cal.3d 302 as follows, "[N]o denial of a fair trial results from the *mere fact* that two defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution." (*Id.* at p. 313, emphasis added.) (RB 72.) Respondent's point fails to overcome appellant's showing. While it may be true that irreconcilable defenses do not *per se* result in gross prejudice, appellant did not rely on this factor in isolation. Rather, appellant showed that it was one in a conglomeration of factors which combined to undermine his defense. Together, they created gross unfairness in violation of appellant's right to a fair trial.

Appellant demonstrated that the Hodges's mysterious and startling disappearance from the trial on the eve of deliberations also detracted from appellant's defense and contributed to the overall unfairness of the proceedings. (AOB 189-193.) Unquestionably, appellant's jurors would have paid serious attention to the Hodges during trial. The prosecutor had promised, after all, that appellant would testify that the Hodges forced him to kill McDade. (15RT 6343-6346.) The Hodges were also physically imposing. Terry was particularly large and John looked quite scary. (People's Ex. No. T-49A; 30CCT 8967; 31RT 11257.) Because appellant's jurors had endured a lengthy trial with the Hodges, their attorneys and investigators and jurors in a relatively small courtroom, the sudden absence of the Hodges would have surely been palpable to appellant's jurors. As defense counsel recognized, there was as danger that once the Hodges were gone, appellant's jurors might treat him more harshly because he was the only defendant left and they feared that he, too, would escape liability. (31RT 11154.) Appellant's jurors would have naturally wondered why the Hodges disappeared, and the most natural explanations for this would be that the Hodges had been victimized by some sort of legal error or managed to obtain a favorable disposition. Both scenarios implied that the Hodges were less culpable than appellant, who remained on trial for his life. These inferences detracted from appellant's defense, which sought to portray the Hodges as ruthless criminals who manipulated appellant, who was younger, mentally slow and unsophisticated, and thus the Hodges were to blame for the crimes.

Respondent dismisses as speculative appellant's claim that his jurors would have drawn inferences negative to appellant from the Hodges's disappearance. (RB 78.) Respondent offers no argument to support the government's conclusory position. Surely appellant's jurors would have

wondered why the Hodges suddenly disappeared. Since the Hodges were already on trial for capital murder, the jurors would not have imagined that they faced even more dire consequences than they had just faced. Inferences negative to appellant were the most natural and inevitable ones for the jurors to draw, especially in the absence of any alternative explanation. (See 30RT 10867-10868 [trial court tells appellant's jurors that the Hodges will no longer be present without providing any explanation for their sudden absence]; see *Saesee v. McDonald, supra,* 725 F.3d 1045, 1049 [in the context of a broken promise of an important witness's testimony, it is natural for jurors to draw a negative inference for the gaping hole left in the case if they are not provided with any alternative explanation].)

Indeed, here the record actually shows that many jurors learned from media reports that the Hodges had been granted a mistrial. (See AOB, Arg. XXI, 448-460.) Six jurors and two alternates stated that they read at least some of an August 27, 1994, Sacramento Bee article reporting that the charges against the Hodges had been dismissed. (32RT 11390-11391, 11154-11155.) This article included comments damaging to appellant by Hodges jurors. (32RT 11392-11393.) Further, two jurors and three alternates reported that they had been exposed to an August 24, 1994, Sacramento Bee article reflecting that the Hodges's case had mistried. (3CT 669.) Juror knowledge of the Hodges's mistrial created pressure on appellant's jurors to hold appellant accountable, even despite doubts, lest no one be held to answer for the tragic killing.

Respondent acknowledges that appellant's jury was excused when certain tapes of Banks's and Leisey's statements were played. (RB 80, citing 26RT 9829, 9835-9836, 9839-9842; People's Ex. No. T-53; 29RT

10683-10688; People's Ex. No. T-62.) As discussed above, Banks and Leisey were crucial witnesses to appellant's mental state defense. Respondent contends that appellant's jurors would have followed the trial court's directives not to speculate about what testimony or evidence they were missing when they were excluded from the courtroom and solely the Hodges jury remained. (RB 80-81.) Limiting instructions are not a cure-all, particularly when they are heaped on each other and all address a particularly sensitive area – here, appellant's efforts to present a defense -- whose proper treatment is crucial to a fundamentally fair trial. Appellant's jurors were told not to speculate about what evidence they were missing when the Hodges jury was present. (*Ibid.*) They were also told not to speculate about why the Hodges suddenly disappeared from trial. (30RT 10867-10868.) Further, they were twice told to ignore newspaper articles to which they had exposed reporting that the Hodges's case had mistried. (31RT 11156, 32RT 11402.) Additionally, as discussed in Argument I, *ante,* they were directed not to speculate about appellant's undelivered testimony. (See 31RT 11112 & 2CT 587 [court gives modified version of CALJIC No. 2.60].) All these instructions were given because there was a danger jurors would draw inferences negative to appellant from matters extraneous to the properly presented evidence. All the negative inferences that jurors were likely to draw tended to undermine appellant's efforts to defend himself. At some point, "'the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" (*People v. Burney* (2009) 47 Cal.4th 203, 230, quoting *Bruton v. United States, supra,* 391 U.S. 123, 135.) Piling limiting instruction upon limiting instruction in areas directly impacting the defendant's efforts to defend himself is such a context.

Thus, the dual jury procedure allowed multiple factors to combine to undermine appellant's defense and lighten the state's burden of proof. Respondent's simply analyzes each asserted factor in isolation. This approach fails to acknowledge the sum total of the unfairness created by the dual jury trial of appellant and the Hodges.

JUROR RELATED ISSUES

IV.

THE TRIAL COURT'S ERRONEOUS REFUSAL TO EXCUSE PROSPECTIVE JURORS LESLIE GONZALEZ AND JUDITH PERELLA FOR CAUSE REQUIRES REVERSAL.

In his opening brief, appellant demonstrated that the trial court erred in denying his challenges for cause against prospective jurors Leslie Gonzalez and Judith Perella. (AOB 202-220.) Both jurors' views in favor of the death penalty were so strong as to prevent or substantially impair their ability to impartially consider imposing a sentence of life without possibility of parole. (See AOB 209-220.) Additionally, Gonzalez, who found police officers more credible than citizen witnesses, could not adequately assure the court that she would set that opinion aside and follow its instructions to evaluate the testimony of police officer witnesses under the same standards as civilian witnesses. (See AOB 205-208.)

Respondent argues that appellant has not properly preserved this issue, notwithstanding his exhaustion of all peremptory challenges. (RB 82.) Respondent further argues that (1) the trial court did not abuse its discretion in denying the two challenges for cause because the jurors' responses were merely equivocal or conflicting and the court's rulings were fairly supported by the record (RB 82-88); and (2) there was no prejudice. (AOB 88-92.) None of respondent's arguments withstand scrutiny.

A. This Claim Should Be Reviewed On Its Merits.

Despite the fact that appellant exhausted all 20 of his allotted peremptory challenges, including against prospective jurors Gonzalez and Perella, respondent claims that he has forfeited this claim by not also

expressly stating dissatisfaction with the jury as selected. (RB 82.) In the opening brief, appellant acknowledged that in *People v. Crittenden* (1994) 9 Cal.4th 83, this Court ruled that in order to preserve for review the denial of a challenge for cause, a defendant must not only exhaust his peremptory challenges but also express dissatisfaction with the jury ultimately selected. (*Id.*, at p. 121, fn. 4; see AOB 203-204.) However, he argued that this additional requirement should not be applied here because his jury selection occurred before *Crittenden* was decided. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1055 [Because jury selection occurred before decision in *Crittenden* which "made it clear that a defendant must express dissatisfaction with the final jury," "that rule does not apply"]; *accord*, *People v. Riggs* (2008) 44 Cal.4th 248, 285-286.)

Respondent argues that this Court made this additional condition clear in two cases decided before appellant's jury selection, *People v. Raley* (1992) 2 Cal.4th 870, 904-905, and *People v. Morris* (1991) 53 Cal.3d 152, 184, overruled on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, and thus this Court should apply the condition here and find appellant's claim forfeited. (RB 82.)

Respondent is mistaken. It is true that in *Morris*, this Court suggested that a defendant must both exhaust all peremptory challenges and express dissatisfaction with the ultimately selected panel.[17] But as found by

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[17] In *Morris*, this Court stated that in order to raise claims regarding the erroneous denial of challenges for cause, a defendant must show: (1) he used a peremptory challenge to remove the juror in question; (2) he exhausted his peremptory challenges or can justify his failure to do so; and (3) he was dissatisfied with the jury as selected. (*People v. Morris*, *supra*, 53 Cal.3d at p. 184.) Because Morris did not exhaust his challenges and

this Court in *Wallace*, it was not until *Crittenden* that this Court made clear that the latter condition was, in fact, an additional requirement. Prior to *Crittenden*, "language in past cases suggested that counsel's expression of dissatisfaction with the jury was not always a necessary prerequisite to challenging on appeal a trial court's decision denying a challenge for cause." (*People v. Weaver* (2001) 26 Cal.4th 876, 911; *accord*, *People v. Blair* (2005) 36 Cal.4th 686, 742; see, e.g., *People v. Coleman* (1988) 46 Cal.3d 749, 770 [To complain on appeal, the rule in California is that a defendant must exhaust his peremptory challenges].) In another case where this Court refused to apply the additional requirement to a trial which occurred after the decisions in *Raley* and *Morris*, the Court recognized that "the law was in a state of flux on this point at the time of defendant's 1993 trial." (*People v. Boyette* (2002) 29 Cal.4th 381, 416 [Comparing *People v. Crittenden*, *supra*, 9 Cal.4th at p. 121 [statement of dissatisfaction required] with *People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088 [suggesting relief would still be granted if a defendant could show denial of an

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"his conduct indicated no dissatisfaction with the jury that heard his case," the Court rejected his claim. (*Ibid.*)

Raley, however, did not make clear that express dissatisfaction was an additional requirement. There, this Court stated:

> "At the conclusion of voir dire, defendant had used only 18 of his 26 peremptory challenges. He offers no justification for his failure to exhaust his peremptory challenges, and he did not indicate any dissatisfaction with the jury when it was sworn. Thus he cannot complain on appeal of any error in refusing to excuse the jurors for cause."

(*People v. Raley*, *supra*, 2 Cal.4th at pp. 904-905.)

impartial jury]; *accord*, *People v. Blair*, *supra*, 36 Cal.4th at pp. 741-742; *People v. Weaver*, *supra*, 26 Cal.4th at p. 911.)

Notably, in several cases decided either after or during the same period as the decisions in *Raley* and *Morris*, this Court continued to formulate the procedural prerequisite as requiring only one condition – the exercise of all peremptory challenges. (See, e.g., *People v. Kelly (II)* (1992) 1 Cal.4th 495, 518-519 ["To complain on appeal that a prospective juror should have been excused for cause, the defendant must have exercised and exhausted his peremptory challenges."]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 103 ["It is well settled that a defendant cannot complain an objectionable juror was forced on him where he could have exercised a peremptory challenge;" defendant had three challenges remaining].) And, in *Crittenden* itself, the Court declined to apply its rule requiring a defendant to both exhaust his challenges and express dissatisfaction in view of previous case law "suggesting an express statement of dissatisfaction is unnecessary if a defendant exhausts his or her peremptory challenges, and the consequent difficulty in identifying this issue as ineffective assistance of counsel." (*Crittenden*, *supra*, 9 Cal.4th at p. 121, fn. 4.) Because the law on this issue was not, in fact, clarified until *Crittenden* was decided, following the jury selection in this case, the Court should decline to find this claim forfeited.

Moreover, as discussed below in section (C), it is inconceivable that counsel was satisfied with the jury as it contained several undesirable jurors for the defense. (See *People v. Weaver*, *supra*, 26 Cal.4th at p. 911.)

Finally, "because the presence of even a single juror compromising the impartiality of the jury requires reversal, counsel would be constitutionally ineffective if [they] had failed to voice dissatisfaction with

the jury as constituted, all the while knowing that [two] biased juror[s] [were] sitting among the 12 seated jurors." (See *People v. Weaver*, *supra*, 26 Cal.4th at p. 911.)

For all of these reasons, this Court should decline respondent's invitation to apply the rule elucidated in *Crittenden* and instead review the merits of this claim.

B. Error.

In the opening brief, appellant established that the trial court erred in denying appellant's challenges for cause against both Leslie Gonzalez and Judith Perella because neither could assure the court that they would consider the penalty of life without possibility of parole as a reasonable possibility. (See AOB 209-220.) Moreover, Gonzalez should have been excused because she found police officers more credible than citizen witnesses and never indicated that she would set aside her personal opinion to judge the credibility of both by the same standards. (See AOB 205-208.)

The State's response is based on the principle that "[w]hen a prospective juror's responses to voir dire questions are halting, equivocal, or conflicting, the reviewing court is bound by the [trial court's] ruling." (RB 83, citing *People v. Mendoza* (2000) 24 Cal.4th 130, 169.) That principle, however, is only applicable where the prospective juror has, in fact, given conflicting answers. (*People v. Velasquez* (1980) 26 Cal.3d 425, 442.) Where prospective jurors, like Gonzalez and Perella, stay firm in their beliefs that an intentional killer should be sentenced to death, the prerequisite for activating the preference for trial court resolution of the conflict *is* absent.

1. Gonzalez's Bias In Favor of Police Officer Witnesses.

On the subject of police officers, respondent argues that Gonzalez's answers were conflicting, because although "she felt that police officers were truthful and were trained to look for specific things," she "also stated that she could judge all witnesses by the same standards."[18] (RB 84.) Respondent further argues that after the Court instructed Gonzalez that police officers and lay witnesses were to be evaluated by the same criteria, she affirmed that she could evaluate police officers in that manner. (RB 85.)

Respondent is wrong; Gonzalez's answers were not conflicting. As established in the opening brief, she never wavered from her view that police officers were more credible than citizen witnesses. (AOB 205-207; see 11RT 3755-3759, 3767-3768.) Although she responded affirmatively when asked whether she could judge all witnesses by the same criteria, she could not agree to set aside her opinion that police officers were more

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[18] Respondent argues that "[i]n response to a question by the prosecutor, Gonzalez said that she would not accept an officer's testimony at face value." (RB 84-85; see 11RT 3763-3764.) In fact, after the prosecutor gave Gonzalez a detailed example concerning a police officer testifying to an identification made under questionable circumstances and asked whether she would be able to consider those circumstances or just assume the officer was right, Gonzalez agreed that she would take the facts under consideration. (11RT 3763.) The prosecutor then asked: "So you would consider a police officer – If a police officer testifies and another witness testifies, and they're diametrically opposed about what they're saying, you wouldn't just accept the police officer on face value, would you? But you would look at the circumstances?" (*Id.*, at pp. 3763-3764.) Gonzalez responded: "Yes, I would." (*Id.*, at p. 3764.) As the Court can see, in this exchange, Gonzalez simply acknowledged she would not *automatically* accept an officer's testimony or accept it over the testimony of a civilian witness. It did not, however, negate Gonzalez's constant opinion that police officers were generally more credible than lay witnesses. (See 11RT 3755-3759, 3768.)

credible.[19] (11 RT 3768.) Indeed, her last word on the topic, after the prosecutor and the court attempted to rehabilitate her, was that police officers are more credible than other witnesses. (*Ibid.*)

2. Gonzalez's Pro-Death Penalty Views.

As established in the opening brief, Gonzalez also could not assure the court that she would consider the penalty of life without possibility of parole as a "reasonable possibility." (AOB 209-215.) She favored the death penalty for murder convictions (11RT 3752), admitted that she would "probably not" be able to view the penalty phase evidence of both sides with impartiality (*ibid.*), and admitted that she would vote for death even if aggravating and mitigating circumstances were evenly balanced. (11RT 3754-3755.)

The State responds: "After the court provided instructions making clear that the prosecutor had to prove that the aggravating factors substantially outweighed the mitigating factors before the jury could vote for death, Gonzalez repeatedly confirmed that she could follow the law. (11RT 3755.)" (RB 86.) However, as argued in the opening brief, the trial court's subsequently extracting from Gonzalez a general agreement to follow the law did not undermine her specifically stated unwillingness to impartially view the defense penalty case or her specifically stated

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[19] Notably, Gonzalez's view was based on personal bias arising from her relationship with her husband, a police officer. When asked why she felt that police officers were more credible than other witnesses, Gonzalez answered: "Because living with a police officer, I hear all the goings-on that a lot of people don't understand, and I feel like they're truthful." (11RT 3756.)

willingness to vote for death upon less of a showing in aggravation than the law demands. (See AOB 213.)

3. Perella's Pro-Death Penalty Views.

As demonstrated in the opening brief, Judith Perella believed that someone who intentionally kills, using a firearm, should always be sentenced to death. (See AOB 215-220; see 9RT 3317, 3319, 3323-3327, 3334.)

Respondent acknowledges, as it must, that Perella, in her questionnaire, "stated that her attitude about the death penalty was one that would substantially impair her ability to vote for life without parole." (RB 86.) Indeed, as the State notes, Perella even underlined "substantially impair" in her questionnaire response (*ibid.*), thereby emphasizing her unwillingness to consider life without parole as a realistic sentence choice. (55CT4A 16175 [question 104, Perella underlined "substantially impair"].) Respondent argues, however, that "[a]t worst, Perella's responses at voir dire were equivocal or conflicting" and "Perella indicated her willingness to obey the law, despite some of the views she had expressed earlier in the process." (RB 88.) Respondent contends that because Perella gave conflicting and equivocal answers, this Court is bound by the trial court's determination. (*Ibid.*)

Here, again, respondent's attempt to bring this juror under the umbrella of "conflicting and equivocal answers" must be rejected. As established in the opening brief, Perella never retracted her opinion that anyone who commits an intentional killing, particularly if committed by a gun, deserves death. (See AOB 215-220.) Respondent does not identify any answers conflicting with that view or answers which suggest Perella

ever equivocated on that point. (See RB 88.) Moreover, as explained in the opening brief, the exchange in which the Court asked Perella if she could follow the law by considering aggravating and mitigating factors and not imposing death unless the aggravating factors substantially outweigh the mitigating factors, did not address Perella's view that an intentional killer who uses a gun should always be sentenced to death and does not rise to the level of a conflicting statement. (See AOB 217-218.) Perella did not say that she would, or could, actually render a life without parole verdict. This exchange did not rehabilitate her opinion that imposition of the death penalty was "cut and dry" for an intentional killing. (9RT 3323-3324, 3334.)

The State's response fails to confront the many instances where Perella made very clear her opinion that anyone who intentionally killed deserves death. (See AOB 215-217; 9RT 3323-3327, 3334.) Nor has respondent addressed appellant's concerns, expressed in his opening brief, that the exchange, in which the Court asked Perella if she could follow the law by considering aggravating and mitigating factors and not imposing death unless the aggravating factors substantially outweigh the mitigating factors (1) left Perella free to individually decide that aggravating factors automatically outweighed mitigating factors in cases of intentional killings; and (2) effectively told Perella that she was free to vote according to her pro-death views because the defendant would be sentenced to life without parole if the jury was not unanimous, thereby removing Perella's responsibility for considering and giving effect to any mitigating evidence. (See AOB 217-218.)

For the reasons expressed in the opening brief and herein, the trial court erred in denying appellant's challenges for cause against both Judith Perella and Leslie Gonzalez.

C. Prejudice.

In his opening brief, appellant argued that this error was prejudicial because it affected the composition of the jury in violation of the Sixth Amendment, undermined appellant's Eighth Amendment right to a reliable penalty determination and violated his due process right to a state created liberty interest in jury selection conducted via the use of peremptory challenges. (See AOB 220-223.) As explained in that brief, had appellant not been forced to use two of his peremptory challenges to remove Gonzalez and Perella, he could have struck two jurors (Juror No. 1 and Juror No. 5), who displayed attitudes strongly influencing them against a minority defendant, such as appellant, charged with capital murder involving gun use. (See AOB 220-221.)

Respondent acknowledges that both jurors made statements which would or could cause concern for the defense, but argues it is speculative to assert that the defense would have struck either juror had it had not had to use its peremptory challenges to strike Gonzalez and Perella. (RB at 89-90.) This is so, respondent contends, because the jurors also made statements which were not harmful to the defense and the defense passed for cause on both. (*Ibid.*) Of course, the fact that the defense passed for cause does not mean that Jurors Nos. 1 and 5 were *desirable jurors for the defense*. As recognized by this Court in *People v. Williams* (1981) 29 Cal.3d 392, a

juror might survive a challenge for cause,[20] but still be highly objectionable to a defendant. (*Id.*, at p. 402 [A juror's protestations of impartiality may immunize him from a challenge for cause, but the juror may still exhibit bias on which prudent counsel would base a peremptory challenge].) When, as in the case here, there was an improper denial of a defendant's challenges for cause, it makes no difference that the final jury was made up of persons, such as Jurors Nos. 1 and 5, who purportedly agreed to be fair, follow the court's instructions and listen to the evidence. That these two jurors may not have fallen into the class of persons who could have been removed for cause is not relevant. What is relevant is that appellant was forced to relinquish two critical peremptory challenges in order to keep constitutionally inadequate jurors (Gonzalez and Perella) off the jury.

Moreover, the record belies the State's attempt to paint Juror No. 1 as an unremarkable juror, who "raised no red flags from the defense standpoint."[21] (RB 90). Respondent points to her questionnaire answer that a "defendant's guilt should have to be proven" as evidence of her neutrality.

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[20] "[A] juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would 'prevent or substantially impair' the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 121, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

[21] Respondent also characterizes Juror No. 1's attitude toward the death penalty as ambivalent. (RB 89.) The record shows that although she believed some crimes warranted the death penalty, she would find it difficult to make the decision herself. (47CT4A 13705, 13712, 3715, 13724.) During voir dire, she affirmed that it would not be easy, but there were situations where she could vote for the death penalty, she could vote for it if aggravating circumstances outweighed the mitigating circumstances, and she would vote for it if it was the appropriate punishment. (10RT 3691-3692; 11 RT 3704-3705.)

(RB 89.) However, given the ambiguous context of this answer[22] and the bulk of her other answers evidencing a strong belief otherwise as well as other attitudes against defendants, the record shows that this was a juror who leaned strongly in favor of the prosecution.

Juror No. 1 admitted that she would "tend to lean towards the prosecution because "*I have a hard time with the term 'innocent' until proven guilty*" and strongly agreed that a defendant in a criminal trial should be required to prove his or her innocence. (47CT4A 13706, 13711, emphasis added.) When informed in the questionnaire that a defendant in a criminal trial is presumed to be innocent unless and until his guilt is proved beyond a reasonable doubt and to a moral certainty, she answered that she had a problem with that burden of proof, explaining "I find it difficult not to associate guilt with a criminal defendant. I believe more burden should be placed on the defendant proving innocence." (*Id.*, at p. 13713.)

During voir dire, she explained that she understood "that's what the law says" (a defendant is presumed innocent and the burden is on the prosecution to prove guilt beyond a reasonable doubt) and could try to follow it *even though she disagreed with it*, but *did not know that she would*

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[22] Question no. 51 stated: "the law does not require the People to prove the defendant's guilt beyond all possible doubt. Do you have any quarrel with this burden of proof?" (47CT4A 13713). Juror No.1 answered yes and then wrote: "Guilt should have to be proven if the law says a defendant is innocent until proven guilty." (*Ibid.*) In the question immediately preceding no. 51, which stated that "[a] defendant in a criminal case is presumed to be innocent unless and until his or her guilt is proved beyond a reasonable doubt and to a moral certainty," Juror No. 1 answered that she did have a quarrel with that burden of proof and explained: "I find it difficult not to associate guilt with a criminal defendant. I believe more burden should be placed on the defendant proving innocence." (*Ibid.*)

be able to set aside her personal feelings to follow the court's "rules." (10RT 3698-3699, emphasis added.) Juror No. 1 also stated that she was angry that criminals are given so many rights and she believed that problems in the criminal justice system should be solved by "less money into jails and swifter punishments. Take away prisoner's rights." (47CT4A 13706, 13710.) She admitted, in her questionnaire, that she was not sure that she could apply the law and reach a decision without prejudice against the defendant (*id.*, at p. 13712) and during voir dire, was never asked to repudiate this opinion. (See 10RT 3689-3700; 11RT 3701-3706.)

Given these attitudes, there was ample cause for appellant's counsel to use a peremptory challenge to remove Juror No. 1 had they been provided the opportunity.

The State also characterizes Juror No. 5 as a "neutral" and "thoughtful" on the basis of his questionnaire answers that he had no quarrel with the reasonable-doubt standard, that he had once been accused of a crime, and that he was neutral towards both sides. (47CT4A 13866-13867, 13873; see RB 90.) The fact that this juror provided some neutral answers did not change the fact that this was not a good juror for the defense, given his death penalty attitudes and prejudices against criminal defendants. Juror No. 5 favored the death penalty and believed it should be used more often; he also strongly agreed that any person who kills another should get the death penalty and strongly disagreed that even the worst criminal should be considered for mercy, explaining "That's why our system is not up to par 100%." (47CT4A 13872, 13884, 13890.) Respondent argues that during voir dire, Juror No. 5 stated that he would listen to background evidence at the penalty phase. (RB 90.) However, during that questioning, the juror never retreated from his strong opinions

in favor of the death penalty (see 9RT 3181-3198) and when asked if he could consider evidence about the defendant's background, merely responded that he "probably would consider some of that." (*Id.*, at p. 3186.) Juror No. 5 also admitted that he could not be fair in a case (such as the instant) where gun use was alleged. (47CT4A 13881.)

Moreover, despite his own arrest, Juror No. 5 possessed very strong attitudes against criminal defendants. (See 47CT4A 13870 [stating that problems with criminal justice system are "[l]oopholes in our laws, politicians not carrying out penalties (death sentence) imposed by jurors & judges"]; *id.*, at p. 13871 [believed that a defendant brought to trial was probably guilty and strongly believed that a defendant should be required to prove his innocence]; *id.*, at p. 13872 [strongly believed that harsher treatment of criminals was the solution to the crime problem]; *id.*, at p. 13878 [believed that mental defenses are used as a means to escape responsibility most of the time].) In short, the record establishes that both Juror No. 5 and Juror No. 1 were not desirable jurors for appellant and had he not been forced to use peremptory challenges to remove Gonzalez and Perella, he would have been able to strike these two jurors.

Respondent also argues that *Ross v. Oklahoma* (1988) 487 U.S. 81 supports the conclusion that there was no prejudice here. (RB at 90-91.) Appellant has previously replied to this point and respectfully directs this Court to his opening brief discussion of *Ross*.[23] (See AOB 221-223.)

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[23] Appellant notes that this Court has granted review in *People v. Black* (No. S206928, hg. granted January 30, 2013) to decide whether a conviction should be reversed because of the erroneous denial of challenges for cause when the defendant exhausts his peremptory challenges by removing the jurors, seeks to remove another prospective juror who could

For the reasons advanced here and in the opening brief, appellant submits that the trial court erred in denying appellant's challenges for cause against prospective jurors Gonzalez and Perella and that this error, which affected the composition of the jury selected to try appellant, was prejudicial.

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not be removed for cause, and is denied additional peremptory challenges, or must the defendant also show that an incompetent or biased juror sat on the jury?

V.

THE TRIAL COURT'S ERRONEOUS REMOVAL OF JUROR NO. 11, WITHOUT SUFFICIENT CAUSE TO CONCLUDE SHE COULD NOT DISCHARGE HER DUTIES AS A JUROR, REQUIRES REVERSAL OF THE JUDGMENT.

Juror No. 11 informed the court that she was very tired due to insomnia and her lack of sleep was causing her to feel intense emotions. She said she felt afraid (mainly due to lack of sleep), felt empathy for everyone involved in the trial and was experiencing scary feelings due to a past episode (unrelated to trial) where someone left threatening messages on her answering machine. Taking sleep medication the previous night caused her to feel better. Juror No. 11 did not ask to be excused. She did not say that she had trouble discharging her duties as a juror. She expressed a desire to continue with jury service. She said a break would help and that she wanted to see a counselor to help her process her feelings over the phone threat incident. Appellant demonstrated that the trial court's decision to excuse Juror No. 11 was prejudicial error. (AOB 224-240.) Respondent disagrees. (RB 92-101.) Respondent's position fails to withstand analysis.

Removal of a sitting juror is a "serious matter" that must be approached with caution. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) Under Penal Code section 1089, a reviewing court will uphold a trial court's exercise of discretion in removing a juror only if her inability to continue serving for either physical or emotional reasons affirmatively appears in the record as a "demonstrable reality." (*Ibid.*)

In arguing in support of the ruling, respondent downplays that Juror No. 11 did not ask to be excused. (RB 96.) The trial court asked her

directly if this was her request, but she did not answer affirmatively. (27RT 10108.) To the contrary, Juror No. 11 indicated that she wanted to continue serving. Respondent omits from the government's synopsis of relevant evidence Juror No. 11's statement that she had talked to her supervisor at work, and her supervisor had advised her to continue on the jury because she had already invested so much in it. (27RT 10112-10113.) Although Juror No. 11 did not expressly adopt her supervisor's remarks, this is the obvious implication from her relating them. The same is true concerning her desire to see a counselor downtown. (27RT 10117-10118.) She wanted to see a counselor concerning her personal issues and wanted to find one who was downtown in order to accommodate her continued jury service. The Sacramento County Superior Court, where appellant's trial was conducted, is located in the downtown Sacramento area.[24] A juror's desire to continue serving despite encountering challenges in doing so is significant. (*People v. Bennett* (2009) 45 Cal.4th 577, 619-621 [upholding trial court's retention of juror who appeared upset about continued service but wanted to keep serving on jury].) Respondent implies that Juror No. 11 did want to be excused because she phoned the court to tell it of her situation. (RB 96.) She did not ask to be excused in her phone message or during her audience with the court. As noted below, between her phone call and the hearing, her situation had improved somewhat.

Respondent cites three cases in which trial court decisions to excuse jurors were upheld on review. (RB 97-99.) Notably, in all three, *the excused jurors asked to be excused.* (*People v. Fudge* (1994) 7 Cal.4th 1075, 1098-1099 [juror Ashe repeatedly asked court to remove her from

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2424 See http://www.saccourt.ca.gov/jury/transport.aspx [describing location of courthouse].

jury service due to anxiety over employment issues and her daughter's move]; *People v. Collins* (1976) 17 Cal.3d 687, 690 [juror asked to be removed because she could not follow the court's instructions concerning deliberations; *People v. Van Houten* (1980) 113 Cal.App.3d 280, 285-286 [juror asked to be excused due to physical and emotional upset over grisly pictures in murder trial].) While a juror's self-assessment is not dispositive of whether good cause exists for her removal (e.g., *People v. Barnwell, supra,* 41 Cal.4th 1038, 1049 & 1053), where, as here, a juror wants to continue despite facing challenges in doing so, this is a significant indicator that the juror is a strong person who is fit to serve. As Juror No. 11 noted, she was able to handle "explosive situations" at work if she was sleeping enough. (27RT 10115.)

Nor did Juror No. 11 state that she could not discharge her duties as a juror. She assured the court and counsel that she was fair and impartial. (27RT 10115.) She never said she had a closed mind or she could not listen to the evidence, judge witness credibility, follow the court's instructions concerning the law, refrain from discussing the case until it was submitted to the jurors for deliberations, or deliberate with the other jurors. (27RT 10108-10118.)

Respondent contends that Juror No. 11's physical exhaustion established good cause for her removal, particularly when coupled with her psychological condition. (RB 96.) It is clear from the record that both Juror No. 11's physical and psychological conditions were attributable to her lack of sleep. In regards to her physical condition, the record shows that she was very tired from not having slept well for five nights. (27RT 10112.) The trial court described her as moving and talking slowly and appearing physically fragile. (27RT 10118.) In regards to her

psychological condition, Juror No. 11's inability to sleep was the root cause of her feeling fear and empathy/identifying with the players in the case to an intense degree. She related that when she has trouble sleeping, she becomes frightened in general. (27RT 10116.) As for empathy and identifying with others, she stated, "I find myself identifying with all of the parties and feeling empathy with everybody. ... As each issue is brought up, I identify it with myself. [¶] But I think that's just because of the sleep deprivation." (27RT 10110.) When she had enough sleep, Juror No. 11 reported being able to handle even "explosive" situations at work. (27RT 10115.) Thus, Juror No. 11 explained that her difficulty sleeping was evoking strong emotions in addition to causing her physical tiredness.

Respondent glosses over that Juror No. 11 reported that, after bottoming out, she was feeling "okay" because she had taken some sleep medication on the previous night, and it had helped her start feeling better. (27RT 10111-10112.) This undercuts the trial court's determination that Juror No. 11 was unable to continue serving as a juror. The medication improved her physical and emotional condition. Juror No. 11 reported that after taking the medication, she was not confused and she felt "okay." (27RT 10112, 10115.)

The trial court's decision to excuse her was premature. Juror No. 11 reported having difficulties from not sleeping but explained that she had begun to sleep and was feeling better. Rather than asking to be excused, she indicated her desire to stay on the jury. She never related inability to discharge any duty required of a juror. As appellant argued, the trial court was unduly concerned the Juror No. 11 *might* suffer a breakdown *in the future* if she continued as a juror, but speculation about future harm is not good cause for juror removal. (AOB 234-235; see *People v. Holt* (1997) 15

Cal.4th 619, 658-659 [speculation fails to establish good cause to excuse a seated juror]; *People v. Fudge, supra,* 7 Cal.4th 1075, 1098-1100 [court was not require to discharge juror when juror's inability to serve has not yet become clear]; *People v. Lucas* (1995) 12 Cal.4th 415, 489 [a "court must not presume the worst" of a juror].) Penal Code section 1089 authorizes removal of a juror who *"is"* unable to serve, not a juror who "is or might be later" unable to serve. While a trial court need not wait to remove a juror until he or she is in the midst of an actual breakdown, the record fails to disclose to a "demonstrable reality" that Juror No. 11 was either unable or sufficiently close to being unable to serve.

It seems that the trial court's decision was heavily influenced by its erroneous belief that Juror No. 11's desire to see a counselor to address her emotional issues would constitute misconduct because it would involve discussing the case. (27RT 10118-10119.) As appellant explained, jurors may discuss their *emotions* as long as they do not discuss the substantive aspects of the case. (AOB 236, citing *People v. Danks* (2004) 32 Cal.4th 269, 300, 304; *People v. Marshall* (1996) 13 Cal.4th 799, 844.) Respondent replies that the court was rightly concerned that Juror No. 11 steer clear of misconduct because "some of her psychological issues were related to the case (e.g., the association between Leisey's testimony and the harassing phone calls the juror received and her fear of the defendants)." (RB 96-97.) The law, however, does not support respondent's position. It does not broadly prohibit discussion of any "psychological issues ... related to [a] case." (RB 97.) For example, *People v. Danks* found acceptable a juror's discussion with her husband of the stress she was feeling about making a penalty decision. (32 Cal.4th 269, 300, 304.) Also, *People v. Marshall* found no juror misconduct where a juror told her husband she feared getting shot if the jury convicted because this remark did not address the

substantive aspects of the case. (13 Cal.4th 799, 844.) Here, Juror No. 11's feelings of "general fear" "that I'm not going to be able to sleep" (27RT 10116), fear due to recalling threatening phone calls unassociated with the case (triggered by Leisey's testimony he had been harassed by phone) (27RT 10108-10110, 10114) and empathy/identification with everyone (27RT 10110) did not require discussion of substantive matters. They were Juror No. 11's own feelings triggered by, but unrelated to, the case. Respondent offers no coherent response to this point.

Therefore, respondent has failed to demonstrate that the trial court's decision to excuse Juror No. 11 was supported by good cause to a "demonstrable reality." The trial court erred.

Respondent's contention that the error was harmless must be rejected. (RB 99-101.) Respondent argues that because Juror No. 11 did not demonstrate she was a lone hold-out in favor of the defense or a juror who openly opposed the death penalty, appellant suffered no prejudice. Under respondent's approach, the erroneous removal of a juror could never be prejudicial to a defendant unless the record showed that the juror intended to or was actually in the process of thwarting a verdict for the prosecution. Respondent cites no authority for this broad proposition.

Appellant argued that the *Chapman* standard for prejudice from federal constitutional error applies to the erroneous removal of a seated juror. (See AOB 237 & cases cited therein.) Even under California's *Watson* standard, the harm need not be as ironclad as respondent suggests. An error will be deemed prejudicial under *Watson* if there is a "*reasonable chance*, more than an *abstract possibility*" that the defendant would have obtained a more favorable verdict in its absence. (*College Hospitals, Inc. v.*

Superior Court (1994) 8 Cal.4th 707, 715, emphasis in original.) The record establishes prejudice under this standard.

Defense counsel emphasized that Juror No. 11 was a "very excellent juror" for the defense. (27RT 10120.) She empathized with everyone and knew what it was like to experience raw fear. She said that she felt fear when she saw the Hodges after the courtroom seating had been rearranged. In closing argument, defense counsel argued that the Hodges' exposure to the Powell jurors was perhaps "the best thing that ever happened in this trial for [appellant]" because the Hodges were so visibly scary. (31RT 11257.) In any case, Juror No. 11's qualities made her especially open to appellant's claim that his mental state was so clouded by fear and pressure from the Hodges that appellant did not form the specific intent required for robbery and first degree murder.

That Juror No. 11 was favorable to the defense is apparent from the prosecutor's questions of her. The prosecutor explicitly asked her if she was capable of voting for guilt. (27RT 10115-10116.) Juror No. 11 did not directly reply because the court sustained defense counsel's objection to this line of questioning. Nevertheless, that the prosecutor was moved to ask his question is telling.

Therefore, there are strong indications in the record which show that Juror No. 11 was favorable to the defense. The trial court's erroneous removal of her prejudiced appellant.

GUILT PHASE ISSUES

VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO INSTRUCT THAT DURESS IS A DEFENSE TO ROBBERY AND MURDER AND MAY RAISE A REASONABLE DOUBT ABOUT THE EXISTENCE OF SPECIFIC INTENT TO ROB OR DELIBERATION AND PREMEDITATION; THEREFORE, APPELLANT'S CONVICITONS FOR ROBBERY AND MURDER AND THE ACCOMPANYING ENHANCEMENTS AND SPECIAL CIRCUMSTANCE FINDINGS MUST BE REVERSED.

Appellant's theory of defense was that he acted under duress due to threats and menaces from the Hodges brothers. Appellant demonstrated that there was substantial evidence to warrant an instruction on duress, both in regards to the charge of robbery, on which the prosecution also relied to prove first degree robbery felony-murder and the robbery felony-murder special circumstance, and in regards to the deliberation and premeditation element of first degree murder. To preserve the issue for review, appellant also argued that, notwithstanding this Court's decision in *People v. Anderson* (2002) 28 Cal.4th 767, a duress instruction was also required for the charge of murder itself. Because there was substantial evidence that appellant robbed and killed under duress, the trial court erred in failing to instruct on the defense, and the error was prejudicial. (AOB 241-263.)

Respondent replies that the trial court properly refused to instruct on of duress because the evidence was insufficient to support the instruction. Further, appellant forfeited the argument that duress applies to the charge of

murder, and any error was harmless. (RB 101-118.) Respondent's position fails to withstand analysis.[25]

A. Substantial Evidence Supported an Instruction on Duress.

Respondent disputes that there was substantial evidence that appellant robbed and killed McDade under duress from the Hodges brothers. (RB 106-111.) According to respondent, appellant's own statements to detective Lee and to Angela Littlejohn refute that he acted under duress. (RB 106-107.) It is true that appellant did not explicitly tell either Lee or Littlejohn that he acted in response to the Hodges's threat to kill him if he did not carry out the robbery and murder. (30CCT 8973-31CCT 9036 [appellant's statement to Lee]; 31CCT 9253-9292 [Littlejohn recounts appellant's statements to her].) Nevertheless, everyone agreed that appellant's statements could not be taken entirely at face value. (31RT 11167 [prosecutor argues point], 31RT 11252, 11284-11285, 11287, 11334 [defense counsel argues point].) Appellant gave several inconsistent versions of what happened. (Compare 30CCT 8975-8977 [appellant sat in car while Hodges committed crimes] with 30CCT 8999-9001 [appellant shot McDade accidentally], 31CCT 9003 [appellant shot McDade because he was pressured and scared] and 31CCT 9263, 9277-9278 [appellant shot McDade after they argued and because McDade "had it coming"].) Jurors had to shift through appellant's statements, disregard portions, accept others and draw reasonable inferences from what they concluded rang true.

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[25] In his petition for writ of habeas corpus, appellant alleges that trial counsel provided ineffective assistance by failing to investigate, prepare and present evidence of the Hodges brothers' long history of violence to support appellant's duress defense. (PetHC, Claim V, 263-284.)

It is disingenuous for the government to now argue that appellant's statements must be taken literally.

Notably, appellant told both Lee and Littlejohn that he was holding back information about what happened. He told Lee, "if I went and told everything that really, really happened, ya'll ... would go swipe them [the Hodges], and they [would get] locked up...." (31CCT 9012.) He told Littlejohn, "nobody really know the truth about why I killed him, the papers got it all wrong." (31CCT 9263; see also 9277.) Respondent simply ignores these statements, and other evidence discussed below, because they do not advance respondent's position. It is necessary under the law to consider them as well as all other evidence supporting appellant's claim that the trial court erred in failing to instruct on duress.

When evaluating if the record contains substantial evidence in support of an omitted instruction, the court must view the evidence in favor of the party alleging instructional error. (*People v. Wilson* (1967) 66 Cal.2d 749, 763.) The court cannot weigh evidence or resolve conflicts in it because these are tasks exclusively reserved for the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Further, on substantial evidence review, the evidence must be evaluated as a whole. (*People v. Bassett* (1998) 17 Cal.4th 1044, 1146.) This approach acknowledges the jury's power as the fact-finder to decide what evidence to believe and what weight to assign it. In its exclusive role as the determiner of fact, the jury can decide to believe only select portions of a witness's testimony. (*People v. Wickersham* (1982) 32 Cal.3d 307, 328, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) It is free to draw any reasonable inferences it chooses to draw from the evidence which it credits. In reviewing if substantial evidence supports an omitted instruction, the

reviewing court must honor the jury's power as fact-finder consistent with the jury trial guarantee. (U.S. Const., amend. VI; Cal. Const., art. I, § 16.) Respondent's approach is inconsistent with these principles. Respondent simply emphasizes the evidence that *supports the judgment*. While this is proper in response to a defendant's claim of insufficient evidence (*People v. Hatch* (2000) 22 Cal.4th 260, 272), it is the *opposite* from what is required on review of a defendant's claim of instructional omission. In determining if substantial evidence supports an omitted instruction, *all doubts must be resolved in favor of the instruction.* (*Wilson, supra,* 66 Cal.2d 749, 763.)

Viewed in this manner, appellant's statements to Lee and Littlejohn do not defeat his duress claim. Rather, they fit into an evidentiary mosaic which supports it. Appellant told Lee that he acted under fear and under pressure from threats. (31CCT 9001-9003, 9019, 9021.) The record showed that appellant was only a teenager, immature for his age (he associated with teenagers younger than he was), and mentally slow. (23RT 8850, 28RT 10412, 10431; see also 31RT 11255-11256 [counsel's argument].) It also supports that appellant did not want to harm McDade. (25RT 9426 [appellant did not want to kill], 30RT 8983-8984 [appellant told his companions not to harm McDade], 32CCT 9315 [appellant was a "wimp" and "chicken-shit" and "didn't have no heart" when it came time to commit the crimes]; see also 31CCT 9015, 9018-9019, 9146, 9151.) He told Littlejohn he approached to McDade to ask about getting his job back. (31CCT 9277-9278.) He had done this many times before (16RT 6517, 6548-6549, 6575), because, as appellant put it, that job "was the only job I was good at." (30CCT 8999-31CCT 9000). According to appellant, the encounter escalated into an argument and culminated in the shooting (31CCT 9277-9278), but, again, no one knew what really happened

(31CCT 9263). Based on this evidence, jurors could have credited appellant's claim that he acted out of fear and under pressure and harmed McDade even though he did not want to. Jurors were not required to credit appellant's explanation that this was because McDade threatened him (31CCT 9001-9003, 9019; see 31RT 11255-11257, 11285-11334 [defense counsel argues McDade did not threaten appellant].) If McDade was not the cause of appellant's fear and pressure, who was? Obviously, the jurors could infer it was the Hodges brothers.

Respondent argues that there was insufficient evidence to place John Hodges at the crime scene and, although Terry Hodges admitted he was there, Terry claimed he returned to the car when appellant shot McDade. (RB 110.) Whether the Hodges were present in close proximity to appellant bears on duress's immediacy requirement. (*People v. Heath* (1989) 207 Cal.App.3d 892, 900 [defendant must act in response to threat of immediate, not future, harm].) Again, respondent applies the wrong standard of review. Respondent simplistically views the evidence at face value and in the light most favorable to the judgment rather than crediting the reasonable inferences in favor of the omitted instruction which fair-minded jurors could have drawn from the evidence as a whole.

The evidence established that both John and Terry Hodges were at the crime scene. Balwinder Chatha, who worked at the Quick Stop Market close to KFC, saw appellant in their presence a few hours before the shooting. (21RT 8182-8183, 8185, 22RT 8372, 8375-8376, 8394, 8410, 8414.) Terry Hodges was driving his black Chevy Caprice. (21RT 8188, 22RT 8380-8381, 8411.) Around the time of the crime, Henrietta Senner walked past KFC and saw a vehicle, very similar to Terry Hodges's Caprice, driving with its lights off in the lot behind the store. (18RT 7359,

7361-7362, 7372, 7374, 19RT 7405, 7444.) There were two or three silhouettes inside the car. (18RT 7364, 7376-7378, 19RT 7417-7418.) Appellant told Lee he was there with both Hodges brothers. (30CCT 8978-8980, 8999, 9010-9014, 9019-9020.) Although appellant claimed the Hodges stayed in Terry's car, he also said that he was afraid to tell everything he knew, the Hodges "wanted it all to be on me," and he shot because he was scared. (30CT 8981, 31CCT 9016, 9020-9021.)

Reasonable jurors could have seen through appellant's claims that he confronted McDade alone. John Hodges told Eric Banks that he manipulated appellant, a "youngster," into committing the crimes. (31CCT 9146, 9151, 9154, 25RT 9426.) Banks, who was familiar with John Hodges's *modus operandi,* spelled it out – for John to have done this, he would have remained by appellant. (31CCT 9144-9145, 9155.) John had to be present, probably with a pistol, to enforce his order to kill. (31CCT 9155-9156, 9158, 25RT 9462-9463.) Further, Terry Hodges told Darryl Leisey that he had to "coach" appellant like his own child to commit the offenses because appellant was "chickenshit." (25RT 9492, 9494, 9498, 27RT 10032-10034, 32CCT 9311, 9315.) Jurors could have rationally concluded that Terry stayed by appellant to ensure appellant did as he was told. Moreover, both of the Hodges brothers wanted McDade killed so he could not identify them as witnesses. Both used language indicating that McDade had seen them: John said he ordered McDade killed so McDade would not identify "*us*." (25RT 9462-9463, 31CCT 9156, emphasis added.) Terry said, "I tell the reason why he had to kill him. … Because no witnesses, no can find. … That's why *they can't charge me*. … [¶s] No witness, no can find *me*." (*Ibid.* emphasis added; see also 32CCT 9314.) The Hodges brothers would not have been concerned about McDade identifying them unless they had been present with appellant

during the crimes. Respondent simply ignores this point and hence fails to refute it.

Respondent devotes the bulk of the government's response to marshalling the evidence supporting that appellant wanted to rob McDade. (RB 107-109.) Unquestionably, there was legally sufficient evidence to support appellant's robbery conviction. Even so, this does not mean that appellant did not act under duress. A more nuanced interpretation of the evidence supports that appellant did not necessarily encounter McDade with a clear intent to rob and kill him.

As appellant argued elsewhere, rational jurors could have interpreted the evidence to depict appellant as an immature teenager who was straddling two worlds as he was formulating his identity. When he approached McDade, he was undecided about what he would do. (AOB, Arg. XVII, 403-404; see also Arg. I, C.4, *ante*.) As appellant explained (AOB 403-404):

> One [world] was the criminal lifestyle represented by the Hodges brothers, a couple of "bad dudes," who were actively encouraging appellant to rob and kill McDade. (30RT 11005, 31RT 11054, 11257 [defense counsel argues Hodges are "bad dudes"]; 25RT 9471, 9474, 31CCT 9155, 32CCT 9303, 9311 [Hodges are linked to guns, drugs, drive-by shootings and prison]; 31CCT 9154-9155 [John Hodges manipulates appellant to do his will and gives the order to kill], 25RT 9494 & 32CCT 9305-9306 [Terry Hodges tells appellant, "just whack the motherfucker"].) The other was the straight and narrow path, represented by the hard-working McDade (16RT 6505-6505, 6509) and appellant's brother, who was pressuring appellant to find work. (30CCT 8999).

> The evidence warranted the inference that when appellant encountered McDade, he was undecided about whether he would carry out the Hodges' directives. Appellant did not act decisively to rob McDade and eliminate him as a witness; instead, he stalled for time. (16RT 6521, 6558-6559, 6562-6563, 6578 [McDade leaves KFC around 10:20 to 10:30 p.m.], 19RT 7583-7586 [Senner hears shot at 10:45 or 10:50 p.m.]; 32CCT 9315 [Terry Hodges tells Leisey the shooter "didn't have no heart"]; 31RT 11280 [counsel argues that if appellant confronted McDade simply to rob and kill him, he could have accomplished this in mere moments].) Appellant still desperately wanted his old job back at KFC, which appellant said was "the only job ... that I'm really good at." (30CCT 8999.) If appellant robbed McDade, he would destroy any chance of regaining it. (See 31RT 11287-11289, 11324-11325 [defense counsel characterizes appellant's job as his "lifeline" and chance at life as a law-abiding citizen].)

Appellant's indecision about whether to try to get his job back or victimize McDade does not amount to specific intent to rob or kill. .

Roper v. Simmons (2005) 543 U.S. 551 held that the Eighth Amendment prohibits imposition of the death penalty on a defendant who was a juvenile when he killed. (*Id.* at pp. 568, 578.) It observed that certain signature qualities of youth "do not disappear when an individual turns 18" but instead gradually subside over time. (*Id.* at pp. 570, 574.) Key among these is a search for identity. (*Id.* at p. 570.) Youths also lack maturity, have a diminished sense of responsibility and are prone to reckless behavior. (*Ibid.*) Additionally, youths are especially vulnerable to outside influences, particularly peer pressure, and lack the resources to extricate themselves from harmful environments. (*Ibid.*) Jurors could have seen appellant as searching for his identity and as undecided about what to do when he encountered McDade. They could have rationally viewed appellant's expressed interest in robbing McDade as youthful bravado

rather than a concrete plan. It took the Hodges to finally force appellant to side with their criminal objectives by threatening his life if he did not do so.

Appellant demonstrated that the evidence showed that the Hodges were frightening, criminally oriented individuals who were typically armed and prone to violence. (AOB 251-252.) Appellant was terribly afraid of them. (AOB 252-253.) According to Leisey, Terry Hodges gave appellant the gun appellant used against McDade. (32CCT 9303.) It had only one bullet in it. (31CCT 9004.) As noted, the Hodges brothers told appellant that they would leave no witnesses who could identify them. (25RT 9462, 9462-9463, 31CCT 9156 [John Hodges's statements], 32CCT 9314 [Terry Hodges's statements].) This statement, combined with Terry's providing appellant with just one bullet, conveyed that if appellant was not with the Hodges he was against them and would have to be eliminated.

Respondent's effort to analogize appellant's case to *People v. Wilson* (2005) 36 Cal.4th 309, 331-332 is unpersuasive. (RB 111-112.) In *Wilson,* the defendant argued on appeal that the evidence showed he acted under duress when he aided and abetted an on-going robbery which was the underlying felony in a felony-murder prosecution. (*Id.* at pp. 331-332.) The defendant admitted he did not see Anderson, the third-party who supposedly threatened him, with a gun. (*Ibid.*) Nor was there evidence, as here, that Anderson manipulated the defendant, ordered him to commit the crime and stood by armed to ensure that the defendant carried it out.

For these reasons, and the reasons advanced in appellant's opening brief, there was substantial evidence that appellant committed the crimes against McDade under duress from the Hodges brothers. The trial court erred in failing to instruct on duress as a defense to robbery and the element of premeditation and deliberation required for first degree murder.

B. Duress is a Defense to Murder.

Next, respondent contends that appellant forfeited his argument that the Legislature cannot constitutionally preclude duress from serving as a defense to murder. (RB 104; see AOB 254-257.) Appellant disagrees. Appellant's requested version of CALJIC No. 4.40 was worded broadly enough to apply the defense of duress to the crime of murder. (2CT 529.) Appellant also objected to the court giving CALJIC No. 4.41 once the prosecutor requested it. (30RT 10934, 10940-10941.) CALJIC No. 4.41 provides that duress is not a defense to a crime punishable with death. (2CT 655.) The trial court decided not to instruct on duress because it believed there was insufficient evidence to support the instruction. (30RT 11023, 11048, 31RT 11051.) It would not have instructed on duress even if trial counsel had articulated appellant's position differently. Defense counsel's failure to do so should, therefore, be excused as futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432 [party need not make futile objection to preserve claim of error].)

Further, the claim is also preserved because the parties extensively discussed what CALJIC No. 4.41 meant when it stated that duress is not a defense to a capital charge, particularly in light of Penal Code section 26(6), which recognizes the defense of duress but limits it if "the crime be punishable with death." (30RT 10934-10937, 10940-10941, 10960-10963.) The lengthy discussions on this topic gave the court an opportunity to decide that duress is a defense to murder. Because the purpose of the forfeiture rule – to give the trial court an opportunity to correct an alleged error – was satisfied, appellant's claim has been preserved. It has also been preserved because a court may reach a challenge to the constitutionality of a statute despite lack of objection below. (See *In re Dixon* (1953) 41 Cal.2d

756, 763 [challenge to the constitutionality of a statute can be raised for the first time on habeas corpus].)

On the merits, respondent argues why the Legislature could rationally choose to limit the defense of duress to non-murder offenses. (RB 112-114.) This sidesteps appellant's argument rather than answering it. Appellant's argument does not depend on whether the Legislature acted rationally. Rather, it depends on how the Legislature has defined murder. "[A] State may not first determine the elements of the crime it wishes to punish, and then thwart the accused's defense by categorically disallowing the very evidence that would prove him innocent." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 68 (O'Connor, J., dissenting).) Duress evidence tends to negate proof of implied malice and specific intent. (*People v. Anderson* (2009) 28 Cal.4th 767, 780-781; *People v. Graham* (1976) 57 Cal.App.3d 238, 239-240.) Both are essential elements of murder. (Pen. Code, § 187.) By side-stepping this claim, respondent fails to overcome appellant's showing.

C. The Instructional Omission Prejudiced Appellant.

Respondent also fails to persuade that the trial court's erroneous failure to instruct on duress was harmless. (RB 114-118.) Initially, respondent contends that the *Watson* standard for assessing prejudice from state law error applies without citing any supporting authority. (RB 114.) In contrast, appellant cited authority indicating that a criminal defendant has a federal constitutional right under the Fourteenth Amendment to present a defense.[26] This right also implicates the Sixth Amendment rights

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[26] The United States Supreme Court recently affirmed the right in *Nevada v. Jackson* (6/3/2013) ___ U.S. ___ [133 S.Ct. 1990, 1992].)

to counsel and jury trial and the Eighth Amendment right to a reliable penalty determination. (AOB 248, 257-258.) A trial court's erroneous failure to instruct on a theory of defense violates these federal constitutional rights and is, therefore, evaluated for prejudice under the stringent *Chapman* standard for federal constitutional error: reversal is required unless the government proves the error harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24). (AOB 248, 257-258.)

In contending that any error was harmless, respondent observes that jurors were instructed on the mental state elements necessary for conviction for robbery and murder. According to respondent, the prosecutor's and defense counsel's closing arguments implicitly highlighted duress as a defense theory, and the jurors nevertheless chose to convict. (RB 115-117.) Respondent's position fails to withstand analysis.

The prosecutor's closing argument never mentioned duress or the elements of the defense. It never acknowledged that the duress is a formal defense. Instead, the prosecutor argued, "[a]nd so what if the [Hodges] were [pressuring appellant]? That is not a defense...." (31RT 11347.) The prosecutor dismissed defense counsel's argument as a "Svengali defense." (31RT 11339.) Additionally, he discredited defense counsel's position by contending that counsel "doesn't care about a just verdict. He cares about the defense of his client...." (31RT 11341.) The jurors would not have been aware that duress is an actual defense sanctioned by law from the prosecutor's remarks. Lay jurors are not expected to correctly guess at legal principles about which they are not correctly instructed. (*People v. Eid* (2010) 187 Cal.App.4th 859, 883; *People v. Franco* (2009) 180 Cal.App.4th 713, 725.)

Likewise, defense counsel's closing argument never mentioned duress or the elements of the defense. Counsel never argued that duress is a formal defense which supported a verdict favorable to appellant. After it ruled that it would not instruct on duress, the trial court expressly prohibited defense counsel from arguing the duress. (30RT 11053-11055.) Without the benefit of an actual instruction from the court, the defense remained in the shadows, unformulated for the jurors to squarely decide whether its elements applied. Given the trial court's order precluding defense argument on duress, defense counsel was only able to argue a second-rate version of part of the defense, i.e., that appellant did not actually formulate the specific intent to rob or engage in deliberation and premeditation because he felt so much fear and pressure due to the Hodges. (31RT 11249-11250, 11327, 11330-11331, 11337-11338.)

Contrary to respondent's claim, counsel's fear and pressure argument was not an adequate substitute for an actual instruction from the court on duress as a defense theory. Words of advocate do not carry the same weight with jurors as do legal instructions from the court. (*People v. Matthews* (1994) 25 Cal.App.4th 89, 99.) When an attorney is forced to argue without the benefit of supporting instructions, jurors are especially likely to mistrust his argument as the artful invention of an advocate attempting to persuade them. (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.)

Defense counsel's claim that appellant did not actually form the mental state necessary for conviction for robbery and murder because his mind was so clouded by fear and pressure emanating from the Hodges was not the equivalent of an argument contending that all the elements of the duress defense had been established. The elements of the duress do not

directly address whether the defendant failed to actually formulate the necessary element of intent required for commission of the charged crime. The pattern jury instruction which counsel unsuccessfully requested, CALJIC No. 4.40, set forth the elements of the defense as follows (2CT 529):

> A person is not guilty of a crime when he engaged in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:
>
> 1. Where the threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and,
>
> 2. If such person then believed that his life was so endangered.
>
> This rule does not apply to threats, menaces, and fear of future danger to his life.[27]

This pattern instruction does not track defense counsel's argument. It does not address the effect of the threatener's threats on the defendant's formulation of the element of intent. Rather, it excuses when the defendant has "engaged in conduct otherwise criminal if the defendant (1) reasonably and (2) subjectively believed his life would be in immediate danger if he did not commit the crime.

Respondent's argument must be rejected because it suggests that the jurors rejected elements of a defense which were never presented to them,

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[27] Defense counsel asked that the pattern instruction be modified to add a concluding paragraph providing that duress, "through its immediacy requirement, negates criminal intent" and instructing jurors to give the defendant the benefit of a reasonable doubt about the matter. (2CT 529.)

even in the form of counsel's argument. Jurors may have rejected the fear and pressure defense counsel advanced based on a belief that one mental state (such as fear and/or pressure) cannot preclude actual formulation of another. Yet even if jurors harbored this belief, it would not have blocked them from finding duress under CALJIC No. 4.40. Respondent characterizes appellant's argument that jurors did not reject a defense of which they did not know as "hair splitting" and "sophistry." (RB 117.) The undisputed elements of the defense speak for themselves.

"Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal" or other favorable result. (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.) For the above reasons and those also advanced in appellant's opening brief (AOB 257-263), respondent has failed to overcome appellant's showing that he was prejudiced by the trial court's erroneous failure to instruct on duress as a defense.

Therefore, the judgment must be reversed due to the trial court's instructional error.

VII.

THE ERRONEOUS ADMISSION OF EVIDENCE CONNECTING APPELLANT TO FIREARMS NOT USED IN ANY OF THE CHARGED OFFENSES VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION AND REQUIRES REVERSAL.

Appellant demonstrated in his opening brief that the trial court erred to his prejudice in admitting evidence linking him to three guns that could not have been the murder weapon. (AOB 264-284.) Such evidence is "highly prejudicial" (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360) because it tends to prove "not that [the defendant] committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 648-649). Consequently, such evidence in inadmissible. (*Riser, supra,* at p. 577.) Respondent replies that the claim must be rejected. (RB 118-131.) Respondent's position fails to withstand analysis.

A. The Claim Has Been Preserved for Review

Initially, respondent contends that appellant forfeited his challenge to three items of evidence linking him to guns not used in the charged crimes. (RB 119-120.) This is incorrect. Contrary to respondent's assertion (*ibid.*), appellant's objection to introduction of appellant's connection to a .32 caliber firearm, which appellant referenced in his statement to detective Lee, was sufficiently timely and specific to preserve appellant's challenge to this evidence. The court's remarks in overruling

the objection indicate that further objections to the other challenged gun evidence would have been futile.[28] (AOB 268-270.)

Respondent correctly points out that counsel first objected to the .32 caliber firearm references out of concern that they might open the door to introduction of gang evidence in the form of a photograph showing appellant and William Akens flashing gang signs and holding guns to each other's heads. (RB 119; 23RT 8864.) In overruling the objection, the trial court found that there was no gang angle to appellant's remarks about the .32 caliber firearm. It stated, "this .32 ... does not, as far as I can tell, have any references to gangs...." (*Ibid.*) Contrary to respondent's implication, however, the trial court did not limit itself to the finding that this evidence did not implicate gangs when it ruled that it was admissible. (See RB 119-120.) The trial court explained that the .32 caliber firearm was relevant because it "may or may not be a weapon that witnesses have testified [appellant] had possession of earlier." (23RT 8864.) The court's remarks referred to the earlier testimony of KFC employees Junnell Rodriquez and Ruben Martinez that appellant had showed them a gun shortly after Halloween of 1991 while they worked a shift at KFC. (16RT 6570-6571, 6617, 6757 [Martinez's testimony], 6595-6597, 6614 [Rodriquez's testimony].) Significantly, defense counsel challenged the court on this point. He stated that the evidence did not show that the .32 caliber firearm had played any role in the case. He said, "[y]our Honor, ... there has been no reference ... in the trial up until this point of a .32 automatic." (23RT

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[28] If trial counsel failed to preserve appellant's challenge to the admission of the firearm evidence, appellant contends in his petition for writ of habeas corpus that counsel rendered ineffective assistance. (PetHC, Claim VI, § A, 287-312.)

8865.) Unpersuaded, the trial court found that the references to the .32 caliber firearm were relevant and not unduly prejudicial, and, therefore, they were admissible. (23RT 8866.) It told counsel, "I don't agree with you that it is irrelevant, prejudicial or inadmissible." (*Ibid.*) This exchange demonstrates that the trial court understood defense counsel to object to the .32 caliber firearm references based on irrelevance and undue prejudice irrespective of any gang angle. The court had found there was no gang connotation to the evidence and proceeded to find it relevant and not unduly prejudicial, regardless of gang issues. Where the record demonstrates that the trial court understood the basis for counsel's objection, even though the objection may have been inartfully phrased, the objection is sufficient to preserve the issue for appeal. (*People v. Scott* (1978) 21 Cal.3d 284, 290.) If any doubt remains, defense counsel's further comments clearly dispel it. Counsel stated that, regardless of any gang angle, "I would still object to it," i.e., appellant's remarks concerning the .32 caliber firearm. (23RT 8866.) This was in plain reference to counsel's earlier objections, as understood by the trial court, based on irrelevance and undue prejudice. (*Ibid.*) Therefore, whether the trial court properly admitted appellant's statements to Detective Lee concerning ownership of a .32 caliber firearm over appellant's irrelevance and undue prejudice objections has been preserved for review.

Respondent disputes that appellant's unsuccessful objection to the .32 caliber firearm evidence shows that it would have been futile for appellant to object to evidence linking him to two other firearms which could not have been the homicide weapon, the gun appellant displayed around Halloween to Martinez and Rodriquez and the shotgun appellant sold. (RB 120.) Characterizing these as "unrelated objections," respondent cites the principal that "the court's treatment of unrelated objections" fails

to demonstrate "that all objections would have been futile." (*Ibid.*, citing *People v. Arias* (1996) 13 Cal.4th 92, 159-160.) The claim must be rejected because appellant's objection to the .32 caliber firearm evidence was related to the evidence of the other two firearms given how the trial court viewed appellant's connection to firearms in general.

Since the trial court reasoned that the .32 caliber firearm evidence was relevant and not unduly prejudicial because it could be the gun involved in the Halloween gun display (23RT 8864, 8866), it is evident that the court believed that the Halloween gun display was itself properly before the jury. It maintained this belief even though it had heard evidence clearly demonstrating that the gun appellant showed to Martinez and Rodriquez could *not* have been the homicide weapon. Both witnesses described the gun they saw around Halloween as a different color from People's Exhibit No. 18A (compare 29CCT 8664 with 16RT 6595-6599, 6628 and with 16RT 6722-6723, 6728-6729), the gun which the prosecution claimed was the murder weapon (28RT 10147-10151; 31RT 11187). Also, both witnesses refused to identify People's Exhibit No. 18A as the gun they had observed. (16RT 6598, 6724-6726.) Given this belief, it is clear that the court would have overruled an objection to the Halloween gun evidence. Therefore, appellant's failure to object to the Halloween gun display should be excused as futile. By the same token, so, too, should appellant's failure to object to evidence that he had sold a shotgun. The record demonstrates that the trial court considered appellant's connection to firearms not used in the homicide to be relevant and not unduly prejudicial. Accordingly, respondent, fails to demonstrate that appellant forfeited his challenge to introduction of evidence linking him to three guns not used in the shooting.

B. The Trial Court Erred in Admitting Evidence Connecting Appellant to Three Firearms That Could Not Have Been the Murder Weapon.

Respondent argues that the trial court properly admitted evidence of appellant's Halloween gun display because that gun could have been the murder weapon. (RB 121.) Appellant disagrees. As noted above, both Martinez and Rodriquez described the gun they saw as being a different color than People's Exhibit No. T-18A. People's Exhibit No. T-18A is a silver revolver with a dark handle. (29CCT 8664.) Martinez described the gun he saw as black with a dark handle. (16RT 6723, 6729.) Rodriquez described seeing a dark gun with a brown handle. (16RT 6625-6626.) Both witnesses would have to be wrong about the color of the gun they saw for that gun to have been People's Exhibit No. T-18A. Additionally, both Martinez and Rodriquez refused to identify People's Exhibit No. T-18A as the gun that appellant displayed. (16RT 6598, 6724-6726.) They would likewise had to have both been mistaken for People's Exhibit No. T-18A to be the gun involved in the Halloween gun display.

Respondent asserts that at one point in her testimony Rodriquez stated that she was unsure that People's Exhibit No. T-18A was not the gun that she saw. (RB 121, citing 16RT 6598-6599.) The record does not support the claim. Defense counsel asked her, ""[d]oes this look like the gun that you saw just after Halloween?" Rodriquez replied, "[n]o." (16RT 6598.) Subsequently, defense counsel asked, "do you know if this is the gun or not?" Rodriquez replied, "I don't think so." (16RT 6599.) Clearly, Rodriquez denied that People's Exhibit No. T-18A was the gun she saw. Notably, this is consistent with her statement to Detective Lee on January 20, 1992, when the events were freshest in her mind; describing the gun she

saw as dark with a brown handle. (16RT 6625-6626.) This is inconsistent with People's Exhibit No. T-18A. (29CCT 8664.)

Respondent also fails to show that Martinez left open the possibility that People's Exhibit No. T-18A was the gun appellant displayed around Halloween. Respondent observes that Martinez recalled the gun he saw was a revolver with a brown or dark handle. (16RT 6725, 6726, 6729, 6772-6774.) (RB 121.) At trial, Martinez testified that the gun he saw was black. (16RT 6723, 6729.) This is inconsistent with People's Exhibit No. T-18A. (29CCT 8664.) Further, he testified that People's Exhibit No. T-18A was not the gun he saw. (16RT 6729.)

Martinez's and Rodriquez's testimony cannot be reconciled with respondent's claim that People's Exhibit No. T-18A might have been the gun used in the homicide. That claim is based on speculation, not evidence, and must be rejected.

Respondent also argues that the Halloween gun display was properly admitted for another reason, i.e., it tended to show that appellant was contemplating robbery at the time. (RB, p. 122.) Respondent offers no supporting argument for why appellant's displaying a gun in a non-threatening manner (16RT 6618-6619, 6758-6759) to KFC employees with whom he was on good terms (16RT 6733) supports the conclusion that he was contemplating robbing KFC. The claim makes no sense. If appellant wanted to rob KFC, he would not have advertised his intention to his would-be victims. The claim must also be rejected as speculative.

Resorting to propensity reasoning, respondent also contends that the Halloween gun display was properly admitted because it showed that appellant was the type of person who carried a gun; in turn, this tended to

show that, on the night of the shooting, appellant approached McDade with the gun used in the shooting and tended to refute that appellant was gun-free and only obtained the gun at the scene from one or both of the Hodges. (RB 123-124.) Respondent's argument does not identify a permissible theory of admissibility for evidence connecting appellant to guns not used in the charged crimes because it is based on propensity reasoning. Propensity evidence is inadmissible. (Evid. Code, § 1101, subd. (a); *People v. Thompson* (1980) 27 Cal.3d 303, 317 ["The inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with a material fact"].) As appellant demonstrated, none of the challenged instances of appellant's prior gun possession involved the murder weapon. (AOB 272-273.) To infer from evidence that appellant possessed guns that were not the murder weapon that appellant approached McDade armed with the murder weapon requires resort to propensity reasoning. One must deduce that appellant has armed himself on prior occasions with guns that were different from the gun used in the crime; therefore, appellant is the type of person who arms himself with guns; therefore, it is likely that on the night of the shooting, appellant was armed with yet another gun, i.e., the gun used in the shooting. The same type of reasoning was advanced by the state in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 in an effort to justify admission of evidence connecting the defendant to a knife that could not have been the murder weapon in the defendant's prosecution for murder committed with a knife. The reviewing court rejected it as based on propensity reasoning: "The only inference the jury could have drawn from such evidence is that because McKinney had owned a knife in September 1983, he owned a knife in January 1984 [when the murder was committed], *i.e.*, that he was the type of person who would own a knife. The evidence thus was

evidence of another act offered to prove character and giving rise to a propensity inference, and did not tend to prove a fact of consequence." (*Id.* at pp. 1382-1383.) This Court has likewise recognized that evidence linking a defendant with weapons that could not have been used in the charged crime is character evidence because it shows that the defendant "is the sort of person who carries deadly weapons." (*People v. Riser, supra,* 47 Cal.2d 566, 577.)

Respondent relies on language in *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 stating that "'the recurrence of a similar result ... tends (increasingly with each instance) to negative ... innocent mental state, and tends to establish .... [t]he presence of ... criminal, intent accompanying such an act.'" (RB 123.) Respondent then argues that the challenged evidence linking appellant to the three instances of firearm possession was properly admitted to prove appellant's "criminal intent." (RB 124.) This misapplies *Ewoldt.* The passage respondent quotes addresses establishing the element of intent for a charged crime to defeat a claim of mistake or accident by showing that the defendant previously committed crimes similar to the charged crime. (*Ewoldt, supra,* at p. 402.) Appellant's previously possessing a gun without using it in a crime is quite dissimilar from him using it in the charged crimes. There is no "recurrence of a similar result." (*Ibid.*) *Ewoldt* also states that "[i]n order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbor[ed] the same intent in each instance. [Citations.]" (*Ibid.,* citations omitted.) Here, the charged crimes and the three disputed instances of gun evidence were clearly dissimilar. Therefore, the uncharged acts were inadmissible "to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense." (*Id.* at p. 394, fn. 2.)

Even if appellant possessed the gun he displayed around Halloween, the shotgun he sold and the .32 caliber firearm he mentioned to Detective Lee with some sort of nefarious mental state, this would simply tend to prove appellant's criminal predisposition. It does not satisfy the strict requirements for admission of uncharged misconduct evidence to prove intent under Evidence Code section 1101, subdivision (b). (*People v. Ewoldt, supra,* 7 Cal.4th 380, 394, fn. 2.; *People v. Williams* (1988) 44 Cal.3d 883, 905 [because uncharged misconduct evidence is inherently prejudicial, its admissibility must be scrutinized with great care]; *People v. Thompson, supra,* 27 Cal.3d 303, 316 ["If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded"], italics in original, fns. & citations omitted.)

Anticipating an argument that the challenged evidence impeached appellant's assertion to Detective Lee that the .32 caliber firearm was the only gun which appellant ever owned, appellant cited the rule against impeachment on a collateral matter. (AOB 267, citing 30CCT 8982.) Respondent does not take issue with the principle that collateral impeachment is disfavored because its probative value is slight whereas its potential for prejudice and confusion is strong. (AOB 281-282, citing Witkin, 3 Cal. Evid. (4th ed. 2000) Presentation at Trial, §§ 341, 346, pp. 426, 431-433 & *People v. Lavergne* (1971) 4 Cal.3d 735, 744; RB 125-126.) Rather, respondent devotes considerable energy to factually distinguishing *People v. Lavergne, supra,* 4 Cal.3d 735, a decision on which appellant relied to set forth the general rule against collateral impeachment. (RB 125-126.) Since appellant cited *Lavergne* for a general principle, respondent's factually distinguishing it misses the mark. Appellant made a meritorious objection to his statements to Detective Lee connecting him with a .32 caliber firearm, but the trial court erroneously

overruled it. The .32 caliber firearm which appellant referenced was not the murder weapon (which was a .38 caliber firearm), and appellant's statements about it were not probative of any material fact. Since appellant's remarks to Lee about the firearm should have been excluded, their erroneous admission cannot justify introduction of even more firearm evidence which would not be independently admissible.

Therefore, respondent fails to persuade that evidence connecting appellant to three guns that were not used in the charged shooting was properly admitted.

C. The Erroneous Introduction of the Gun Evidence Prejudiced Appellant.

Appellant demonstrated that the erroneous introduction of his connection to the Halloween gun display, the shotgun sale and the .32 caliber firearm prejudiced his efforts to defend against the charge of capital murder. The harm was substantial enough to violate his right to a fundamentally fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment, and undermined his right to a reliable penalty determination, as guaranteed by the Eighth Amendment. (AOB 270-280, 283-284.)

Respondent contends that any error was harmless because there was "overwhelming evidence of appellant's guilt." (RB 126.) Appellant has already addressed this contention and respectfully directs the Court to that portion of his brief. (See Arg. I, § C.4, *ante.*)

Further, respondent asserts that CALJIC No. 2.50, with which the jury was instructed, cured any potential for prejudice because it told jurors not to consider evidence of appellant's uncharged misconduct to show that

he "is a person of bad character or that he has a disposition to commit crimes." (RB 126-127; 31RT 11110 & 2CT 580-581 [CALJIC No. 2.50].) The claim fails to withstand analysis. Although CALJIC No. 2.50 prohibited jury consideration of other crimes evidence for bad character and criminal predisposition, it also told the jury it *could* consider other crimes evidence on the issue of "intent which is a necessary element of the crime," identity of the perpetrator, knowledge or that appellant "possessed the means that might have been useful or necessary for the commission of the crime charged." (31RT 11110 & 2CT 580-581.) The challenged gun evidence did not logically tend to show any of the instruction's authorized purposes. It did not show that appellant possessed the means necessary to commit the charged crime because it failed to show that any of the guns which appellant possessed before the shooting could have been the gun used in the shooting. For the same reason, the challenged gun evidence did not tend to prove appellant's identity as the perpetrator since the inference of identity flows from possession of the instrumentality of the crime. (*People v. Hamilton* (1985) 41 Cal.3d 408, 430.) Nor did the challenged evidence support an inference that appellant harbored "intent which is a necessary element of the crime" due to the lack of sufficient similarity between the uncharged misconduct and the charged crime. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 394 & 402.) Likewise, the disputed gun evidence did not logically tend to establish knowledge because knowledge was not an essential element.

Appellant argued that in order for jurors to rely on the challenged gun evidence to draw the inferences which the instruction authorized, they would have had to first draw impermissible inferences about appellant's bad character and criminal predisposition. For example, for jurors to infer from the gun evidence that appellant possessed the means necessary to

commit the crime, jurors would have needed to reason that because appellant possessed various firearms which were not the firearm used in the shooting, appellant is the type of person who possess deadly weapons, and, therefore, he likely possessed the gun used in the crime. This is precisely the type of reasoning condemned in the instruction and the rule against admission of propensity evidence. At worst, the instruction encouraged jurors to rely on bad character and propensity reasoning in drawing authorized inferences based on the gun evidence. At best, the instruction's conflicting directives – do not use propensity reasoning but feel free to draw an authorized inference that depends on propensity reasoning – cancelled each other out, leaving jurors adrift without appropriate guidance. Either way, the instruction did not cure the harm flowing from the erroneous admission of the gun evidence.

Respondent's reliance on *Estelle v. McGuire* (1991) 502 U.S. 62 is misplaced. (RB 127.) There, the defendant was prosecuted for infanticide. His defense was that the victim sustained her fatal injuries when she fell off a couch when the defendant left the room. (*Estelle v. McGuire, supra,* at pp. 65-66.) Evidence that the victim had sustained prior serious injuries was properly admitted to prove that the injuries she sustained the day she died had been inflicted intentionally, not accidentally. (*Id.* at p. 68.) An instruction informed jurors that they could consider the prior acts on the issue of the defendant's guilt if they concluded that the defendant committed them and found a "clear connection" between them and the charged murder. (*Id.* at p. 67.) The instruction explicitly told jurors that they could not consider the prior act evidence to prove the defendant's criminal predisposition. (*Ibid.*) The opinion reasoned that jurors would have understood the instruction to allow them to consider the victim's prior injuries for permissible purposes, such as intent, identity, motive or plan.

(*Id.* at pp. 73-75.) One of the permissible purposes framed by the evidence was lack of accident or mistake. (*Id.* at pp. 68-69.)

In contrast to *Estelle v. McGuire*, the challenged evidence here was not admitted for any proper purpose. Nor was there any way that jurors could consider it for the purposes permitted in CALJIC No. 2.50 without drawing impermissible inferences about appellant's criminal predisposition.

Respondent also attempts to minimize the prosecutor's reliance on the challenged evidence. (RB 127.) The record belies the assertion. The prosecutor referenced the gun evidence multiple times in his opening statement. (5RT 6356, 6369 [referring to possession of .32 caliber firearm], 6309-6311 [referring to post-Halloween gun display].) Presenting it during the state's case consumed approximately 55 pages of transcript. (16RT 6626-6628, 6570-6571, 6595-6599, 6608-6611, 6615-6619, 6625-6628, 6637, 6722-6726, 6728-6732, 6750-6751, 6753-6765, 6770-6771, 6773-6774, 30RT 10793, 10805; 30CCT 8982, 8984.) Additionally, the prosecutor referenced it four times during his closing argument. Notably, the prosecutor relied on it to encourage jurors to draw impermissible inferences about appellant's criminal predisposition. He argued, "why does he have a gun? Because he's thinking, he's on the criminal, criminal path. ... He's a street kid, and he's thinking that this gun can get me some money. If he's thinking this gun can get me some money, he's thinking about doing an armed robbery." (32RT 11359.) The prosecutor also asserted that appellant "doesn't get that gun because he likes to go target-shooting out in the woods. He's got that gun because he's headed down the criminal path." (31RT 11341-11342.) The prosecutor drew the jurors' attention to the gun evidence by stating, "It sounds like as far back as Halloween of 1991 Carl Powell is thinking about robbing Kentucky Fried

Chicken. [¶] Then one and a half to two months before the murder, according to Ruben Martinez, Carl Powell came to Kentucky Fried Chicken and showed Reuben a gun." (31RT 11186.) Additionally, the prosecutor contended that appellant's Halloween gun display constituted an uncharged crime and was addressed in CALJIC No. 2.50. (31RT 11162-11163.) Thus, the prosecutor took advantage of the erroneously admitted gun evidence, which took considerable time to present, by repeatedly drawing the jurors' attention to it and relying on it to argue that appellant was criminally oriented. This exacerbated its prejudicial effect. (*People v. Woodward* (1979) 23 Cal.3d 329, 341; *McKinney v. Rees, supra,* 993 F.2d 1378, 1386.)

Respondent also argues that because there were permissible inferences that the jurors could have drawn from evidence of appellant's connection to three guns not used in the shooting, appellant's due process right to a fundamentally fair trial was respected. (RB 128.) A due process violation occurs "[o]nly if there are no permissible inferences the jury may draw from the evidence" and it is of "'" such quality as necessarily prevents a fair trial."'" (*Ibid.*, quoting *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) Appellant has demonstrated there were no permissible inferences which jurors could have drawn from the erroneously admitted gun evidence. (See § B, *ante;* AOB 270-280.) Moreover, evidence wrongly linking appellant to numerous firearms not used in the killing was of sufficient quality to deprive appellant of a fair trial. This Court has long recognized the potent prejudicial effect of such evidence. (*People v. Riser, supra,* 47 Cal.2d 566, 577, citing *People v. Wong Ah Leong* (1893) 99 Cal.440; *People v. Yee Fook Din* (1895) 106 Cal. 163, 165-167; *People v. O'Brien* (1900) 130 Cal. 1, 5; *People v. Riggins* (1910) 159 Cal. 113, 121.) So, too, has federal authority. (*McKinney v. Rees, supra,* 993 F.2d 1378;

Alcala v. Woodford (9th Cir. 2003) 334 F.3d 862.) "Rightly or wrongly, many people view weapons, especially guns, with fear and distrust." (*United States v. Hitt* (9th Cir. 1992) 981 F.2d 422, 424.) Such evidence may cause jurors to conclude that the defendant is "the sort of person who ... [is] so dangerous he should be locked up regardless of whether or not he committed this offense." (*Ibid.*)

Respondent's efforts to distinguish appellant's case from the federal decisions on which appellant relied are unpersuasive. (RB 128-129.) In *McKinney v. Rees, supra,* 993 F.2d 1378, the prosecution presented evidence in the defendant's prosecution for murder committed with a knife connecting him with multiple knives that could not have been the murder weapon. Evidence was admitted that the defendant was proud of his knife collection, strapped a knife to his body while wearing camouflage clothing and had scratched "death is his" on his door. (*Id.* at pp. 1381-1382.) *McKinney* observed that the knife evidence was "emotionally charged." (*Id.* at p. 1385.) The prosecution portrayed the defendant as leading a "commando lifestyle" and created an image of him as "a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body. This evidence, as discussed above, was not relevant to the questions before the jury. It served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive." (*Ibid.*) Appellant's case shares parallels with *McKinney.* Here, the prosecution also portrayed appellant as proud of his gun ownership as shown by the Halloween gun display. It emphasized that his connection to guns evidenced his criminal lifestyle, i.e., that he was a "street kid" headed down the "criminal path."

(31RT 11341-11342, 32RT 11359.) Indeed, the prosecution speculated that appellant's Halloween gun display meant that appellant was contemplating robbery. (*Ibid.*) The impermissible uses to which the state put the gun evidence in appellant's case are on par with those in *McKinney.*

Although appellant's case is distinguishable from *McKinney* because appellant, unlike McKinney, confessed, appellant's confession was only one of several versions of the incident which he gave to the police. (30CCT 8973 - 31CCT 9036.) Jurors had to decide to what extent they found it believable, particularly in regards to a delicate assessment of appellant's mental state. Did appellant approach McDade with innocent intent to talk about getting his job back, only to succumb to pressure from the Hodges to rob and kill or did appellant set out with these criminal objectives clearly in mind? There were no eyewitnesses to the shooting. Appellant's mental state was based on circumstantial evidence, which warranted competing inferences. The prosecution's portrayal of appellant as a criminally oriented "street kid" who was proud of possessing firearms, frequently possessed them and, as evidenced by his connection to firearms, was contemplating robbery, was emotionally charged and, as in *McKinney,* deprived appellant of a fair trial.

In *Alcala v. Woodford,* 334 F.3d 862, the Ninth Circuit ruled that erroneous admission of knife sets that were not the murder weapon constituted constitutional error. The prosecutor emphasized the irrelevant knives in his closing argument, they fit into the state's theory of "strange coincidences" (the murder weapon and knife sets were made by the same manufacturer), and they tended to bolster proof of the defendant's identity as the killer, where identity was in significant dispute. (*Id.* at pp. 886-888.) Although respondent correctly points out that appellant admitted to

shooting McDade (RB 131), *Alcala* nevertheless supports appellant's position. Here, too, the prosecution emphasized the irrelevant weapons evidence. As noted above, the prosecutor outlined it in his opening statement, devoted substantial time to developing it during trial and repeatedly mentioned it in his closing argument. Further, the evidence was used to strengthen the state's case concerning the disputed issue of appellant's intent. It did so based not on legitimate inferences but based on impermissible propensity reasoning.

Therefore, respondent has failed to overcome appellant's showing that erroneous introduction of evidence linking appellant to numerous firearms that could not have been used in the homicide requires reversal of appellant's convictions for robbery and murder, the robbery-murder special circumstance and the penalty determination of death.

VIII.

THE ERRONEOUS INTRODUCTION OF BAD CHARACTER EVIDENCE PERTAINING TO GANGS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND REQUIRES REVERSAL.

Appellant demonstrated that the trial court erred to his prejudice in allowing introduction of irrelevant and prejudicial gang evidence. (AOB 285-308.) Respondent replies that the claim has been partially forfeited, there was no error and any error was harmless. (RB 131-140.)

Initially, respondent contends that appellant forfeited appellate claims concerning admission of (1) evidence that appellant's friend, Roosevelt Coleman, was a Crip with the street name "Baby Snake;" and (2) Schuyler's testimony describing appellant's manner of dress as "Crippin'." (RB 134-135.) The claims were preserved for review. As appellant pointed out, he made a successful *in limine* objection to introduction of any gang evidence. (5RT 2116.) The trial court broadly ruled that all gang evidence was irrelevant and inadmissible because there was no gang angle to the case. (5RT 2116-2117.) It subsequently reiterated its ruling on multiple occasions (15RT 6235, 16RT 6791-6794, 6798, 17RT 6822-6823) and made clear that no gang references could be admitted unless the matter was first litigated outside the jury's presence and the court found that the probative value of the gang evidence outweighed its potential for prejudice. (16RT 6799-6800, 17RT 6801, 6803, 6822-6823). Respondent cites authority for the proposition that *in limine* rulings are not binding because subsequent developments during trial may give the trial court solid grounds for reconsidering its pretrial decision. (RB 134-135 & cases cited therein.) Respondent, however, fails to point to any subsequent developments which

would have given the trial court reason to part from its *in limine* determination.

When the trial court made this ruling, it understood how the gang evidence fit into the context of the case. Consequently, appellant did not need to reiterate his *in limine* objection each time gang evidence was referenced at trial. (*People v. Morris* (1991) 53 Cal.3d 152, 190, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) This Court has observed that an *in limine* objection can preserve a claim of evidentiary error under Evidence Code section 353 under certain circumstances:

> ... [A] specific objection to a particular body of evidence can be advanced and ruled upon definitively on a motion *in limine,* thus satisfying the requirements of the statute. In this case, for example, defendant made a motion *in limine* to exclude all of the testimony of the two female witnesses based on allegedly coercive terms in their written plea agreements. The motion was clearly and unequivocally denied. The objection was specific, it was directed to an identifiable body of evidence, and it was advanced at a time when the trial judge could give fair consideration to the admissibility of the evidence in its context. Moreover, the Attorney General does not point to any event in the trial occurring after the *in limine* ruling and before the evidence was offered that so changed the context as to constitute a basis for reconsideration of the ruling. Under these circumstances, defense counsel was justified in concluding that a mere repetition of the same objection advanced on the motion *in limine* would serve no useful purpose. The objection having been made and ruled upon, the issue was preserved for appeal.
>
> (*Ibid.*; citation omitted.)

Here, too, appellant made a timely and specific objection to an identifiable body of evidence when the trial court could fairly consider its admissibility in context. The trial court likewise made an unequivocal ruling on the objection. Additionally, nothing transpired to give the trial court reason to reconsider its decision. Accordingly, appellant's *in limine* objection to introduction of gang evidence was sufficient to preserve the issues raised for review.

Appellant's claims have not been forfeited for additional reasons. As appellant demonstrated, his request for a curative admonition concerning Schuyler's testimony that appellant was "crippin'" satisfied the requirement for a timely and specific objection under Evidence Code section 353. (AOB 298.) Appellant relied on two decisions to support his position. In *People v. Jennings* (1991) 53 Cal.3d 334, 375 this Court found a claim of error preserved because the defendant sought "some ... form of remedial action" to combat improperly admitted evidence. Also, in *People v. Elliot* (2005) 37 Cal.4th 453, 481, it recognized that a request for a limiting instruction serves the same purpose as a contemporaneous objection to evidence. Respondent fails to address and hence distinguish these decisions. Because appellant brought the error in Schuyler's testimony to the trial court's attention in time for it to rectify it, appellant satisfied the purposes of the contemporaneous objection rule. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.) Appellant's claim has, therefore, been preserved.

In light of the trial court's refusal to admonish the jury to disregard Schuyler's gang reference that appellant was "crippin" (18RT 7194-7195, 7198-7199), appellant's failure to later object to or otherwise request remedial action concerning his reference to detective Lee that Coleman as a

Crip with street name Baby Snake must be excused as futile. (AOB 298-299.) Respondent characterizes the comparison as "inapt" (RB 135), but both referred to the Crip criminal street gang and both should have been excluded under the trial court's *in limine* ruling. Moreover, any objection to the Coleman gang references would have come on the heels of the trial court's overruling appellant's objection to other gang references in his statement to Lee, i.e., references to his own street name and house name and to associating with "homies" and a "road dog." (23RT 8867-8868, 8893-8894.) This, too, supports that an objection directed at the Coleman gang references would have been futile. (See *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365 & fn. 8 [where counsel's hearsay objection was overruled as to one statement, same objection to similar statements was unnecessary and, hence, the failure to object to the latter statement did not waive the asserted error for appeal].) Respondent replies to appellant's futility argument with only conclusory assertions which, by their nature, are unpersuasive. The trial court's persistent, unfavorable rulings concerning gang evidence once the evidentiary portion of the guilt phase started excuse appellant's failure to object to the Coleman gang references. Accordingly, appellant's claim of error has been preserved.[29]

Next, respondent's defense of the trial court's challenged rulings on their merits is feeble and must be rejected. (RB 135-136.) Respondent simply observes that a trial court has discretion in determining whether to admit gang evidence. (RB 136.) While this is true, respondent offers no

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[29] If trial counsel failed to preserve appellant's challenge to the gang evidence for review, appellant maintains in his petition for writ of habeas corpus that counsel rendered ineffective assistance. (Pet HC, Claim VI, § B, 312-335.)

reason in support the trial court's exercise of discretion here. Nor can respondent. As the trial court aptly observed, there was no gang angle to the case and gang evidence was irrelevant and prejudicial. (5RT 2116-2118.) The court should not have admitted it in contravention of its pretrial ruling.

Nor, as respondent claims, was any error was harmless. (RB 136-140.) As respondent correctly points out, the defense did not dispute that appellant was the shooter; rather, it contested appellant's mental state at the time of the charged robbery and murder. (RB 136; see 31RT 11249-11250.) Respondent fails to logically support the government's claim that the gang evidence was harmless because the issue in dispute had been narrowed to intent. The inherently prejudicial nature of gang evidence threatens to invite jurors to reason that the accused has a criminal disposition and, therefore, committed the charged crimes. (*People v. Williams* (2009) 170 Cal.App.4th 587, 612.) This danger applies when intent is in dispute. Once jurors conclude that a defendant has a criminal disposition, they are likely to find him guilty of the charged crimes by failing to hold the state to its burden of proof. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 230 [gang evidence threatens to cause jurors to reason that, regardless of whether the defendant committed the charged crimes, defendant "had committed other crimes, would commit crimes in the future, and posed a danger to police and society in general and thus he should be punished"].)

Moreover, contrary to respondent's assertions (RB 136-138), jurors would have suspected gang connotations to the challenged evidence of appellant's street name, style of dress described as "crippin," association with his "homie" and "road dog," and association with a Crip who also had

a street name. Respondent addresses each item of evidence in isolation in an effort to down play its significance. (*Ibid.*) The fact is, however, that *all* the challenged evidence was admitted and it *all* combined to create and reinforce gang connotations harmful to the defense. Jurors are astute and live in the real world. They did not need the gang aspect of the evidence to be explicitly spelled out for them. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 905 [although the prosecution did not explicitly call the youth group appellant and his friends belong to a "gang," jurors undoubtedly identified it as such, either from their personal knowledge or from their in-court observations of the witnesses' age, ethnicity, and tattoos"].) Because the prosecutor knew this, he sandwiched references to appellant's street name between references to appellant's Halloween gun display in his opening statement to imply that appellant was a gun-toting gang member. (15RT 6310-6311.) As appellant pointed out, a "homie" is by definition a gang-member. (AOB, p. 304; see www.thefreedictionary.com and www.dictionaryreference.com [defining "homie" as "homeboy" and further defining "homeboy" as a "fellow gang member"].) Further, it is common knowledge that gang members have monikers or street names. (AOB 302 & cases cited therein.) Moreover, if there was any doubt about whether a street name suggests gang membership, detective Lee dispelled it by explicitly linking Coleman, a Crip, to having a street name. (34CCT 9023, 9030.) When appellant hesitated to tell lee Coleman's street, Lee chided him by saying, "you know he's got a street name." (*Ibid.*) Lee implied that Coleman had a street since he was a Crip and gang members have street names. Respondent dismisses as speculative the notion that because appellant associated with Coleman, a Crip, jurors would have also suspected that appellant was also a Crip. (RB 137.) This naïve assertion must be rejected. Guilt by association has a powerful appeal. (E.g., *People*

v. Perez (1981) 114 Cal.App.3d 470, 477 [irrelevant gang membership evidence allowed jurors to draw unreasonable inferences about defendant's guilt based on theory of guilt by association].) Counsel for John Hodges was so concerned that the Hodges jurors would infer John Hodges's guilt from his association with appellant that he requested that the court give a curative admonition distancing John Hodges from Schuyler's testimony that appellant was "crippin." (18RT 7194.) Further, by the time jurors heard that Coleman was a Crip who obviously had a street name (24RT 8893-8894 [jurors watch videotape of appellant's statement to Lee]), they had already heard that appellant himself had a street name (see 34CCT 8974 & 34CCT 9023, 9030) and Schyuler's description of appellant as "cripping." (18RT 7170). There can be little doubt that, considering the evidence as a whole, jurors concluded that appellant was Crip who associated with other Crips, such as Coleman and his "road dog" and "homies."

Respondent distinguishes appellant's case from decisions on which appellant relied because, according to respondent, the gang evidence in those cases was more pervasive than in appellant's. (RB 138-140.) Appellant cited these decisions to argue that because gang evidence is highly inflammatory, its admissibility should be examined with great care, and it should be excluded if its probative value is weak. (AOB 300-301 & case cited therein.) Respondent's factually distinguishing these opinions fails to advance the government's cause. Unquestionably, the principles they stand for are good law. (See, e.g., *People v. McKinnon* (2012) 52 Cal.4th 610, 655 [because gang evidence "'may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it' [citation]"].)

Appellant also pointed out that the erroneous introduction of gang evidence will result in reversal, particularly if the gang evidence is cumulative of other, less prejudicial evidence, and he cited several supporting decisions. (AOB 301, citing *People v. Cardenas, supra,* 31 Cal.3d 897, 904-905; *People v. Albarran, supra,* 149 Cal.App.4th 214, 225-232; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) Respondent argues that the gang evidence in these decisions was more pervasive and inflammatory than the gang evidence in appellant's. (RB 138-140.) Contrary to respondent's claim, the gang evidence in *People v. Cardenas* is comparable to that here. *Cardenas* reversed the defendant's robbery conviction in a case where the defendant's identity as the culprit was open to doubt due largely to the erroneous introduction of evidence that the defendant and certain defense witnesses all belonged to a youth group called El Monte Flores. (*Cardenas, supra,* at pp. 902-903, 910.) Some of the witnesses were asked to display their tattoos before the jury. (*Id.* at pp. 902-903.) The prosecutor also asked questions advancing the speculative suggestion that the charged robbery had been a gang operation. (*Id.* at p. 905-906.) The gang evidence was offered to show that defense witnesses were biased in favor of appellant due to their common association with him, but appellant's friendship with these individuals was amply established by other, properly admitted evidence. (*Id.* at p. 904.) *Cardenas* found that the gang evidence created substantial danger of undue prejudice because "[t]here was a real danger that the jury would improperly infer that appellant had a criminal disposition because (1) the El Monte Flores was a youth gang; (2) such gangs commit criminal acts; and (3) appellant was a member of the Flores gang." (*Ibid.*)

Similar to the identification evidence in *Cardenas,* the evidence of appellant's mental state was subject to competing inferences. (See Arg. I, §

C.4, *ante.*) Jurors would have understood the challenged evidence to pertain to gangs based on reasonable inferences drawn from the totality of the evidence and from their common knowledge. (*People v. Cardenas, supra,* 31 Cal.3d 897, 905.) The gang evidence was either irrelevant or, as in the case of Schuyler's description of appellant's dressing like a Crip, cumulative. As in *Cardenas,* jurors were likely to draw highly damaging inferences concerning appellant criminal predisposition and rely on them to convict appellant irrespective of whether the prosecution had met its burden of proof. Additionally, the gang evidence also combined with other improperly admitted and inflammatory evidence, namely appellant's connection to various firearms that could not have been used in the charged crimes. (See Arg. VII, *ante.*) Accordingly, this case is like *Cardenas* and also requires reversal.

This case stands in contrast to *People v. Abel* (2012) 53 Cal.4th 891, which found introduction of evidence of the defendant's gang membership to be harmless. (*Id.* at pp. 925-926.) There, the prosecutor elicited from a witness that she feared her son would be harmed due to her testifying and started to explain that he was affiliated with a gang to which the defendant had once belonged. (*Id.* at p. 923.) Assuming the reference was erroneously elicited, this Court deemed it harmless because it was fleeting and the prosecutor quickly changed the subject rather than exploiting it during the witness's testimony; the trial court gave a curative admonition and jurors otherwise heard that the "defendant was a dangerous man who had committed numerous violent crimes and had spent a substantial portion of his life in prison." (*Id.* at p. 925.) In contrast, here evidence suggesting appellant's gang membership and association with other gang members was repeatedly presented. The trial court did not take remedial action but simply let it in without admonishing the jury to disregard it. Additionally,

the evidence portrayed appellant as an immature teenager, without violence or incarceration in his past, who was slow and easily dominated by more forceful individuals. (See also *People v. Fuiava* (2012) 53 Cal.4th 622, 689 [defendant could not have been prejudiced by prosecutor's alleged misconduct in unduly emphasizing gang membership where trial court sustained defense counsel's objections to prosecutor's questions and other evidence already indicated defendant was a gang member].)

Therefore, respondent's efforts to defend the introduction of prejudicial gang evidence against appellant must be rejected.

IX.

APPELLANT'S STATEMENTS TO LITTLEJOHN THAT HE INTENDED TO COMMIT ROBBERY IN THE FUTURE SHOULD HAVE BEEN EXCLUDED AS MORE PREJUDICIAL THAN PROBATIVE.

Appellant demonstrated in his opening brief that the trial court committed prejudicial error in admitting over appellant's objection his statement to Angela Littlejohn that he wanted to get his gun back to "get ... money." (AOB 309-320.) Respondent disagrees. (RB 140-147.)

Initially, respondent claims that portions of appellant's claim have been forfeited because trial counsel did not make the same exact points below as appellant makes in his opening brief: i.e., that the challenged evidence was cumulative and its prejudicial effect was exacerbated by Littlejohn's commentary that appellant and his associates would use the gun to kill, a commentary which, considered in context, preyed on fears associated with race and gangs. (RB 142.) Respondent cites *People v. Saunders* (1993) 5 Cal.4th 580, 589-590 as support, but *Saunders* simply provides that a party must make a timely and specific objection below to preserve a claim of error for appeal. (*Ibid.*) Appellant did so. Counsel objected to specific evidence: appellant's statements to Littlejohn about getting his gun back to do more robberies. Also, counsel objected on specific grounds: counsel cited Evidence Code sections 352 and 1101 and argued that the challenged evidence was "too prejudicial," particularly because it related to hypothetical future conduct. (15RT 6788-6790, 28RT 10372-10373.) Counsel's timely objection to specific evidence on specific legal grounds was sufficient to preserve the argument appellant now raises. (Evid. Code, § 353.) It fairly apprised the trial court of the issue presented

so as to give the court a chance to cure the error. (*People v. Seaton* (2004) 34 Cal.4th 193, 198.)

It was not necessary for counsel to explain in detail every reason why the challenged evidence was more prejudicial than probative or evoked the prohibition against admission of propensity evidence in order to preserve appellant's rights to advance these reasons on appeal. Respondent fails to cite any authority requiring appellate arguments to parrot exactly what was said below. The law is more flexible. For example, in *People v. Livaditis* (1992) 2 Cal.4th 759, trial counsel objected to "other crimes" evidence but not to a specific cocaine-related other crime. *Livaditis* found the argument preserved for review: "[a]lthough defendant did not specifically object to the evidence regarding the cocaine, we believe that defendant's general objections on the grounds argued on appeal to all of this evidence, which were overruled, were sufficient to satisfy the contemporaneous objection rule. (Evid. Code, § 353.)" (*Id.* at p. 775, fn. 3; see also *People v. Briggs* (1962) 58 Cal.2d 385, 410 [issue preserved "[e]ven if ... the objection was not properly phrased, and even if it was not stated in the most precise terms"].) Therefore, appellant's challenge to his statements concerning future robberies has been preserved in its entirety.[30]

In defending the trial court's ruling, respondent ignores the inherent potential for prejudice which this Court has recognized exists in statements of possible future criminal conduct in a hypothetical situation. *People v. Karis* (1988) 46 Cal.3d 612 acknowledged that such statements have at

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[30] If trial counsel failed to preserve appellant's challenge to the admission of appellant's statement of future intent to rob, appellant contends in his petition for writ of habeas corpus that counsel rendered ineffective assistance. (PetHC, Claim VI, § C, 335-349.)

least as much potential for prejudice in suggesting criminal propensity as does evidence of other crimes, which is well-recognized to be "highly prejudicial." (*Id.* at p. 312.) Due to their great potential for prejudice, such statements should be admitted only after having been "carefully examined." (*Ibid.*) Respondent devotes the bulk of the government's reply to asserting the relevance of appellant's statements about wanting his gun back to "get ... money." (RB 143-144.) Appellant did not dispute that the statements had some relevance. (AOB 314.) Rather, he demonstrated that their potential for prejudice outweighed their probative value.

Appellant observed that the statements were about hypothetical circumstances in the future made by an immature teenager who was bragging to girls about his bravado. (AOB 315; 31CCT 9023, 9261, 9263; 23RT 8850; see also 31RT 11256 [defense counsel argues that appellant was immature because he associated with Roosevelt Coleman, who was only 15 years old].) Moreover, appellant made the statements when he was already wanted by the police and had nothing to lose. (30CCT 8987 [appellant's mother tells him to turn himself in because he is wanted by the police].) Since appellant had become an outlaw, even if he had acted under duress or without the requisite criminal mental state, nothing stopped him from confirming or exaggerating his criminal reputation. His stated post-offense intent to rob was not necessarily probative of his earlier intent, when circumstances were different.[31] (Cf. *People v. Karis, supra,* 46

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[31] In the film, *Thelma and Louise*, Louise encounters her drunken friend, Thelma, being raped in a parking lot bar and fatally shoots the rapist. The two women flee and become outlaws. They assume authorities will not believe that Louise acted in self-defense of her friend. Having become outlaws, Thelma commits an armed robbery and the two threaten and falsely imprison a state trooper in pursuit of their new, nothing-left-to-lose

Cal.3d 612, 637 [statement of intent is not probative if circumstances suggest it is transitory].) Further, Littlejohn described appellant as mentally "slow" and "stupid." (28RT 10412, 10431; 31CCT 9263.) While the statements did have some probative value, it was limited by the context in which they were made. (*People v. Karis, supra,* 46 Cal.3d 612, 636-637 [circumstances under which statements are made must be carefully examined to determine if they detract from proof of defendant's claimed intent].) Talk is cheap. People, especially immature teenagers trying to impress others, say things they do not mean. People are especially apt to do this when talking about *hypothetical* circumstances. Why not fantasize and embellish about something that is not real? As appellant pointed out, he also told Littlejohn that he would resist police when they came after him (31CCT 9265), but what actually happened was that the police apprehended appellant when he cowered behind a closet door in a child's room. (19RT 7534, 7536-7537). When appellant's statements are considered with a basic understanding of human nature and in light of their context, it is clear that their probative value was tempered. Respondent replies in a conclusory manner that this is not so. (RB 143-144.) Appellant stands on the showing he has made.

As appellant demonstrated, another factor that diminished the statements' probative force was that they were cumulative of other evidence establishing appellant's intent to rob at the time of the charged crimes. Respondent argues that there was significant evidence presented of appellant's intent to rob but nevertheless maintains that the statements were

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lifestyle. It is plain that their intent in their post-shooting crimes does not reflect their earlier mental state before they became outlaws. (See http://en.wikipedia.org/wiki/Thelma_%26_Louise.)

not cumulative because they "were not replicated by any other witness." (RB 145.) This is wrong. The other evidence establishing intent to rob consisted mainly of appellant's statements to Detective Lee. (30CCT 8976, 31 CCT 9015.) Even under respondent's own terms, appellant's challenged statements were cumulative.

Further, appellant also showed that his statements to Littlejohn about wanting his gun back to "get ... money" carried significant potential for prejudice given their context. Littlejohn related the statements along with her running commentary that she refused to return the gun because, if she did, appellant and his friends would commit murder. (31CCT 9265, 9267, 9285.) When analyzing the probative value versus potential for prejudice of other crimes evidence, a close cousin to statements of future intent, it is proper to consider the source of the evidence and how it is related in court. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) Similarly, the manner in which challenged evidence may link to other evidence presented may also augment its potential for prejudice. (E.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 906.) Littlejohn's gloss was severely damaging. It portrayed appellant, as well as his associates, as willing to not only rob but also kill simply because they were young, reckless and "stupid" and "money makes your head swell." (31CCT 9266, 9291.) Littlejohn painted a portrait of a group of reckless, young, African-American men predisposed to commit violence under unspecified circumstances. Appellant contended that such an image would have easily preyed on jurors' fears of gangs and possibly even have evoked negative stereotypes which jurors held about racial minorities. (AOB 317-318.) Respondent's replies to these points are superficial and conclusory. According to respondent, there was no danger jurors would take Littlejohn seriously, appellant's statements did not refer to gangs, and there is no showing any juror actually harbored racial bias.

(RB 145-146.) Because Littlejohn knew these young men, jurors were likely to take her concerns seriously. She also had a forceful personality, which comes through even on the "cold record" on appeal. (See 31RT 11293 [in argument, counsel characterizes Littlejohn a "pretty severe woman" who reminded him of the song, "pork salad and a mean razor-toting woman"].) Consequently, jurors would have registered her concerns clearly.

In regards to respondent's remaining points, respondent overlooks that evidence with undue potential for prejudice threatens to evoke an *emotional bias* against the accused which lacks any legitimate bearing on the issues. (*People v. Karis, supra,* 46 Cal.3d 612, 638.) Determining whether such potential for prejudice exists requires more than just skimming the surface of the evidence presented or jurors' admissions about their prejudices or lack thereof. For example, *People v. Cardenas, supra,* 31 Cal.3d 897 deemed evidence of the defendant's association in a youth group unduly prejudicial because it had clear gang connotations and jurors, like the public at large, harbor fears about gangs in general. Appellant's case deserves the same sort of sophisticated scrutiny, especially because the statements at issue are, like other crimes evidence, inherently prejudicial. (*Karis, supra,* at p. 636.) Further, this is a capital case where there is a heightened need for reliability in the verdict. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Respondent also argues that there was overwhelming evidence against appellant so any error was harmless. (RB 146.) Appellant respectfully directs this Court to his earlier response to this claim. (See Arg. I, § C.4, *ante.*)

Therefore, respondent has failed to overcome appellant's showing that the trial court committed prejudicial error in admitting his statements to Littlejohn that he wanted his gun back to "get … money."

X.

ADMISSION OF AN IRRELEVANT AND UNDULY GRUESOME PHOTOGRAPH OF THE DECEDENT, PEOPLE'S EXHIBIT NO. T-4, REQUIRES REVERSAL.

Appellant demonstrated in his opening brief that the trial court abused its discretion in admitting, over appellant's objection, People's Exhibit No. T-4, a close-up photograph of the decedent showing a large amount of blood. (AOB 321-330.) Respondent replies that the claim was partially forfeited, the photograph was properly admitted and any error was harmless. (RB 147-152.)

Initially, respondent argues that "[p]art of this argument has been forfeited and it must be denied." (RB 147.) Because respondent offers no supporting argument (see RB 147-152), the claim must be rejected. As appellant demonstrated, defense counsel objected to People's Exhibit No. T-4 as inflammatory, and he joined in the arguments of the Hodges brothers (19RT 7475, 7555-7556), who asserted that the exhibit's potential for prejudice outweighed its probative value under Evidence Code section 352. (2CT 460-465; 15RT 6259-6261; 19RT 7475, 7549-7550, 7553-7556). Given this context, it is clear that the trial court understood the basis for counsel's objection. (*People v. Scott* (1978) 21 Cal.3d 284, 290.) Therefore, appellant's challenge to admission of People's Exhibit No. T-4 has been preserved.

Next, respondent asserts that People's Exhibit No. T-4 was relevant. (RB 150.) Appellant conceded that the exhibit was relevant to show the nature and placement of the fatal wound. (AOB 326.) Specifically, it illustrates that the victim was shot in the temple and, due to the presence of gunpowder fouling and tattooing around the wound, it supports witness

testimony that the shot was fired from close range. (AOB 326; AOB 324 [citing coroner Schmuck's testimony].) Simply because evidence is relevant, however, does not render it admissible under Evidence Code section 352. It must be excluded under that provision if its potential for prejudice substantially outweighs its probative value. (*People v. Turner* (1984) 37 Cal.3d 302, 321; *In re Cortez* (1971) 6 Cal.3d 78, 85-86.) This is the case here.

Appellant argued that the disputed photograph exhibited substantial potential for prejudice because it showed the victim with a significant amount of blood on his chest. The large amount of blood was gruesome and inflammatory and thus threatened to evoke an emotional response from jurors against appellant due to the "horror of the crime...." (*People v. Chavez* (1958) 50 Cal.2d 778, 792.) The victim's loss of blood did not add to the state's case. (AOB 328-329; see also AOB 323, citing 19RT 7553-7556 [defendants argue that principal value of photograph to state was how it tended to inflame jurors by showing more blood than did other photos].) The coroner testified that death would have been nearly instantaneous and did not factor blood loss into the cause of death. (27RT 9986, 10002.) Notably, respondent does not argue that the victim's blood loss was probative.

Additionally, appellant demonstrated that the inflammatory nature of People's Exhibit No. T-4 substantially outweighed the photograph's probative value because the exhibit was unnecessary to the state's case. Two other photographs were admitted which also showed the nature and placement of the fatal wound and visible powder burn around the wound: People's Exhibit Nos. T-3 and T-59B. (AOB 324-325.) Coroner Schmuck, the witness most knowledgeable about the significance of powder burns out

of the three prosecution witnesses who addressed the topic (coroner Schmuck, officer Chapman and detective Lee), admitted that the disputed exhibit was unnecessary to his rendering an expert opinion that the victim was shot at close range. (AOB 324, 328-329.) The coroner made clear that the other exhibits also illustrating the wound and powder burn were all that he required. (*Ibid.*) Thus, although People's Exhibit No. T-4 offers a close-up of the wound and powder burn, the close-up was unnecessary to illustrate the coroner's testimony or to serve as a basis for his expert opinion. Respondent offers no answer to this point and, therefore, fails to refute it. (RB 150-151.)

At best, respondent observes that People's Exhibit No. T-4 illustrated a basis for the opinions of the coroner and officer Chapman that the gunshot was fired at close range. (RB 150.) Appellant has already addressed coroner Schmuck above. In regards to officer Chapman, the officer was not deemed an expert in powder burns, and his primary significance as a witness was that he discovered the body and secured the crime scene. (See AOB 328-329.) The testimony of a witness of minor importance concerning powder burns should not be used as a gateway to admission of such a gruesome exhibit.[32] (*Ibid.*) By ignoring this contention, respondent fails to overcome it.

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[32] Appellant pointed out that Detective Lee also testified that McDade had been shot at close range as evidence by the powder burn around his wound, and Lee confirmed that McDade appeared as shown in People's Exhibit No. T-4. (AOB 324, citing 23RT 8828-8829.) No evidence was presented about Lee's expertise in interpreting powder burns. Thus, Lee was even more peripheral of a witness on this topic than was officer Chapman, who testified that he had been taught about them in the police academy and on-the-job training. (19RT 7467, 7470-7471.)

Otherwise, respondent resorts to conclusory reasoning to argue that the exhibit's potential for prejudice failed to outweigh the exhibit's probative value. (RB 151.) The nature of the assertion precludes a meaningful reply, and appellant stands on the showing he has previously made.

Respondent also argues that the error was harmless. (RB 151-152.) First, respondent asserts that "it does not appear that the jury used the photos during deliberations. (3CT 670, 672.)" (*Ibid.*) The claim overlooks the court's comment to the jurors that the evidence and exhibits would be made available to them in the jury room. (32RT 11375; see also 32RT 11378-11379 [court and counsel discuss counsel's verifying with court clerk that only those exhibits properly admitted against appellant would be made available to the jurors].) Second, respondent contends that any error was harmless because the evidence of appellant's guilt was "overwhelming." (RB 152.) Appellant has previously replied to this point and respectfully directs this Court to that portion of his brief. (See Arg. I, § C.4, *ante.*)

XI.

APPELLANT'S ABSENCE FROM CRITICAL PROCEEDINGS PERTAINING TO WHETHER HE WOULD TESTIFY AND THE SUBSTANCE OF HIS TESTIMONY CONSTITUTES REVERSIBLE ERROR.

Appellant demonstrated that his absence from multiple proceedings pertaining to a key issue which dominated his trial – whether and for whom he would testify – constituted reversible error. (AOB 331-342.) At the proceedings which appellant missed (April 18, April 19, May 17, July 6, and July 11, 1994), defense counsel described appellant's anticipated testimony and assured everyone not only that appellant would testify, but that he would do so as a witness for the state, which was actively seeking to convict him of capital murder and sentence him to death. Counsel acknowledged that the state had not offered appellant any consideration in exchange for his testimony. Further, in violation of the attorney-client privilege, counsel outlined appellant's testimony. What occurred at these proceedings was directly relevant to the prosecutor's highly prejudicial broken promise of appellant's testimony. (See Arg. I, *ante.*) Respondent replies that no error occurred due to appellant's absence and, even if it did, it was harmless. (RB 152-160.)

A criminal defendant has a due process right under the federal and state constitutions to be personally present at any proceeding which is critical to the outcome of his trial if his presence would contribute to its fairness. (U.S. Const., amend. XIV; Cal. Const., Art. I, § 15; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745.) A defendant may personally waive the right if the waiver is knowing, intelligent and voluntary. (*People v. Robertson* (1989) 48 Cal.3d 18, 60-62.) Further, a capital defendant has a statutory right to be present at all proceedings unless the defendant executes

a written waiver in open court.[33] (Pen. Code, §§977, 1043.) Respondent does not contend that appellant personally entered a knowing, intelligent and voluntary waiver or a written waiver. Rather, respondent argues that because the hearings appellant missed were not substantially related to his opportunity to defend, counsel's proceeding in appellant's absence was a sufficient waiver of appellant's right to be present.[34] (RB 159, citing *People v. Cooper* (1991) 53 Cal.3d 771, 825.) Appellant now turns to the question of whether the proceedings appellant missed were substantially related to his opportunity to mount a defense.

Respondent asserts that appellant's presence was unnecessary because the proceedings at issue addressed questions of law. (RB 152, 157-158.) Certainly, some of the discussions did address questions of law. But extremely important questions of fact directly pertaining to appellant's defense, which were uniquely within appellant's knowledge and control, were also substantially addressed in appellant's absence. At the proceedings at issue, defense counsel revealed the factual nature of appellant's defense, i.e., that appellant acted under duress from the Hodges. (2RT 1020 [4/18/94 hearing]; 14RT 5963-5964 [7/6/94 hearing].) Counsel also represented that the defense would be established through appellant's testimony. (*Ibid.*) Plainly, appellant had intimate knowledge of these crucial facts. They affected the "whole complexion of the trial" by making

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[33] A capital defendant may also forfeit his right to be present by disruptive behavior. (Pen. Code, § 1043.) It is undisputed that appellant did not engage in disruptive behavior.

[34] If defense counsel's proceeding in appellant's absence waived appellant's right to be present, appellant maintains in his petition for writ of habeas corpus that counsel rendered ineffective assistance. (PetHC, Claim VII, § A, pp. 352-353.)

appellant a potential ally of the prosecutor against the Hodges. (See 14RT 5960.) Because the substance of appellant's testimony was revealed, appellant's presence at these hearings bore a "substantial relationship to ... defendant's opportunity to better defend himself." (*Kentucky v. Stincer, supra,* 482 U.S. 730, 746.)

Further, the court and parties discussed at length in appellant's absence if appellant would take the stand and testify that he was coerced by the Hodges. (2RT 1019-1022 [4/18/94 hearing], 2RT 1103-1109 [4/19/94], 14RT 5900-5901, 5911, 5932-5933, 5934, 5938, 5947-5948, 5965-5967 [7/6/94], 6095, 6108 [7/11/94].) The court and the attorneys took divergent positions on whether appellant would testify at all, and particularly whether he would testify for the prosecution. Castro stated that appellant would testify for the state. (2RT 1019-1022.) Holmes, on the other hand, emphasized it was impossible to say one way or the other since the decision was entirely appellant's and he could make it at any time. (14RT 5934.) The trial court expressed disbelief that appellant would testify for the prosecution. (2RT 1022.) It cautioned everyone to proceed with the understanding that appellant could choose to assert his right to testify or remain silent throughout trial. (2RT 1022, 14RT 5947-5948.) The prosecutor was uncertain about whether appellant would testify. (14RT 5911.) Later, he decided to call appellant. (14RT 6095, 6108.) Counsel for the Hodges emphasized that it was impossible to know whether or not appellant would testify. (2RT 1022, 14RT 5938, 5966.)

Appellant had an unconditional, constitutional right to decide to either testify or remain silent, even over his counsel's objection. (*Rock v. Arkansas* (1987) 483 U.S. 44, 52.) Whether or not appellant would testify was a factual matter uniquely within appellant's knowledge and control.

What and when appellant would decide about testifying or remaining silent was uncertain either until appellant took the stand or the trial ended without his testimony. As defense counsel Holmes expressed at the July 6, 1994, hearing held in appellant's absence, "[t]he thing we have to remember here is Mr. Powell himself is the one that ... is in control up to the very last minute if he wants to get on the stand or not. And I think where somebody is setting themselves up for a couple of mistrials here if he in fact doesn't testify. He's already got up and told both juries what he's going to say." (14RT 5934.)

Had appellant been present at the proceedings he missed, he could have made an earlier, better-informed, decisive decision about whether to testify or remain silent given that the prosecution was not offering him any consideration in exchange for his testimony against the Hodges (14RT 5954-5956) and such testimony would label him a snitch. (15RT 6268). Instead, the issue of appellant's testimony remained unresolved until trial ended without it. Counsel for appellant expressed the belief that appellant would testify "when I tell him to," whereas counsel for John Hodges related different information, that appellant would not testify. (2RT 1019, 16RT 6667, 30RT 10819-10820; see *Brooks v. Tennessee* (1972) 406 U.S. 605 [defendant has 5th amend. right to wait and see how cases progresses before he decides whether to testify or assert his right to silence].) Given how critical appellant's decision about testifying or remaining silent was to how the trial progressed (see generally, AOB, Arg. I, §B, pp. 79-99 [factual summary]), and given his personal knowledge and control over that decision, the trial court erred in holding the April 18, April 19, May 17, July 6 and July 11, 1994, proceedings in appellant's absence.

Respondent's efforts to analogize the proceedings held in appellant's absence to those from which the defendants were permissibly excluded in *People v. Box* (2000) 23 Cal.4th 1153, 1190-1192 and *People v. Holloway* (1990) 50 Cal.3d 1098, 1115-1116 are unpersuasive. (RB 156-157.) In both cases, the court and parties discussed the admissibility of the defendant's out-of-court statements. Obviously, the defendants had knowledge about the contents of their statements. Unlike in appellant's case, however, the defendants' statements had already been made and were thus static pieces of evidence. (*Box, supra,* at p. 1191; *Holloway, supra,* at pp. 1112, 1116.) They were not factual matters in the process of taking form. The defendants in *Box* and *Holloway,* therefore, were in no position to develop facts at the hearings which they missed. Here, in contrast, appellant was. He could have informed counsel of facts pertaining to the defense theory of duress or taken a definitive stance about testifying or remaining silent. Consequently, appellant's case is more like *People v. Davis* (2005) 36 Cal.4th 510. *Davis* found that the defendant's right to be present had been violated by his exclusion from a pretrial hearing wherein the court and parties came to agreements about unintelligible words on jailhouse tapes of conversations in which the defendant had participated. (*Id.* at pp. 523, 531.)

In addition to having special knowledge about developing facts highly relevant to presentation of his defense, appellant was also in the unique position of being able to assert the attorney-client privilege against Castro's disclosure of his anticipated defense. It is plain from the hearings from which appellant was excluded that Castro's description of appellant's coercion defense came from confidential attorney-client communications with appellant. Castro told the court and parties that appellant would testify he had been coerced. (2RT 1019-1022 [4/18/94 hearing].) The attorney-

client privilege may be asserted by either the client or counsel to block disclosure of privileged information, but only the client can waive it to authorize such disclosure. (*Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 98; *People v. Vargas* (1975) 53 Cal.App.3d 516, 527; Evid. Code, §§ 953, 954, 955.) Appellant was absent from the April 18, 1994, hearing where Castro first disclosed that appellant would testify he acted under duress so that "the Hodges brothers don't get away." (2RT 1019.) Had appellant been present, he could have directed Castro not to violate the privilege. Respondent replies that Castro must have made the disclosure with appellant's authorization, but respondent points to nothing to support the claim. (RB 159.) Respondent's conclusory allegation is unpersuasive.

Respondent next asserts that because appellant's attorneys did not think it was necessary for appellant to be present at the hearings he missed, this supports that appellant's presence "'did not, in fact, bear ... a substantial relation' to the fullness of his opportunity to defend." (RB 159, citing *People v. Jennings* (2010) 50 Cal.4th 616, 683.) Counsel's judgment in this case is questionable. Counsel boldly asserted that appellant would testify on behalf of the prosecution, without any consideration, and furnished the prosecution with appellant's anticipated testimony in violation of the attorney-client privilege. (2RT 1019-1023, 14RT 5954-5956, 5963-5964.) Counsel did so even though the prosecution desperately needed appellant's testimony to bolster an otherwise weak case against the Hodges brothers. (2RT 1020-1022.) The prosecution took a position harmful to appellant: appellant's testimony was credible to the extent it tended to condemn the Hodges and appellant but, to the extent it helped appellant, it was false. (14RT 5926-5927, 6108 [prosecutor states he intends to introduce appellant's statements inconsistent with his anticipated testimony].) Further, defense counsel Castro asserted that appellant would

testify "whenever I tell him to" (2RT 1020) even though appellant had an absolute right to testify or remain silent despite counsel's wishes. (*Rock v. Arkansas, supra,* 483 U.S. 44). Counsel's furnishing appellant's most precious confidences to his adversary intent on his annihilation under these unprecedented circumstances and the arrogance of his false claim that he could control appellant's testimony indicates that counsel's judgment does not deserve the weight respondent attributes to it.

In regards to prejudice, respondent contends that it is appellant's burden to show prejudice. (RB 160.) Consistent with this Court's opinion in *People v. Davis, supra,* 36 Cal.4th 510, 533, the *Chapman* standard for federal constitutional error applies: the error is prejudicial unless the government proves it harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) *Chapman* is the proper standard because the error, appellant's exclusion from hearings at which his presence bears a reasonably substantial relation to his opportunity to defend against the charges, implicates the Fourteenth Amendment right to due process. (*Kentucky v. Stincer, supra,* 482 U.S. 730, 745.) Federal authority also supports that *Chapman* applies. (E.g., *Rushen v. Spain* (1983) 464 U.S. 114, 117-118, 120 (per curiam); *United States v. Gordon* (D.C. Cir. 1987) 829 F.2d 119, 129, fn. 10.)

Respondent also suggests that appellant's absence from the proceedings at issue made no difference because appellant was present at other hearings which also addressed whether he would testify. (RB 154-157 [summarizing various proceedings relevant to issue of appellant's testifying].) While appellant did attend other hearings concerning this issue, the ones he missed were amongst the most, if not the most, significant ones. The April 18, 1994 hearing set the stage for the others and

the July 6, 1994, hearing thoroughly explored the issue of appellant's testifying. At the first hearing, Castro announced that appellant would testify he acted under duress from the Hodges and would do so as a prosecution witness. (2RT 1019-1023.) Once Castro revealed appellant's anticipated testimony, the cat was out of the bag. After this hearing, Castro stated his desire to "lock in" appellant's testimony. (2RT 1108.) He often expressed the expectation that appellant would testify or assured the prosecutor that he would. (E.g., 4RT 1787, 1871-1872, 5RT 1916, 14RT 6095, 15RT 6266.) Subsequently, Castro stated that he adopted the defense theory of duress and decided that appellant would testify "*regardless* of what appellant's desires were." (30RT 10887, emphasis added.) The comments in appellant's presence made it seem like the fact that appellant would testify had already been determined, and they thus exerted pressure on appellant to live up to this expectation. Counsel for John Hodges accused Castro of using his representations that appellant would testify as a means of pressuring appellant into taking the stand. (29RT 10604.) At the July 6, 1994, hearing, it became clear that the prosecutor was extremely interested in presenting appellant's testimony to bolster what he had previously admitted was a weak case against the Hodges, and appellant's testimony stood to seriously impact the entire trial. (14RT 5900-5901, 5905-5906, 5934, 5947-5948.) It was also apparent that the prosecutor would not give appellant any consideration for his valuable testimony. (14RT 5954.) The July 11, 1994, proceeding established the prosecutor's plan to use appellant's testimony while arguing that the real truth lay in appellant's January 27, 1992, statement to detective Lee. (14RT 6108.) Because the hearings from which appellant was absent made clear that appellant's testimony was pivotal and set up the expectation that appellant would testify to duress for the prosecution for no consideration, appellant's

exclusion from them mattered. Appellant could have asserted himself in a manner that altered the course of the trial. He could have said he would not testify no matter what and thereby precluded the prosecutor's broken promise of his testimony. (See Arg. I, *ante.*) The prosecution fails to prove beyond a reasonable doubt that this would not have happened.

Respondent's position that appellant's absence from certain important hearings concerning whether he would testify is insignificant because appellant attended others cannot withstand analysis when taken to its logical extreme. It would mean, for example, that a defendant's absence during testimony by one witness identifying him as the culprit would be rendered harmless by his presence for the testimony of another witness also identifying him. Such an approach is untenable because a defendant may have knowledge of facts affecting the one witness but not the other.

Even more importantly, it is impossible to say when exactly appellant's presence would have realized its potential. Respondent implies that if appellant did not do or say anything at the hearings he attended, there is no reason to believe that his attending the crucial hearings he missed would have made any difference. The position must be rejected. The accused is not a well-calibrated machine who necessarily takes advantage of each opportunity to assert his own best interests in the clearest and strongest terms. He may be mentally slow (as appellant was). He may be shy to speak up. He may not necessarily understand what is going on in court. His position may become clear to him only over time and repeated exposure to the same topic. Respondent's approach is more appropriate for an attorney, who is trained in the law, the art of persuasion and understands how to make an appropriate record. A layperson person accused of violating the law should not be held to such a high standard.

This is especially true for a defendant such as appellant. Appellant was only 21 years old at the time of trial, immature for his age and mentally slow. (23RT 8850, 28RT 10412, 10431; see also 31RT 11255-11256 [counsel's argument].) He was still growing. (23RT 8849-8850.) His brain was still developing and so was his identity. (*Roper v. Simmons* (2005) 543 U.S. 551, 570, 574.) Further, appellant was mentally challenged. Littlejohn described him as "slow" and like he should be receiving SSI benefits.[35] (28RT 10412, 10431.) Respondent does not show beyond a reasonable doubt that, had appellant been present at the proceedings he missed, nothing would have fallen into place for him about whether he should testify and nothing would have changed. Respondent fails to demonstrate to a near certitude that appellant would not have complained about Castro's violating the attorney-client privilege or taken a definitive stance against testifying so as to preclude the prosecutor's broken promise of his testimony. (See Arg. I, *ante* [discussing serious prejudice to appellant's defense resulting from prosecutor's broken promise].)

Accordingly, respondent has failed to persuade that appellant's absence from proceedings conducted on April 18, April 19, May 17, July 6 and July 11, 1994, was harmless beyond a reasonable doubt.

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[35] According to Doctor Nicolas's penalty phase testimony, appellant had an I.Q. of 75, which means that his intellectual abilities are below 96 percent of the population. (34RT 12002, 12006-12007.)

XII.

THE TRIAL COURT ERRED, TO APPELLANT'S PREJUDICE, BY INSTRUCTING THE JURY UNDER CALJIC NO. 2.50 THAT EVIDENCE OF APPELLANT'S UNCHARGED CRIMES COULD BE USED TO PROVE INTENT, IDENTITY, KNOWLEDGE OR POSSESSION OF THE MEANS NECESSARY TO COMMIT THE CHARGED OFFENSES.

The trial court gave CALJIC No. 2.50, directing the jury that it could consider evidence of appellant's uncharged misconduct for only the limited purposes of demonstrating intent, identity, possession of the means necessary to commit the crime and knowledge; it also prohibited jurors from considering such evidence to prove appellant's bad character or criminal predisposition. The instruction pertained to evidence of appellant's uncharged conduct of carrying a concealed firearm. (30RT 10943-10944; 31RT 11162-11163.) Appellant demonstrated that the instruction erroneously permitted jurors to draw irrational and prohibited inferences. The error violated appellant's right to a fair trial and lightened the prosecution's burden of proof. (AOB, pp. 343-357.) Respondent argues that the claim has been forfeited, the instruction was proper and any error was harmless. (RB, pp. 160-166.) The claim must be rejected.

Respondent contends that the claim of instructional error was forfeited because defense counsel did not object to CALJIC No. 2.50. (RB, p. 162.) As appellant demonstrated, defense counsel asserted that the instruction was inapplicable. (30RT 10942-10944.) This was sufficient to preserve appellant's challenge to the instruction because it informed the court why the defense found the instruction objectionable. (*People v. Marks* (2003) 31 Cal.4th 197, 228-229.) Further, even if defense counsel did not adequately object, the claim should still be reviewed. The forfeiture

rule applies to the failure to object to instructions that are correct under the law and responsive to the evidence. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012.) Appellant submits that the instruction was legally incorrect and unresponsive to the evidence and, therefore, his claim of error must be considered. Moreover, the failure to object to an instruction will not forfeit a claim that the instruction is erroneous if the error affected the defendant's substantial rights. (Pen. Code, § 1259.) It is necessary, therefore, for this Court to review the instructional error claim to determine if appellant's substantial rights were violated. (*People v. Prieto* (2003) 30 Cal.4th 226, 247 & 268.) Respondent's conclusory assertion of forfeiture fails to overcome these points, which appellant made in his opening brief.[36] (AOB, pp. 246-348.)

Appellant agrees with respondent's observation that the issue presented by appellant's challenge to CALJIC No. 2.50 was largely addressed in Argument VII, *ante,* which addressed introduction of appellant's connection to various guns not used in the charged offenses. (RB, p. 162.) Accordingly, appellant respectfully requests that his response to the present issue be considered in conjunction with his response to Argument VII.

Respondent argues that CALJIC No. 2.50 properly allowed jurors to consider appellant's carrying a concealed firearm as proof of his intent. (RB, pp. 162-163.) The instruction told the jurors that evidence of appellant's other crimes "may be considered by you only for the limited

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[36] If objection to CALJIC No. 2.50 was required and defense counsel did not sufficiently object to the instruction, then appellant asserts in his petition for writ of habeas corpus that counsel provided ineffective assistance. (PetHC, Claim VII, § B, pp. 354-356.)

purpose of determining if it tends to show the existence of the intent *which is a necessary element* of the crime charged...." (31RT 11110 & 2CT 580-581, emphasis added.) Respondent does not contend that appellant's carrying a concealed firearm tended to show the *element of intent* necessary for proof of any of the charged crimes. Rather, respondent maintains that the uncharged misconduct showed that appellant harbored some sort of culpable intent which was not "innocent." (RB, pp. 162-163.) According to respondent, because appellant previously carried a concealed firearm with this culpable intent, then, when he encountered McDade during the charged crimes, he also (1) had the same culpable mental state and (2) was armed with a firearm of his own accord rather than having the Hodges force the gun on him. (*Ibid.*) Respondent's claim is unpersuasive.

It has long been recognized that other crimes evidence is inherently prejudicial. (E.g., *People v. Williams* (1988) 44 Cal.3d 883, 904.) Other crimes evidence is inadmissible to prove criminal propensity. (Evid. Code, § 1101, subd. (a).) It may be admitted, however, to prove an intermediate fact from which guilt may then be inferred, such as motive, intent, identity, plan or absence of mistake (Evid. Code, § 1101, subd. (b)), so long as propensity reasoning does not play any role in the chain of inferences necessary to make the wrongdoing relevant. (*People v. Thompson* (1980) 27 Cal.3d 303, 317). Due to its inherent potential for prejudice, other crimes evidence may be admitted only after it has been "'scrutinized with great care'" and subjected to a "'closely reasoned analysis'" (*Williams, supra,* at p. 905) and if it exhibits "'*substantial* probative value.'" (*People v. Foster* (2010) 50 Cal.4th 1301, 1331, quoting *Thompson, supra,* at p. 318, italics in *Thompson.*) "'If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.'" (*People v. Daniels* (1991) 52 Cal.3d 815, 856.)

Respondent's explanation for why appellant's carrying a concealed firearm prior to the charged robbery and murder could properly be considered under CALJIC No. 2.50 for intent, i.e., lack of an "innocent state of mind" (RB, p. 163), fails to withstand the rigorous analysis required for other crimes evidence. The instruction explicitly told jurors that they could consider appellant's uncharged misconduct to prove the *element of intent* necessary for proof of the crime charged. (31RT 11110 & 2CT 580-581, emphasis added.) The mental state involved in carrying a concealed firearm is intentionally carrying the weapon with knowledge of its presence. (*People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030-1031; CALJIC No. 12.41.1; CALCRIM No. 2520.) This mental state does not correspond to any element of any of the charged crimes or robbery, murder and theft. (AOB, p. 352.) Moreover, the manner in which the uncharged misconduct and the charged crimes were committed was too dissimilar to warrant an inference that appellant harbored the same intent on both occasions. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 402.) Respondent's claim that appellant's carrying a concealed firearm could properly be considered for some other type of intent that was not a necessary element of the charged crime fails to defend the instruction. The instruction told jurors that they could *only* consider the uncharged wrongdoing for the purposes specified in the instruction and they were "not permitted to consider such evidence for any other purpose." (31RT 11110.) By failing to defend the instruction as allowing uncharged misconduct to be considered for the necessary element of intent, respondent fails to overcome appellant's showing that the instruction authorized jurors to consider the uncharged misconduct for an unauthorized purpose. (See AOB, pp. 351-354.)

Respondent's assertion also fails on its own terms because it runs afoul of the rule prohibiting character evidence. (Evid. Code, § 1101, subd.

(a).) For jurors to infer from appellant's previously carrying a firearm that on the night at issue he armed himself of his own accord rather than obtaining the gun from the Hodges, they would have needed to draw impermissible inferences about appellant's propensity to carry concealed firearms.[37] Similarly, for jurors to deduce from appellant's previously carrying a firearm that he harbored some sort of nefarious mental state during the encounter with McDade which was relevant to prove robbery or murder, jurors would have had to draw impermissible inferences concerning appellant's bad character. Although it is illegal to carry a concealed firearm (Pen. Code, § 12025), as noted above, the offense requires simply general criminal intent and knowledge. People

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[37] Respondent argues that appellant's prior conduct of carrying a concealed firearm tended to refute the claim that appellant approached McDade gun-free to discuss getting his job back only to have one or both Hodges force a gun on appellant to use against McDade. (RB, pp. 162-163.) Appellant did not describe such a scenario in his statements to detective Lee (30CCT 8973 - 31CCT 9036) or Angela Littlejohn (34CCT 9253 - 9292) which were admitted into evidence. Rather, the scenario arose from the prosecutor's outline of appellant's anticipated testimony (15RT 6343-6346), which never materialized because appellant ultimately decided to exercise his right to remain silent. (30RT 10820; see generally, AOB, Arg. I).

Some evidence did, however, suggest that the Hodges brothers may have given appellant the gun used in the shooting. According to Banks, John Hodges must have been on the scene with a pistol to enforce his order to kill. (31CCT 9155-9156, 9158, 25RT 9462-9463.) According to Darryl Leisey, Terry Hodges gave appellant the gun. (32CCT 9303.) Defense counsel maintained in his closing argument that appellant approached McDade with innocent intent to discuss getting his job back. (31RT 11333.) He never argued that appellant was gun-free. Counsel also intimated that the Hodges manipulated appellant's gun so it only had one bullet. (31RT 11268-11270.)

intentionally and knowingly arm themselves without necessarily harboring some sort of additional culpable mental state, such as that required to prove robbery or murder. As appellant demonstrated, the prosecutor's argument that appellant's arming himself prior to the charged crimes supports that he was contemplating robbery was based on speculation. (AOB, pp. 273-274.) The same is true concerning appellant's gun possession in the park with Eversole and Brogdon about a week before the charged crimes. Further, for the reasons discussed in Argument IX, deducing from appellant's post-offense remarks to Littlejohn that he wanted his gun back to "get money" that appellant had the mental state for robbery during the encounter with McDade also required resort to speculation. There was not a sufficiently "direct relationship" (*People v. Daniels, supra,* 52 Cal.3d 815, 857) between appellant's carrying a concealed firearm in Littlejohn's presence before she took it and the element of intent in the charged crimes against McDade to allow jurors to consider the former as proof of the latter.

Therefore, respondent fails to demonstrate that CALJIC No. 2.50 properly authorized jurors to infer "the existence of the intent *which is a necessary element* of the crime charged..." from evidence that appellant previously carried a concealed firearm.

Respondent does not attempt to defend CALJIC No. 2.50 on the ground that it permitted jurors to consider evidence of appellant's uncharged misconduct as proof of knowledge. Therefore, respondent fails to overcome appellant's showing that the erred in this regard. (AOB, p. 354.)

Next, respondent argues that the instruction correctly allowed jurors to consider appellant's carrying a concealed weapon to prove appellant's possession of the means necessary to commit the crimes. This also goes to

the issue of identity. (*People v. Hamilton* (1985) 41 Cal.3d 408, 430.) Appellant has previously demonstrated why it was impermissible for jurors to conclude that because appellant carried a concealed firearm which could not have been the murder weapon around Halloween of 1991, he possessed the murder weapon in January of 1992. (See Arg. VII, *ante*; AOB, Arg. VII, 264-284.)

Appellant conceded that appellant's firearm possession before the crimes, when he was in the park with Eversole and Brogdon, and after the crimes, when he was returning from Los Angeles, had some tendency to prove identity and possession of the means useful or necessary to commit the crimes. (RB, pp. 163-164; AOB, p. 355.) Because the instruction permitted jurors to use the gun possession for numerous other impermissible purposes, however, it was erroneous. (See *People v. Carrasco* (1981) 118 Cal.App.2d 936, 944 ["'instructions should be clear and simple to avoid misleading the jury],'" quoting *Guerra v. Handlery Hotels, Inc.* (1959) 53 Cal.2d 266, 272.) The prosecutor compounded the error by arguing to the jury that the instruction addressed appellant's Halloween gun display. (RT 11162-11163.) As appellant has demonstrated, the Halloween gun display did not allow jurors to draw any of the inferences authorized by the instruction.

Respondent also argues that the instruction did not lighten the state's burden of proof because it prohibited jurors from relying on other crimes evidence to prove criminal disposition. (RB, p. 164.) Respondent relies on *Estelle v. McGuire* (1991) 502 U.S. 62, 75, where the United States Supreme Court ruled that a different other crimes instruction did not invite jurors to rely on propensity reasoning. Appellant has previously

distinguished *McGuire* and respectfully directs this Court to that portion of his brief. (See Arg. VII, *ante.*)

Therefore, respondent has failed to overcome appellant's showing that CALJIC No. 2.50 was erroneous.

Next, respondent asserts that any error was harmless under the *Watson* standard. (RB, pp. 165-166.) It bears emphasis that the error in CALJIC No. 2.50 directly affected the issue of intent by permitting unauthorized inferences about it in a case where intent was the crucial issue in dispute. Otherwise, appellant has largely anticipated this claim and respectfully directs this Court's attention to that portion of his opening brief. (AOB, pp. 356-357.)

XIII.

THE JUDGMENT CANNOT STAND BECAUSE THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN INSTRUCTING THE JURY IT COULD CONSIDER APPELLANT'S EFFORTS TO SUPPRESS EVIDENCE PURSUANT TO CALJIC NO. 2.06.

Appellant demonstrated in his opening brief that the trial court erred to his prejudice by giving CALJIC No. 2.06, which provided that jurors could draw an inference of consciousness of guilt on finding that appellant engaged in "concealing evidence." (AOB, pp. 358-365.) The trial court and parties discussed if Littlejohn's disposing of the gun in a dumpster supported the instruction. (30RT 10937-10939.) The trial court initially agreed with the defense that there was no evidentiary basis for the instruction given Littlejohn's testimony that she forced appellant to give her the gun and then she herself decided to dispose of it even though appellant wanted it back. (30RT 10897, 10899, 10938.) The prosecutor conceded that this was the only reasonable way to view Littlejohn's testimony. (30RT 10938.) He argued, nevertheless, that the jurors could disregard parts of Littlejohn's testimony and attribute the gun's winding up in a dumpster to appellant because Littlejohn, the mother of appellant's friend, put it there. (30RT 10938-10939.) Ultimately, the trial court accepted this position and gave the instruction. (30RT 10939, 2CT 565 & 31RT 11104.)

The Attorney General contends that the trial court properly gave CALJIC No. 2.06, and, even if it erred, any error was harmless. (RB, pp. 166-169.) Notably, respondent makes no effort to defend the evidentiary basis for the instruction on the theory advanced below. (RB, p. 168.) Nor could respondent. There was no rational reason for jurors to dissect and selectively credit Littlejohn's testimony as suggested. Even if they did,

only speculation, not rational inferences, linked appellant to the gun's winding up in the dumpster. (AOB, pp. 361-363.)

Respondent contends that other evidence of appellant's efforts to conceal evidence supported CALJIC No. 2.06. (RB, pp. 167-168.) First, respondent cites two stories that appellant gave to detective Lee about what happened on the night at issue: a third-party shot McDade and the shooting was accidental. (RB, p. 167.) Respondent's reliance on this evidence is unpersuasive. Jurors would have seen these statements as more appropriately qualifying under CALJIC No. 2.04, which was also given. (2CT 564 & 31RT 11104.) CALJIC No. 2.04 provided that, if jurors found that appellant had tried to fabricate evidence, they could infer his consciousness of guilt from these efforts. (*Ibid.*) Jurors would have viewed CALJIC No. 2.04 as applying to appellant's false statements because the statements were "*fabricate[d]* evidence" created to mislead. (*Ibid.*, emphasis added.) CALJIC No. 2.06, in contrast, spoke of a defendant's efforts "to *suppress* evidence ... by concealing evidence." (2CT 565, emphasis added.) Only under a strained view of the plain language of CALJIC No. 2.06 does the instruction to apply to the invention of false stories about how a crime occurred, particularly when the instruction is juxtaposed against CALJIC No. 2.04. Respondent's reliance on *People v. Jackson* (1996) 13 Cal.4th 1164 for a contrary proposition is misplaced. (RB, p. 167.) There, the defendant lied to the police that a gun was not at a certain location when the police asked him about it; this was, in effect, an effort to conceal the gun from the police. (*Jackson, supra,* at p. 1225.) Here, appellant's "claims that a third party shot McDade or the shooting was accidental" (RB, p. 167) were not efforts to conceal any specific evidence from the authorities. Consequently, the jurors would have logically assumed that CALJIC No. 2.06 applied to other evidence. After

all, this is how the trial court and parties viewed the evidence applicable to the instructions. In short, there is no "reasonable likelihood" that jurors would have viewed CALJIC No. 2.06 in the manner respondent suggests. (*Boyde v. California* (1990) 494 U.S. 370, 380.)

Second, respondent relies on evidence that debris from the robbery was found scattered in the streets at Mangrum and Golf View as a basis for CALJIC No. 2.06. (RB, pp. 167-168.) The claim must be rejected. Leaving items in plain view in a public place does not qualify as an effort to "suppress" evidence by "concealing" it. Therefore, respondent fails to overcome appellant's showing that the trial court erred in giving CALJIC No. 2.06.

Nor, as the Attorney General claims, was the error clearly harmless because evidence of appellant's guilt was "overwhelming." (RB, p. 168.) Appellant demonstrated that whether he possessed the culpable mental state required to convict him of first degree murder and robbery was subject to debate. (See AOB, Arg. I, § C.5, 127-137.) Further, while respondent attempts to downplay the significance of the negative inference that CALJIC No. 2.06 warranted (RB, p. 169), the fact is that the prosecutor fought to have the instruction given because he believed it would help him win appellant's conviction. This Court should not view the instruction as any less significant than the prosecutor did. (Cf., *People v. Cruz* (1964) 61 Cal.2d 861, 868 [refusing to treat erroneously admitted evidence sought by prosecution as any less important than how the prosecution viewed it].)

XIV.

THE INSTRUCTION ON FLIGHT, CALJIC NO. 2.52, AUTHORIZED AN IRRATIONAL PERMISSIVE INFERENCE.

Appellant demonstrated in his opening brief that the trial court erred to his prejudice in giving CALJIC No. 2.52, which permitted jurors to draw an inference of consciousness of guilt from evidence of appellant's "flight" without further defining the term. (AOB, pp. 366-372.) "Flight" is defined as movement through space,[38] a definition without any guilty connotations. (AOB, p. 367; see also *People v. Clem* (1980) 104 Cal.App.3d 337, 344; AOB, p. 367.) In light of this definition, CALJIC No. 2.52 allowed jurors to draw an irrational inference. (AOB, pp. 366-368.) It should have specified that to draw an inference of consciousness of guilt, the jury must find that the flight was for the "purpose to avoid being observed or arrested" (*People v. Crandell* (1988) 46 Cal.3d 833, 869) or words to that effect. (AOB, pp. 367-368). Respondent replies that the instruction was proper and any error was harmless. (RB, pp. 169-173.)

Respondent fails to explain why the trial court was absolved from defining "flight" in a manner that logically warrants an inference of consciousness of guilt. Notably, respondent does not dispute that the word "flight" is defined as movement through space, a definition that lacks guilty connotations. Respondent, therefore, fails to persuade that the instruction supported a rational inference of consciousness of guilt from evidence of mere "flight."

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38 http://dictionary.reference.com/browse/flight.

Respondent relies on several decisions which found that the flight instruction had been properly given under the evidence presented. (RB, p. 171, citing *People v. Carter* (2005) 36 Cal.4th 1114, 1182; *People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) Next, respondent asserts that the jurors in appellant's case could have found under the evidence that appellant fled for the purpose of avoiding detection. (RB, p. 172.) Appellant did not argue, however, that there was no evidentiary basis for CALJIC No. 2.52. The evidence allowed for the jurors to draw competing inferences about why appellant traveled, i.e., he traveled (1) for innocent reasons (recreation, to visit his mother) or (2) with a guilty purpose (to avoid capture). The plain language of the instruction allowed for an inference of consciousness of guilt under either view, but, logically, it was warranted only under the second. Consequently, CALJIC No. 2.52 permitted jurors to draw an irrational inference. The cases respondent cites for evidentiary sufficiency do not speak to this point.

Respondent also relies on this Court's decisions approving CALJIC No. 2.52 in *People v. Mendoza* (2000) 24 Cal.4th 130, 179-180 and *People v. Abilez* (2007) 41 Cal.4th 472, 521-523. (RB, pp. 170-171.) Appellant addressed these decisions in his opening brief by arguing that they did not squarely govern the claim he presents – that, because "flight." by definition, does not necessarily warrant an inference of consciousness of guilt, CALJIC No. 2.52 should have defined "flight" in a manner which did. (AOB, pp. 369-370.) Respondent fails to persuade to the contrary. Respondent relies on *Mendoza* for the proposition that due process allows for an inference of consciousness of guilt to be drawn from evidence of flight. (RB, p. 170.) This fails to answer appellant's point that only flight for a guilty purpose warrants such an inference.

Additionally, respondent relies on *Abilez's* explanation that CALJIC No. 2.52 is derived from Penal Code section 1127c. (RB, p. 171.) Penal Code section 1127c, however, does not define "flight" in a way that necessarily warrants a logical inference of consciousness of guilt. It, too, fails to address appellant's point. A jury instruction couched in statutory language is not necessarily correct under the law. (*People v. Thomas* (1945) 25 Cal.2d 880, 895; *People v. Cortez* (1994) 30 Cal.App.4th 143, 166-167.) Thus, neither *Mendoza* nor *Abilez* assist respondent.

In regards to prejudice, appellant has already addressed respondent's claim that the evidence of his guilt was "overwhelming." He respectfully directs this Court to that discussion. (See Arg. I, § C.4, *ante*.) For the reasons previously stated, the claim must be rejected. (*Ibid.*)

Respondent's contention that the phrasing of CALJIC No. 2.52 was too vague to harm appellant must also be rejected. An inference of a defendant's consciousness of guilt makes it easier for jurors to infer actual guilt. (*United States v. Harris* (9th Cir. 1986) 792 F.2d 866, 869.) The prosecutor requested CALJIC No. 2.52 to make it easier to convict appellant. The nuanced issue of appellant's state was in dispute. It is appropriate to assume that the instruction fulfilled the purpose for which the prosecutor requested it. Accordingly, the erroneous instruction, permitting jurors to irrationally infer appellant's consciousness of guilt, prejudiced appellant.

XV.

THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY INSTRUCTING JURORS UNDER CALJIC NO. 2.71.7 TO VIEW APPELLANT'S EXONTERATING UNRECORDED ORAL STATEMENTS WITH CAUTION.

Appellant demonstrated in his opening brief that the trial court's version of CALJIC No. 2.71.7 was erroneous. It told jurors to view *all* of appellant's pre-offense, oral statements of "intent, plan, motive or design" with caution, regardless of whether they were incriminating or exculpatory. As this Court has noted, oral pre-offense statements and oral admissions are treated similarly for purposes of cautionary instructions. (*People v. Beagle* (1972) 6 Cal.3d 411, 455, fn. 5, superseded by statute on other grounds as stated in *People v. Castro* (1985) 38 Cal.3d 301, 307-308.) The cautionary language in such instructions applies "*only* to statements which tend to prove guilt and not to statements which do not."[39] (*People v. Slaughter* (2003) 27 Cal.4th 1187, 1200, emphasis added.) (AOB, Arg. XV, 373-379.)

Respondent argues that appellants claim was forfeited due to defense counsel's failure to object to CALJIC No. 2.71.7, the instruction was correct, and, if not, any error was harmless. (RB 173-178.) Respondent's claims fail to withstand analysis.

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[39] The current version of the instruction, CALCRIM No. 358 supports appellant's argument. It does not tell jurors to view all oral statements with caution but only those which tend to prove guilt. It provides in pertinent part: "Consider with caution any statement made by the defendant *tending to show his guilt* unless the statement was written or otherwise recorded." (Emphasis added.)

A claim of instructional error is not forfeited for review despite lack of objection below if the error undermined the defendant's substantial rights. (Penal Code, sec. 1259.) It is necessary for this Court to review appellant's claim to determine if appellant was deprived of his substantial rights.[40] (*People v. Prieto* (2003) 30 Cal.4th 226, 247 & 268.) Respondent's forfeiture claim must, therefore, be rejected.

Appellant and respondent agree that the instruction addressed appellant's pre-offense statements to Kim Scott, as related by Scott, and his statements to John Hodges, as related by Eric Banks. (AOB, pp. 375-376, citing 30RT 10904, 10945-10946.) Respondent contends that the instruction was proper because all of appellant's statements related by Scott and Banks were incriminating. (RB, p. 176.) This is an overly simplistic view of appellant's statements in light of the charges, evidence and parties' theories of the case.

The most serious charge against appellant was murder. The prosecution advanced theories that (1) appellant was the direct perpetrator and intentionally killed to eliminate a witness as a theory of second degree murder (e.g., 31RT 11160, 11165, 11176-11177) and (2) appellant killed with deliberation and premeditation as a theory of first degree deliberate and premeditated murder (e.g., 31RT 11159, 11163-11164, 11171-11174, 11193). Although the prosecutor maintained appellant was the actual killer, he argued that jurors could instead find that appellant acted as an aider and abettor to the Hodges brothers, who were the actual killers, as theories of

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[40] If an objection to the instruction was required to preserve appellant's claim of error, appellant asserts in his petition for writ of habeas corpus that trial counsel rendered ineffective assistance by failing to object. (PetHC, Claim VII, § C, 356-361.)

appellant's guilt for first or second degree murder. (31RT 11175, 11219; see 2CT 599 [court gives CALJIC No. 3.01, setting forth elements of aiding and abetting].) These theories required proof that appellant specifically intended to kill McDade. (2CT 599 [CALJIC No. 3.01].) Appellant's statements related by Scott and Banks that appellant did not want McDade killed were exonerating in regards to these theories.

Respondent argues that because appellant's statements were all made in the context of planning a robbery, they were all incriminating in regards to the charges of robbery and first degree murder based on a felony-murder theory. (RB, p. 176.) As noted, the prosecution sought to prove murder on more than just a felony-murder theory. Its doing so supports that the jury could rationally view the evidence, including appellant's pre-offense statements to Scott and John Hodges, more broadly than just going to felony-murder robbery. It is disingenuous for the government to now disown theories of liability on which it openly relied below. Respondent's claims that the instruction was proper must, therefore be rejected.

Moreover, appellant's statements that he did not want to kill McDade were helpful to appellant even in regards to robbery felony-murder and the robbery felony-murder special circumstance. It was the defense theory of the case that when appellant approached McDade, it was with the intention to talk about getting his job back, not with an intention to rob or kill him. (31RT 11333-; see generally, AOB, pp. 131-136.) Defense counsel argued that the Hodges brothers, who were much more criminally sophisticated than appellant, put appellant in such a state of fear and pressure that appellant committed the crimes while his mental state was so clouded by fear and pressure that he did not form the intent to rob or kill. (31RT 11313-11315, 11318, 11329-11330, 11334.) Appellant's statements

that he did not want to kill McDade tended to support this theory through a process of inferential reasoning. Respondent completely ignores this line of argument even though it is based on valid inferences that could be drawn from the evidence.

Next, respondent argues that any error was harmless because jurors would have viewed Scott's and Bank's testimony on an all-or-nothing basis. (RB, pp. 176-178.) Appellant fails to see how the instruction's wrongly directing jurors to treat evidence helpful to appellant with caution is harmless because it also correctly told them to view evidence harmful to appellant with caution. That the instruction was partially beneficial to the defense does not cancel out how the error harmed the defense.

Appellant presented a mental state theory of defense that required the jury to piece together various items of evidence. (See 31RT 11252, 11284-11285, 11287, 11334 [counsel argues that because appellant's statements were inconsistent and incomplete, jurors had to pick out what facts rang true and piece together what happened].) Appellant has summarized his defense in substantial detail in his opening brief. (AOB, Arg. I, § C.5.a, 127-137.) In short, the defense sought to show that appellant was mentally slow, young for his age and easily manipulated by the Hodges, who were older and more criminally sophisticated than appellant; appellant was willing to steal but he was not violent; appellant liked and respected McDade and desperately wanted to get his job back; he did not want to kill or rob McDade when he approached him, but he acted out of fear and pressure from the Hodges, who were on the scene; the fear and pressure were so great that they clouded his mental state when he ultimately shot McDade. Appellant's statements to Scott and Banks that he did not want to kill McDade were an important piece in this evidentiary

mosaic. The erroneous instruction wrongly told jurors to give these helpful statements less credit than ordinary evidence not subject to a cautionary instruction. This harmed the defense and made it easier for the prosecution to win a conviction.

Notably, the prosecutor wanted the jury to parse witness testimony with a finer comb than does the Attorney General's "all-or-nothing" position. The prosecutor took issue with that portion of Scott's testimony relating appellant's remark, "I'm going to get y'all" (in reference to the KFC employees) rather than stating that he was going to rob KFC. (31RT 11190-11191 [prosecutor's closing argument].) That the government advances a position on appeal at odds with its position below demonstrates the hollowness of its current stance.

Jurors have the inherent power to selectively credit portions of witness testimony and assign whatever weight they choose to assign to the portions that they credit. (*People v. Wickersham* (1982) 32 Cal.3d 307, 328, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201; CALJIC Nos. 2.20 & 2.27.) For example, because Banks was motivated to obtain leniency in his own cases and knew that authorities were interested in information incriminating John Hodges, jurors could have suspected that Banks sought to augment John Hodges's role in the killing while downplaying appellant's. The instruction, however, told jurors to view with caution Banks's rendition of appellant's remarks which tended to downplay appellant's role. Additionally, because Scott was appellant's friend, jurors may have harbored some suspicion to those parts of her testimony in which she related appellant's statements favorable to the defense. The instruction told jurors to view with caution the helpful parts of appellant's statements related through Scott. CALJIC No. 2.71.7's

erroneous directive that they treat even appellant's favorable pre-offense oral statements with caution would have wrongly pushed jurors to reach such conclusions.

By similar reasoning, jurors could have believed appellant's statements that he did not want to kill and disbelieved his statements that he wanted to rob. As defense counsel argued, appellant had no violence in his background: he was willing to steal but not steal at gunpoint and certainly not steal and kill. (31RT 11326-11327.) The instructional error would have undermined the jurors' belief in appellant's favorable statements. Because they were a key part of the evidence that fit together to support appellant's mental state defense, this would have negatively impacted the jurors' assessment of disbelief in appellant's statements about wanting to rob.

In short, respondent's "all-or-nothing" position must be rejected. The instructional error prejudiced appellant by undermining evidence important to appellant's theory of defense.

XVI.

THE INSTRUCTIONS THAT THE HODGES WERE "ACCOMPLICES AS A MATTER OF LAW" BECAUSE THEY WERE AIDERS AND ABETTORS WRONGLY DIRECTED THE JURORS TO FIND THAT APPELLANT WAS THE DIRECT PERPETRATOR OF THE ROBBERY AND MURDER AND REQUIRE REVERSAL OF THESE CONVICTIONS AND ATTACHED ENHANCEMENT AND SPECIAL CIRCUMSTANCE FINDINGS.

Appellant demonstrated in his opening brief that the trial court erred to his prejudice in instructing jurors under CALJIC Nos. 3.10 and 3.16 that the Hodges brothers were "accomplices as a matter of law" because they were "subject to prosecution for the identical offense[s]" charged against appellant "by reason of aiding and abetting." (AOB, Arg. XVI, 380-398.) The evidence permitted jurors to rationally find that the Hodges brothers, not appellant, were the direct perpetrators. The accomplice instructions, however, wrongly directed the jurors away from this interpretation of the evidence by directing them to view the Hodges brothers as aiders and abettors. As a consequence, the instructions compelled jurors to view appellant as the direct perpetrator. This was error which prejudiced appellant. (*Ibid.*) Respondent replies that any error was forfeited or invited, the instructions were correct and, even if they were not, any error was harmless. (RB, pp. 179-186.)

Appellant's claim was not forfeited. Although appellant did not object to the instructions, his claim may be reviewed under Penal Code section 1259. This statute provides a claim of instructional error to which no objection was lodged below may be reviewed on appeal if the error affected the defendant's "substantial rights." Review of appellant's claim is

necessary to determine if the instructional error affected his "substantial rights."[41] (*People v. Prieto* (2003) 30 Cal.4th 226, 247 & 268.)

Nor was appellant's claim invited. Respondent argues that "it appears" that defense counsel wanted the challenged instructions. (RB, p. 180.) The trial court had a *sua sponte* duty to correctly instruct on the need for accomplice corroboration. (*People v. Gordon* (1973) 10 Cal.3d 460, 466; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1158-1159.) Defense counsel did not request the challenged instructions or explicitly argue that they must be given. Rather, counsel acceded to the trial's decision to give them. This is not enough to establish invited error. For invited error to apply when a party accedes to an erroneous instruction, the record must reflect that counsel expressed a deliberate tactical purpose for doing so. (*People v. Barraza* (1979) 23 Cal.3d 675, 683-684.) Otherwise, the trial court shall be held to its duty to give correct *sua sponte* instructions. (*Ibid.*) A "trial court's duty to instruct fully on the relevant legal theories is not dependent on counsel" and will not be excused unless counsel "deliberately *caused*" the court to err. (*People v. Wickersham* (1982) 32 Cal.3d 307, 334-335, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Respondent's claim that "it appears" defense counsel wanted the instructions fails to show that counsel expressed a deliberate tactical reason for acceding to them. Therefore, the error was not invited.

Next, respondent argues that the trial court's instructions directing the jurors to view the Hodges as aiders and abettors as a matter of law were

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[41] If trial counsel's failure to object to the instruction forfeited review of appellant's claim, appellant asserts in his petition for writ of habeas corpus that counsel rendered ineffective assistance. (PetHC, Claim VII, pp. 361-368.)

correct because there was "overwhelming evidence" that the Hodges aided and abetted appellant. (RB, pp. 180-182.) Respondent's point must be rejected. Respondent fails to cite any authority establishing that a trial court's duty of instruction is circumscribed by someone's view of "overwhelming evidence." Adopting such a standard would usurp the jury's exclusive role as fact-finder. (See *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 573 [trial court cannot "override or interfere with the jurors' independent judgment"].) Rather, the law provides that a trial court must instruct on general principles of law where they are closely and openly connected with the case. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) In regards to evidence based instructions, they must be supported by "substantial evidence." (*People v. Barton, supra,* 12 Cal.4th 186, 201, fn. 8.) Substantial evidence is evidence sufficient to convince a rational jury. (*Ibid.*) The duty to instruct on principles of law supported by substantial evidence is not limited "to those ... theories which seem strongest on the evidence, or on which the parties have openly relied." (*People v. Breverman* (1998) 19 Cal.4th 142, 155.) Because respondent's position is inconsistent with this authority, it must be rejected.

There were various ways in which jurors could have interpreted the evidence to cast the Hodges brothers, not appellant, as the direct perpetrators. First, defense counsel argued that appellant liked and respected McDade, wanted his job back and it was not in his character to rob at gunpoint. (31RT 11256, 11287-11291, 11324-11327.) Also, in his initial version of events, appellant told Lee that he just stayed in the car. (30CCT 8976.) Jurors could have rationally pieced together this evidence to acquit appellant. Further, the trial court instructed on the lesser included crime of receiving stolen property because there was evidence sufficient to convince a rational jury that appellant did not commit the murder or

robbery (see above) but only received a share of the proceeds from the Hodges, who were the direct perpetrators. (32 RT 11366-11367 & 3CT 635-636 [court gives CALJIC No. 14.65, defining receiving stolen property].) Third, evidence established that appellant told the Hodges where they could obtain easy money. (30CCT 8976-8977, 8983-8984, 31CCT 9154-9156.) When combined with that portion of his statement to Lee in which he said he was present at the scene in the car (30CCT 8976), it supported a rational finding that appellant was an aider and abettor to the robbery committed by the Hodges. Notably, the trial court instructed on aiding and abetting as a theory of appellant's liability. (2CT 598 & 31RT 11117 [court gives CALJIC No. 3.01, defining aiding and abetting].) Therefore, there was substantial evidence of various scenarios casting the Hodges brothers as the direct perpetrators, not accomplices "as a matter of law ... by reason of aiding and abetting." (3CT 600 & 3CT 604 [CALJIC Nos. 3.10 & 3.16].) The trial court erred in instead instructing that they were.

Next, respondent argues that any error was harmless. (RB, pp. 182-186.) Many of respondent's points go to whether there is a reasonable likelihood that the jurors would have viewed CALJIC Nos. 3.10 and 3.16 as instructing them that the Hodges were aiders and abettors as a matter of law. Whether there is a reasonable likelihood that jurors would have interpreted arguable ambiguous instructions in an erroneous manner goes to the issue of error, not prejudice. (*Boyde v. California* (1990) 494 U.S. 370, 380-381.) Appellant argued at length why there was such a reasonable likelihood. (AOB, pp. 387-393.) He argued that the plain language of CALJIC Nos. 3.10 and 3.16 -- that "[a]n accomplice ... is subject to prosecution for the identical offense[s] charged" against appellant "by reason of aiding and abetting" and "Terry and John Hodges were

accomplices as a matter of law" – supported his position. Additionally, nothing in the parties' arguments disabused the jurors from viewing the challenged instructions consistent with their plain language. They focused their arguments not on whether appellant was an aider and abettor but about whether he was the direct perpetrator. If John and Terry Hodges were aiders and abettors "as a matter of law," then appellant was the only logical candidate under the evidence for the direct perpetrator. Additionally, the remaining instructions were consistent with appellant's being the direct perpetrator and the Hodges brothers being his aiders and abettors. Although the trial court instructed the jurors with CALJIC No. 3.01, defining aiding and abetting, and CALJIC No. 14.65, defining receiving stolen property, the jurors were also instructed that not all instructions given necessarily applied. Thus, the instructions easily lent themselves to the erroneous interpretation appellant challenges – that the Hodges were appellant's aiders and abettors and, thus, appellant was the direct perpetrator. (*Ibid.*)

Respondent also argues that appellant was not prejudiced because CALJIC Nos. 3.10 and 3.16 did not direct jurors to find that appellant was the direct perpetrator. The jurors still had to find that appellant committed the crimes beyond a reasonable doubt. (RB, pp. 182-183.) Respondent misses an essential point of appellant's prejudice claim. Even if jurors still had to ultimately find appellant guilty beyond a reasonable doubt of the charged crimes on the theory that appellant was the direct perpetrator, the instructional error constrained them into seeing appellant as the direct perpetrator rather than in a different light tending to support a verdict more favorable to the defense. The prohibition against directed verdicts certainly applies to the obvious situation where a trial court directs jurors to find a defendant guilty. (*Rose v. Clark* (1986) 478 U.S. 570, 578.) It also applies

when the directive is more subtle. "The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations....'" (*People v. Figueroa* (1986) 41 Cal.3d 714, 724.) The question, therefore, is whether appellant was prejudiced by the erroneous way in which the instructions constrained the jurors' fact-finding powers.

Respondent asserts that the error must be reviewed for prejudice under the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818, 824) for state law error under *People v. Flood* (1998) 18 Cal.4th 470, 489-490. (RB, p. 182.) *Flood* undermines rather than supports respondent's position. *Flood* ruled that California's near-automatic-reversal standard for removal of an element from the jury's consideration no longer applied and such error must instead be assessed for prejudice under California's general *Watson* standard. (*Id.* at pp. 480-491.) *Flood,* however, also ruled that when the error is of federal constitutional magnitude, it must be assessed under the stringent *Chapman* standard for federal constitutional error. (*Id.* at p. 504.) *Chapman* applies when the trial court's instructions remove an essential element from the jury's consideration because they "effectively prevent the jury from finding that the prosecution failed to prove a particular element of the crime beyond a reasonable doubt." (*Id.* at p. 491.) A trial court cannot direct a "partial verdict" for the prosecution by preventing the jury from deciding if it proved an essential component of its case. (*Id.* at p. 492.) Such an error violates the federal constitutional rights to due process (U.S. Const., amend. XIV) and the right to jury trial (U.S. Const., amend. VI). (*Id.* at p. 491.) In a capital case, it also violates the Eighth Amendment right to a reliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 642-643.) Here, the court's

instructional error directed jurors to find the essential element of the direct perpetrator's identity. (*People v. Hogue* (1991) 228 Cal.App.3d 1500, 1505.) It, therefore, must be assessed for prejudice under the *Chapman* standard: reversal is required unless the government shows beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Appellant demonstrated in his opening brief that there were solid reasons under the evidence to doubt his identity as the direct perpetrator and respectfully directs this Court to his more detailed discussion there. (AOB, pp. 396-397.) To summarize, no physical evidence or disinterested eyewitness clearly supported this theory.[42] Banks, Leisey and Schuyler all had personal motives to please the prosecution with their accounts. The Hodges brothers, in their statements related by Banks and Leisey, had strong reasons to augment appellant's role and minimize their own. Additionally, appellant himself gave multiple, inconsistent accounts of the crimes. His strong fear of the Hodges gave him a compelling motive to cast greatest blame on himself. (*Ibid.*) Angela Littlejohn characterized appellant as "weak" and a "follower," and defense counsel argued that appellant was just a "sneak thief," not a violent robber and killer. (AOB, p. 397.) At the same time, the Hodges were linked to prison, drugs, violence,

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[42] While it was the prosecution's theory that the gun retrieved through Littlejohn was the homicide weapon (31RT 11187), the prosecution's ballistics expert could only testify that this gun was consistent with the one used in the homicide. (28RT 10147-10148, 29RT 10153, 10155, 10161). Appellant was linked to it via his statements (31CCT 9008-9009, 9021-9024) and Littlejohn's account. (31CCT 9263-9264, 9276, 9285-9286; 28RT 10403-10405), not through physical evidence indicating that he was the triggerman. As noted, appellant gave multiple inconsistent statements about his role in the killing.

drive-by shootings and weapons. They instilled deep fear in appellant. Recognizing that the evidence did not invariably demonstrate appellant's identity as the direct perpetrator, the trial court instructed on aiding and abetting and receiving stolen property as theories of appellant's liability. (*Ibid.*) For these reasons, respondent's claim that there was "overwhelming evidence" that appellant robbed and killed McDade must be rejected.

Respondent's efforts to distinguish cases on which appellant relied failed to advance the government's contention that the error was harmless. (RB, pp. 183-186.) Appellant relied on these cases to demonstrate that there was a reasonable possibility that the jurors interpreted CALJIC Nos. 3.10 and 3.16 in an erroneous manner. (AOB, pp. 387-393.) Respondent's distinguishing them on the issue of prejudice is largely off the mark.

Notably, respondent relies on *People v. Heishman* (1988) 45 Cal.3d 147 on the ground that it rejected a similar claim. (RB, pp. 183-184.) *Heishman* rejected a claim of *error* and since been disapproved on that very point. There, the defendant faulted the instructions for providing that a witness, Gentry, was an accomplice as an aider and abettor. It was the defense theory that Gentry was the actual perpetrator and acted alone. The opinion parsed the instruction's language to conclude that, under them, jurors were still free to find that Gentry was indeed the perpetrator and acted alone. (*Id.* at pp. 162-163.) *People v. Ward* (2005) 36 Cal.4th 186 disapproved *Heishman* on this point because its view of the instructional language was strained. (*Id.* at p. 212.) Respondent distinguishes *Ward* on the facts. (RB, p. 184.) However, respondent failed to distinguish it in regards to the proposition for which appellant cited it.

Next, respondent seeks to distinguish *People v. Hill* (1967) 66 Cal.2d 536 on the ground that there the source of the evidence concerning

whether or not a codefendant was an accomplice as a matter of law was the codefendant's testimony. (*Id.* at pp. 184-185.) Respondent fails to explain why it should matter whether the supporting evidence is a codefendant's testimony on the stand or another type of evidence. It does not. Appellant cited *Hill* for the proposition that instructing jurors that another player is an accomplice "as a matter of law" creates a danger that jurors will infer the defendant's guilt from the player's legally mandated accomplice status. (AOB, pp. 388-389.) *Hill* remains good law on this point.

Respondent also distinguishes *People v Riggs* (2008) 44 Cal.4th 248 on grounds that continue to miss the mark. Appellant cited *Riggs* for the proposition that a trial court properly refuses to give CALJIC No. 3.16, directing that a player is an accomplice "as a matter of law," to avoid directing a factual finding that undermines the defendant's alibi defense. (AOB, p. 389.) Respondent points out that in *Riggs* the player at issue was not an accomplice as a matter of law whereas here the Hodges were. Appellant relies on his previous response to the claim that the Hodges were accomplices as a matter of law.

Next, respondent addresses *People v. Bittaker* (1989) 48 Cal.3d 1046. (RB, p. 186.) Appellant cited *Bittaker* for the simple proposition that this Court has adhered to *Hill* decades after issuing it. (AOB, p. 389, citing *Bittaker, supra,* at p. 1100.) There, this Court ruled that there was no danger that the jurors would impute the defendant's guilt from his codefendant's confession in light of an instruction that the codefendant was an accomplice as a matter of law. (*Id.* at p. 1100.) Respondent theorizes that this is because the defendant and codefendant were both "equally guilty" and then argues that appellant and the Hodges were "equally guilty" as well. (RB, p. 186.) *Bittaker,* however, does not explain the basis for its

opinion. An aider and abettor and direct perpetrator are both liable for the crime they commit and in this sense they are typically "equally guilty." (Pen. Code, § 31; but see *People v. McCoy* (2001) 25 Cal.4th 1111 [aider and abettor can be convicted of more serious crime than direct perpetrator if evidence warrants].) Taken to its logical conclusion, the "equally guilty" rationale would be inconsistent with *Hill* because there it could also be said that the defendant and codefendant were "equally guilty." *Bittaker,* however, cited *Hill* with approval. (*Bittaker, supra,* at p. 1100.) Respondent's reliance on *Bittaker* fails to advance the government's cause.

Therefore, respondent has failed to overcome appellant's showing that the trial court erred to appellant's prejudice in directing jurors that the Hodges were aiders and abettors as a matter of law.

XVII.

BECAUSE THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON THEFT AS A LESSER INCLUDED OFFENSE TO ROBBERY, IT IS NECESSARY TO REVERSE THE ROBBERY, FIRST DEGREE MURDER, FIREARM USE AND SPECIAL CIRCUMSTANCE VERDICTS AND THE ENSUING JUDGMENT OF DEATH.

Appellant argued in his opening brief that the trial court erred to his prejudice in failing to instruct the jury with theft as a lesser-included offense to robbery. (AOB, pp. 399-416.) Respondent disagrees. (RB, pp. 186-190.)

First, respondent attempts to recharacterize appellant's argument as one asking for a pinpoint instruction on after-formed intent. (RB, pp. 187-188.) Respondent argues that such an instruction must be requested, and, since defense counsel did not request any such instruction, the trial court acted properly in failing to give it. (*Ibid.*) Respondent's claim must be rejected because it addresses an argument that appellant did not make and sidesteps the argument he did make.

A pinpoint instruction is one which clarifies or highlights a legal concept in order to draw jurors' attention to a basis for entertaining reasonable doubt. (*People v. Ward* (2005) 36 Cal.4th 186, 214.) Such an instruction, therefore, pertains to one or more instructions which the trial court has already decided to give regarding to the charge(s) that the defendant faces. This Court has ruled that the standard CALJIC instructions defining robbery and robbery felony-murder properly conveyed the concept of after-acquired intent. (*People v. Hughes* (2002) 27 Cal.4th 287, 358-360.) There was no need, therefore, for trial counsel to request a

pinpoint instruction concerning it. Accordingly, appellant did not raise any claim of error regarding the omission of any such a pinpoint instruction.

An instruction on a lesser-included offense, in contrast, gives the jury an *additional* option for conviction supported by the evidence beyond the options presented in connection with the charged crime(s). (*People v. Breverman* (1998) 19 Cal.4th 142, 155.) Giving jurors this additional option promotes the reliability of the verdict by guarding against the risk that jurors will convict when given an all-or-nothing choice between conviction or acquittal. (*Ibid.*) Giving the jurors an appropriate third option is mandated under the federal constitution in a capital case due to an enhanced need to ensure a reliable verdict. (U.S. Const., amend. VIII; *Beck v. Alabama* (1980) 447 U.S. 625, 639; *Schad v. Arizona* (1991) 501 U.S. 624, 645-648.) A trial court has a *sua sponte* duty to instruct on all lesser-included offenses supported by the evidence when the evidence also raises the question whether all elements of the greater, charged crime have been proven. (*Breverman, supra,* at p. 162; see also *Schad, supra,* at pp. 647-648 [in capital case, court must only instruct on a factually supported third-option that realistically offsets danger jury will convict of capital murder rather than acquit].) Appellant now turns to respondent's arguments in regards to whether the trial court prejudicially erred in failing to give a *sua sponte* instruction on the lesser included offense of theft.

Respondent argues that the record is devoid of substantial evidence that appellant committed theft, not robbery. (RB, p. 188.) Not so. Appellant related several versions of events to detective Lee and told Angela Littlejohn that the papers "got it all wrong," "nobody really [knew] the truth," and he had been "under pressure." (31CCT 9263, 9269.) Both parties acknowledged that given the state of the evidence, the jurors had to

pick through it to decide what to believe. (31RT 11167, 11252 [attorneys argue jury must shift through the evidence and credit it selectively]; *People v. Jeter* (1964) 60 Cal.2d 671 [since jurors could have believed some but not all of defendant's testimony, trial court should have instructed on lesser included crime].)

As appellant demonstrated, jurors could have rationally concluded that when appellant obtained the money from McDade, he did so without resort to force or fear and without actually forming the specific intent to steal it because he was undecided about whether he wanted to follow the straight and narrow path pursuant to his brother's wishes or side with the Hodges' criminal plans to rob and kill. Further, while holding the bank bag, appellant shot McDade motivated not by intent to steal but out of one or more out of several possible motivations, including animus, confusion, fear and pressure. After the shooting, appellant made off with the money and only then actually formed the intent to steal. (AOB, pp. 403-408.)

Appellant relied on that portion of his statement to detective Lee in which appellant said that he approached McDade to ask about getting his KFC job back and the two engaged in small talk and discussed employment; McDade put him off about the job, as he had done before; this caused appellant stress because his brother was pressuring him to find work and appellant kept trying unsuccessfully to get back his old job, "the only job ... that I'm really good at...." (30CCT 3999-31CCT 9000.) Appellant told Lee, "I was talking to him about getting my job back and he was like, come back tomorrow. And I, he didn't say nothing. *You know, he just gave me the money.* And then he just started talking....: (30CT 8999, lines 17-19, emphasis added.) Appellant described talking out his gun only *after* McDade "just gave me the money," when McDade "wanted to get out of

the car and hurt me. But I was like *I pulled my gun out* and he's like kinda just sat back down. And then he started talking off the wall stuff...." (31CCT 9000, emphasis added.) Jurors could rely on this portion of appellant's statement to conclude that appellant did not use force or fear to obtain the money. Further, they could also logically find that appellant was *undecided* about stealing from McDade at this crucial junction. The evidence allowed jurors to see appellant was being torn between two divergent paths: (1) to lead a law-abiding life and obtain legitimate employment, as his brother wanted (31CCT 8992-8993, 8999); or (2) to engage in the criminal lifestyle, represented by Hodges, and carry out their plans to rob and kill McDade (31CCT 9154-9155 [John Hodges manipulates youngsters to do his will and gives the order to kill; 25RT 9494 &32CCT 9305-9306 [Terry Hodges tells appellant to "whack the motherfucker"]). A state of being undecided between two competing alternatives is not equivalent to specifically intending either one. Additionally, jurors could have inferred that appellant shot McDade while still in this undecided state, i.e., without actually forming the intent to steal but in response to other internal pressures. Because McDade refused to rehire appellant (15RT 6517-6518), appellant had a motive to kill him out of animus. Appellant also stated that McDade threatened him and his family and this caused appellant fear, pressure and confusion. (30CCT 8999, 31CCT 9000-9003.) These intense feelings, singularly or cumulatively could have caused appellant to explode in violence and shoot McDade.

Respondent's arguing that this was not a valid interpretation of the evidence is inconsistent with the government's position at trial. The prosecutor was so seriously concerned that jurors might find that appellant killed for a reason other than robbery that he repeatedly argued against such

an interpretation of the evidence in his closing remarks. (31RT 11164, 11170, 11174-11175, 11179-11180, 11185, 11190-11191, 11195-11196, 11227.) Thus, there was substantial evidence that appellant committed theft, not robbery. Jurors could find that appellant obtained the money without force or fear and without actually forming the specific intent to steal; he shot McDade for reasons other than to facilitate the theft and then, only after the shooting, when he made off with the loot, did appellant actually form the intent to permanently deprive.

Respondent argues that there was "overwhelming evidence" that appellant formed the intent to steal before killing McDade. (RB, p. 188.) Respondent cites no authority for applying a test of "overwhelming evidence" to whether instruction on a lesser included crime is warranted. To the contrary, the substantial evidence test governs. (*People v. Breverman, supra,* 19 Cal.4th 142, 162.) In applying it, the court cannot weigh the evidence or make credibility determinations because these tasks are exclusively reserved for the jury. (*Ibid.*)

Next, respondent focuses on a slightly different portion of appellant's statement to Lee than did appellant to argue that appellant obtained the money after taking out his gun and thus only after applying force or fear. (31CT 9001, lines 1-8.) In this version, appellant took out his gun and then demanded the money. (*Ibid.*) Appellant acknowledges that the evidence can be viewed in the manner that respondent advances. But this does not mean it cannot be viewed in the manner that appellant has described. It was up to the jury to decide what to believe. Because substantial evidence supported the theft scenario, the trial court erred in failing to instruct on theft as a lesser-included offense to robbery.

Respondent also argues that any error was harmless. (RB, p. 189.) Referring back to the government's earlier discussion of the evidence, respondent argues that the evidence in support of the judgment was "overwhelming." (*Ibid.*) Appellant has already replied to this claim and respectfully directs this Court to that portion of his brief. (See Arg. I, § C.4, *ante.*) Several matters, however bear emphasis because they undermine respondent's position that this was a straight-forward case of robbery and murder. Appellant did not shoot McDade until after the two had been talking for about 30 minutes. (19RT 7583-7586 [Senner heard shot at 10:45 or 10:50 p.m., just before movie ended at 11 p.m.]; 31CCT 9020 [appellant and Hodges arrived around 10:15 p.m., when McDade was getting off work]; 16RT 6521, 6558-6559, 6562-6563, 6578 [McDade leaves KFC around 10:20 to 10:30 p.m.].) This lapse of time is inconsistent with appellant's robbing and killing according to a premade plan. Further, appellant was a mentally slow teenager at the time of the crimes. (23RT 8850, 28RT 10412, 10431; see also 31RT 11255-11256 [counsel's argument].) His approaching McDade while straddling two worlds would have fit jurors' understanding of human nature, particularly of someone with appellant's characteristics. Additionally, appellant told Littlejohn that no one knew the real reason for the killing, the papers "got it all wrong," he had been "under pressure," he shot McDade after they argued and McDade "had it coming." (31CCT 9263, 9269, 9277-9278).

Next, respondent tersely asserts that the standard instructions were adequate to convey that appellant had to form the specific intent to steal at or before the application of force. (RB, p. 189.) Likewise, respondent notes that the jurors found that appellant used a gun during commission of robbery. (*Ibid.*) As appellant argued in greater detail (AOB, pp. 415-416), correct instructions on a greater including offense do not render harmless

the failure to instruct on a lesser included offense because they do not give jurors a choice between the two. (*People v. Breverman, supra,* 19 Cal.4th 142, 178, fn. 25.) Although the standard instructions "adequately cover[ed] the issue of the time of the formation of the intent to steal" (*People v. Hendricks* (1988) 44 Cal.3d 635, 643), none of them highlighted it. (*People v. Kelly, supra,* 1 Cal.4th 495, 530.) Thus, they did not tend to lessen the harm resulting from the instructional omission. (*Ibid.*)

Respondent also notes, again without any analysis, that the jury was instructed on the lesser crime of receiving stolen property. (RB, p. 189.) As appellant argued in his opening brief, this lesser option for conviction depended on jurors finding that appellant did not steal or kill, a scenario quite different from the findings that jurors would need to make to convict appellant of the lesser-included offense theft as outlined above. Consequently, the jurors' rejection of receiving stolen property does not render harmless the trial court's failure to instruct on theft. (See AOB, pp. 409-411.)

Therefore, the trial court's failure to instruct on theft as a lesser-included offense to robbery was prejudicial error. Appellant's convictions for robbery, murder and the robbery felony-murder special circumstance must be reversed.

XVIII.

THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN USING THE DISJUNCTIVE BETWEEN PARAGRAPHS ONE AND TWO OF CALJIC NO. 8.81.17.

Appellant demonstrated that the trial court committed prejudicial error in using the disjunctive between paragraphs one and two of CAJIC No. 8.81.17, defining the felony-murder special circumstance. (AOB, pp. 417-426.) Respondent disagrees. The government argues that the claim of error was forfeited, no error occurred and any error was harmless. (RB, pp. 190-194.) Respondent's position must be rejected.

Appellant's claim has not been forfeited even though defense counsel did not object to the instruction. Penal Code section 1259 provides that a reviewing court may review a claim of instructional error to which no objection was raised if the error affected the defendant's substantial rights. It is necessary for this Court to review appellant's claim to determine if appellant's substantial rights were compromised.[43] (*People v. Brents* (2012) 53 Cal.4th 599, 612, fn. 6 [addressing claim of error in CALJIC No. 8.81.17 despite lack of objection below]; *People v. Prieto* (2003) 30 Cal.4th 226, 247 & 268.) Respondent contends that a "similar claim" was deemed forfeited in *People v. Valdez* (2004) 32 Cal.4th 73, 113. (RB, p. 191.) There, the trial court omitted paragraph two. This Court rejected the claim on the merits because there was no evidence to support the instruction. (*Valdez, supra,* at pp. 113-114, citing *People v. Kimble* (1988) 44 Cal.3d

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[43] If trial counsel's failure to object to the instruction forfeited appellant's challenge to it, then appellant maintains in his petition for writ of habeas corpus that counsel rendered ineffective assistance. (PetHC, Claim VII, § E, pp. 368-376.)

480, 501: *People v. Navarette* (2003) 30 Cal.4th 458, 505.) *Valdez* is distinguishable because there the error did not affect the defendant's substantial rights, and, therefore, the claim was forfeited under Penal Code section 1259. Here, use of "or" between paragraphs one and two did affect appellant's substantial rights. Appellant now turns to that issue.

Concerning the merits, respondent argues that using the disjunctive between paragraphs one and two in CALJIC No. 8.81.17 was acceptable because there is no reasonable likelihood that the jurors would have interpreted the instruction to allow them to find the felony-murder special circumstance true even if the robbery was merely incidental to the murder. (RB, p. 191.) Respondent argues that the concluding "merely incidental" language of paragraph two logically applies to both paragraphs one and to the rest of the language in paragraph two. (RB, pp. 191-192.) The claim fails to withstand analysis given the instruction's plain language. (See AOB, p. 417 [quoting CALCJI No. 8.81.17]; 3CT 619 & 31RT 11125-11126 [instruction].) First, the "merely incidental" language" is presented in paragraph two as an alternative to paragraph one as indicated by use of the disjunctive, "or," between paragraphs one and two. Second, the "merely incidental" language is also presented as a restatement of the earlier part of paragraph two. This is indicated by use of "[i]n other words," to start the sentence containing the "merely incidental" language. (*People v. Brents* (2012) 53 Cal.4th 599, 613; *People v. Dement* (2011) 53 Cal.4th 1, 47, fn. 25.) For these reasons, jurors would not have concluded that the "merely incidental" language applied to paragraph one and was a necessary prerequisite to finding the special circumstance true in light of all the requirements set forth in CALJIC No. 8.81.17. Use of the conjunction "and" between paragraphs one and two was necessary to convey this concept. Third, this Court has repeatedly made clear that the disjunctive

should not be used between paragraphs one and two. (*People v. Friend* (2009) 47 Cal.4th 1, 79 ["[u]sing the disjunctive (or) between the elements of CALJIC No. 8.81.17 would indeed be inappropriate"]; *People v. Harris* (2008) 43 Cal.4th 1269, 1299 ["Defendant correctly observes that use of the disjunctive 'or' between the enumerated paragraphs was erroneous"]; *People v. Prieto, supra,* 30 Cal.4th 226, 256-257 [agreeing that instruction using "or" was defective]; *People v. Rayley* (1992) 2 Cal.4th 870, 903 [use of disjunctive was "indeed inappropriate"].) Respondent's position is inconsistent with these opinions. Fourth, the editors of CALJIC revised the instruction to use "and" between the two paragraphs rather than "or." There would have been no need for this revision under respondent's interpretation.

Respondent's efforts to distinguish two opinions on which appellant relied to argue that it is unacceptable to use "or" between paragraphs one and two, *People v. Friend, supra,* 47 Cal.4th 1 and *People v. Prieto, supra,* 30 Cal.4th 226, do not advance respondent's position. (RB, p. 192; AOB, p. 418.) Appellant relied on them for the basic proposition that it is wrong to use "or" between paragraphs one and two. (AOB, p. 418.) That the paragraphs were not linked at all, either by "and" or "or" in *Friend* does not undermine the validity of *Friend's* observation that use of "or" is improper. (*Friend, supra,* at pp.78-79.) In *Prieto,* the trial court used the disjunctive between the paragraphs in CALJIC No. 8.81.17 and this Court found that the instruction was defective. (*Prieto, supra,* at p. 256.) *Prieto* therefore supports the proposition for which appellant cited it. Accordingly, use of "or" between the paragraphs in CALJIC No. 8.81.17 was inappropriate.

In regards to prejudice, respondent maintains that the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818) for state law error

applies, not the *Chapman* standard for federal constitutional error (*Chapman v. California* (1967) 386 U.S. 18). (RB, pp. 192-193.) According to respondent, even if use of the disjunctive in CALJIC No. 8.81.17 means that jurors found the special circumstance true without resort to paragraph two, paragraph two do not set forth an "element" of the special circumstance. (*Ibid.*) Respondent thus argues that the *Chapman* test, which applies to omission of an essential element, does not apply. (*Neder v. United States* (1999) 527 U.S. 1, 19.) Respondent is mistaken. *Chapman's* stringent test, which requires reversal unless the government proves the error harmless beyond a reasonable doubt, must be used.

This Court's recent opinions make clear that *Chapman* applies. *People v. Rountree* (2013) 56 Cal.4th 823 called the independent felonious purpose requirement an essential "requirement" of the felony-murder special circumstance, and it emphasized that this requirement must be fulfilled for the special circumstance to apply. (*Id.* at pp. 854-855.) In another recent opinion, *People v. Riccardi* (2012) 54 Cal.4th 758, this Court made clear that, regardless of whether the independent felonious purpose requirement is called an element or a requirement, the trial court's failure to instruct on it when it is supported by substantial evidence is error that must be assessed for prejudice under the "beyond a reasonable doubt" standard, i.e., the *Chapman* standard. "Instructional error under *People v. Green*[44] is reversible unless it was harmless beyond a reasonable doubt. [Citations.]" (*Id.* at p. 838.) *Riccardi* reversed the felony-murder special circumstance due to the trial court's failure to instruct that the "burglary special circumstance was not established if the burglary was merely incidental to

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[44] *People v. Green* (1980) 27 Cal.3d 1.

the murder." (*Id.* at pp. 838-839.) Additionally, *People v. Brents, supra,* 53 Cal.4th 599, called the independent felonious purpose requirement an "element" of the felony-murder special circumstance. After finding that the trial court's version of CALJIC No. 8.81.17 misinstructed on this element, it applied *Chapman's* harmless beyond a reasonable doubt standard to find the error prejudicial. (*Id.*at pp.613-614.)

Next, respondent argues that any error was harmless because "[e]ven in this arguably imperfect form," i.e., using the disjunctive between paragraphs one and two, "CALJIC No. 8.81.17 conveyed that the robbery could not simply be incidental to the murder." (RB, p. 194.) The contention is simply another way of saying that the instruction was adequate. As shown above and in appellant's opening brief, the instruction was erroneous. Respondent's point is unpersuasive.

So, too, is respondent's claim that the parties' arguments cured any resulting harm. (RB, p. 194.) The arguments of the parties are no substitute for legal instructions from the Court. "[I]nstruction by the court would weigh more than a thousand words from the most eloquent defense counsel." (*People v. Matthews* (1994) 25 Cal.App.4th 89, 99.) Jurors cannot be expected to divine legal principles on which they are not instructed. (*People v. Eid* (2010) 187 Cal.App.4th 859, 88.) The prosecutor argued repeatedly that appellant committed a robbery and murder and the reason for the murder was to eliminate the robbery victim as a witness. (31RT 11164, 11170, 11174-11175, 11179-11180, 11185, 11190-11191, 11195-11196.) The prosecutor advanced this theme on numerous occasions, no doubt, because he realistically feared that jurors would find no independent felonious purpose, i.e., they would find that appellant's primary purpose was to kill McDade out of animus because McDade would

not rehire him (16RT 6517-6518) and the robbery was a ruse to distract the victim or confuse authorities. Significantly, the evidence showed that the loss of the KFC job was hard on appellant. Appellant's brother pressured him to find work, and appellant felt that the KFC job was the only job he was good at. (30CCT 8999-31CCT 9000.) After losing his job, appellant returned to KFC about a dozen times and asked to be rehired, but to no avail. (16RT 6517-6518, 6548-6549, 6575.) Appellant told Littlejohn that he shot McDade after they argued and McDade "had it coming." (31RT 9263, 9277-9278.) Also, after he lost his job, appellant also told Kim Scott, "I'm going to get y'all" in reference to KFC. (18RT 7286, 7350.) There was ample cause for jurors to find that appellant's primary purpose was murder.

For this reason, respondent fails to persuade that *People v. Prieto, supra,* 30 Cal.4th 226, 256-257 supports that the instructional error was harmless. In *Prieto,* there was no evidence to support that the murder was the defendant's primary purpose and the defendant's commission of various felonies was merely incidental to this objective. (*Id.* at p. 257.) Here, in contrast, appellant has shown that jurors could reasonably interpret the evidence in such a manner. (AOB, pp. 422-424.)

Additionally, respondent reiterates the claim that the evidence of appellant's guilt was "overwhelming." (RB, p. 194.) Appellant has already addressed this contention and respectfully directs this Court to that portion of his brief. (See Arg. I, § C.4, *ante.*)

Therefore, the felony-murder special circumstance must be reversed due to the use of "or" between paragraphs one and two.

XIX.

THE TRIAL COURT ERRED IN INSTRUCTING APPELLANT'S JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187.

Appellant demonstrated in his opening brief that the trial court erred in instructing on first degree murder because he was charged with only second degree murder. (AOB, pp. 427-434.) Respondent argues that the claim must be rejected. (RB, pp. 195-196.) Appellant has anticipated respondent's arguments and submits the issue on the points he made in his opening brief.[45]

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[45] If trial counsel's failure to object to the instruction forfeited appellant's challenge to it, appellant asserts in his petition for writ of habeas corpus that counsel provided ineffective assistance. (PetHC, Claim VII, § F, 376-383.)

XX.

MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT REQUIRE REVERSAL OF THE JUDGMENT.

Appellant demonstrated in his opening brief that the prosecutor engaged in misconduct on multiple occasions during his opening and rebuttal arguments. These errors prejudiced appellant and require reversal of the judgment. (AOB, pp. 434-447.) Respondent replies that the prosecutor did not commit misconduct and any error was forfeited and harmless. (RB, pp. 197-208.)

A. Denigrating Role of Defense Counsel

Appellant demonstrated that the prosecutor committed misconduct by (1) attacking defense counsel for asking "leading type questions" which enabled counsel to cause "witnesses ... to be manipulated" (AOB, pp. 435; 31RT 11191); (2) contending that defense counsel had put on a "Svengali" defense (AOB, pp. 436-437; 31RT 11339) and (3) arguing that defense counsel "doesn't care about a just verdict" but merely cares about defending his client. (AOB, pp. 437-438; 31RT 11341). Respondent replies that the prosecutor's remarks were legitimate comments on use of "defense tactics." (RB, pp. 200-202.)

Respondent relies on *People v. Medina* (1995) 11 Cal.4th 694, where this Court upheld a prosecutor's remarks which stated "that an experienced defense counsel will attempt to 'twist' and 'poke' at the prosecution's case...." (*Id.* at p. 759.) (RB, p. 201.) The prosecutor's first two remarks, which had to do with manipulation, do not compare to those in *Medina.* Manipulation is use of trickery or force to make someone do something

they would not otherwise do.[46] Resorting to deception or force to control a witness or present a defense is reprehensible conduct, whereas challenging the State's case is not.

Respondent also cites *People v. Gionis* (1995) 9 Cal.4th 1196, 1215-1217 in defense of the prosecutor's remarks. (RB, p. 201.) *Gionis* upheld prosecutorial comments that lawyers can "change black to white," represent "bad people" and approach the truth "loosely." The opinion upheld the remarks as simply establishing that lawyers are "schooled in the art of persuasion." (*Gionis, supra,* at p. 1216.) The prosecutor's challenged comments here about manipulating witnesses by use of leading questions were more like another comment condemned in *Gionis*: " ' "You're an attorney. It's your duty to lie, conceal and distort everything and slander everybody." ' " (*Ibid.*) Using trickery to cause a witness to say something the witness does not want to say or to present a defense crosses the line from persuasion to use of concealment and distortion. Because it is deceptive, it is also similar to lying. (See also *People v. Bell* (1989) 49 Cal.3d 502, 538 [remarks that "suggest that counsel was obligated or permitted to present a defense dishonestly" are improper].)

Indeed, the prosecutor's comment concerning use of leading questions was itself deceptive. It implied that there is something wrong with an attorney's asking leading questions. The practice is, of course,

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[46] See http://wordnet.princeton.edu/perl/webwn?s=manipulate [defining "manipulate" as tampering with for purpose of deception and as controlling another to one's advantage].

See also http://en.wikipedia.org/wiki/Svengali ["The word 'Svengali' has entered the language meaning a person who, with evil intent, manipulates another into doing what is desired"].

permissible. (Evid. Code, § 767, subd. (a)(2).) The prosecutor himself asked leading questions of certain witnesses. (E.g., 23RT 8721-8724, 8744; 29RT 1073 et seq.) It is impermissible for a prosecutor to "deceive the jury on any material issue." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Respondent fails to address this point and hence fails to overcome it.

Respondent's claim that the prosecutor's third comment, that counsel was just "trying to defend his client ... [and h]e doesn't care about a just verdict," was merely a comment on defense tactics rings hollow. (RB, p. 201.) As respondent observes, the prosecutor's comment appears to be in reply to defense counsel's concluding remarks. Counsel argued for a second degree murder verdict, stating "[w]e would ask not that he be found not guilty, but that he be judged according to his guilt." (31RT 11339.) Attacking defense counsel personally for just caring about defending his client but not about a just verdict was improper. To the extent it addressed tactics, it portrayed defense counsel as a hired gun willing to do or say anything to benefit his client, even if it resulted in injustice. The real point of the claim was not to comment on tactics, however. It sought to personally demonize defense counsel for being sleazy. The prosecutor should have instead limited his argument to what the evidence showed and what conclusions jurors should draw from it.

Appellant relied on *People v. Hawthorne* (1992) 4 Cal.4th 43, which condemned prosecutorial reliance on Justice White's dissent in *United States v. Wade* (1967) 388 U.S. 218, 256-258. (AOB, p. 438, citing *Hawthorne, supra,* at p. 59.) Appellant contended that the prosecutor's challenged remarks resembled Justice White's statement in *Wade* that the prosecution has a duty to ascertain "the true facts surrounding the commission of the crime" whereas the defense does not. (*Ibid.*)

Prosecutorial argument based on Justice White's dissent, observed this Court, interjects "an extraneous generalization" before the jurors about defense counsel's role which threatens to divert their attention away from the law and facts. (*Id.* at p. 60.) Respondent replies that here the prosecutor's remarks were not "an extraneous generalization" and thus did not "divert[] the jury from the specifics of the case at hand." (RB, p. 203.) Because respondent simply advances this conclusory allegation without offering any support, it is unpersuasive and fails to overcome appellant's showing.

Therefore, respondent has failed to persuade that the prosecutor's challenged remarks disparaging defense counsel were proper argument.

B. Statements of Personal Opinion and References to Matters Beyond the Evidence

Appellant also faulted the prosecutor for engaging in misconduct by injecting his personal opinions into the case and alluding to his knowledge of evidentiary incongruities in other cases to shore up the State's proof in this one. (AOB, pp. 438-440; 31RT 11340, 32RT 11351.) Respondent defends the prosecutor's remarks. (RB, pp. 203-205.)

Addressing defense counsel's argument that the defense and prosecution shared a common view of much of the evidence (for example, the testimony of Leisey or Banks), the prosecutor stated, "I resent him continuing to say that he and I agree." (31RT 11340.) The prosecutor wrongly injected his personal resentment at defense counsel into the proceedings. (*People v. Mendoza* (2007) 42 Cal.4th 686, 703-704 [prosecutor commits misconduct by referring to his own personal feelings].) This comment is indefensible. Respondent simply ignores it. This fails to overcome appellant's showing it was misconduct.

Next, respondent argues that a number of the prosecutor's first-person references (see AOB, p. 439; 31RT 11340) were acceptable because they were "referring to the evidence" and the "prosecution view." (RB, p. 204). The prosecutor said, *inter alia,* "Carl Powell is a cold-blooded murderer. That's what Carl Powell is, and *that's what I think he is.*" (31RT 11340.) He also said, "*My* purpose from the very beginning in this case was to convict Carl Powell, John Hodges and Terry Hodges of first-degree murder, with the special circumstances." (*Ibid.*) He also said, "*I* am not aligned" with defense counsel and disputed that "*I* agree with him on these various facts...." (*Ibid.*) If the prosecutor were simply expounding on the prosecution's viewpoint, as respondent asserts (RB, p. 204), he did not need to continually refer to himself in the first-person. His remarks suggested that the jurors choose between the prosecutor and defense counsel as individuals rather than focus on the evidence. The prosecutor's remark that appellant was a cold-blooded killer "and that's what I think he is" was misconduct. It unequivocally expressed the prosecutor's personal opinion about appellant's guilt. (*People v. Bain* (1971) 5 Cal.3d 839, 848 [prosecutor cannot express personal opinion about defendant's guilt].) Respondent's claim that it was a comment on the evidence is simply wrong.

Nor does respondent persuade that the prosecutor engaged in permissible argument when he said, "in a case like this, everything never fits." (32RT 11352.) Respondent claims this remark merely conveyed that all the pieces of evidence did not neatly fit together in this case due to its complexity. (RB, p. 205.) Appellant disagrees. The prosecutor did not say, "in this case everything does not fit." By using the phrase, "case *like* this," the prosecutor indicated that appellant's case was one in a broad category of similar cases. Further, by saying "everything *never* fits," the prosecutor alluded to a temporal continuum of decisions. Plainly, the

prosecutor was comparing appellant's case to other similar cases to say that, based on his experience with cases like appellant's over time, it was not unusual for everything to not fit together perfectly. In so doing, the prosecutor tried to persuade appellant's jurors with his special knowledge of other cases to bolster the state's proof in appellant's case. This was misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 828 [prosecutor commits misconduct by implying there is extra-record information of which he is privy which supports defendant's guilt]; *People v. Sandoval* (1992) 4 Cal.4th 155, 183 [same].)

Therefore, the prosecutor committed misconduct by advancing his personal opinions and alluding to his special knowledge of extra-record information.

C. Emotional Appeal

Appellant also challenged as misconduct the prosecutor's comments that appellant's family did not "seem real supportive of him" as illustrated by appellant's (1) mother telling him to return to Sacramento when he went to Los Angeles to visit her and (2) brother "kicking him out on the street." (AOB, pp. 440-441; 32RT 11353.) These remarks did not address any material issue and invited jurors to reject appellant as unworthy of anyone's concern. (*Ibid.*) It is misconduct for the prosecutor to make remarks which encourage jurors to let "emotion ... reign over reason" or invite "an irrational, purely subjective response." (*People v. Redd* (2010) 48 Cal.4th 691 742, internal quotations omitted.)

Respondent claims that the prosecutor's statement that appellant's mother and brother did not support him sought to undermine appellant's claim to detective Lee that he did not want to tell everything he knew about

the Hodges' involvement in the crimes because he feared that doing so would jeopardize his family's safety. (RB, pp. 205-206.) According to respondent, if appellant's family was not supportive, this suggested that the family was not close and appellant did not care about them; if appellant did not care about them, then he probably did not fear for their safety and he lied when he said he did not want to incriminate the Hodges further out of fear for his family's safety. The claim is unpersuasive. Many people deeply care for family members even if they have rejected or abused them. Also, even people who are ambivalent about their family will likely wish to protect it from affirmative harm. What was really at issue was whether appellant held back information about the Hodges. The connection between appellant's mother and brother failing to act supportive of appellant and appellant's lying about the Hodges's further involvement in the crimes is simply not there.

Therefore, respondent has failed to demonstrate that the prosecutor's injecting remarks about his family's lack of support of appellant was permissible argument.

D. Statements About Lack of Remorse

Appellant contended that the prosecutor committed misconduct when he repeatedly referred to appellant's lack of remorse during his closing remarks to the jury. (AOB, pp. 441-443, citing 31RT 11193-11195, 11207-11208, 11213, 11224, 11237, 32RT 11355-11356.) For example, the prosecutor argued that, according to John Hodges and Angela Littlejohn,

> ... [H]e doesn't have any remorse. And he's sitting here ... you might think that he's younger than the Hodges brothers, and he looks kind of down. [¶] You know, the most

> remorseful criminal in the world is the guy who's been caught. You know, but this shows he didn't care; he didn't have any remorse. [¶s] ... [I]ts so outrageous. He shoots a guy in the head, and then he walks around bragging to the girls, thinking it's a joke and having no remorse.
>
> (31RT 11207-11208.)

A defendant's lack of remorse is irrelevant during the guilt phase of a capital trial unless the defense opens the door to it during its case-in-chief. (AOB, p. 441, citing *People v. Riggs* (2008) 44 Cal.4th 248, 301; *People v. Jones* (1998) 17 Cal.4th 279, 307.)

Respondent points out that appellant does not challenge the admission of the evidence (John Hodges's and Angela Littlejohn's statement and/or testimony) on which the prosecutor relied to argue appellant's lack of remorse. (RB, p. 206.) While this is so, merely because evidence has been admitted without objection does not make it grounds for impermissible argument. The prosecutor may urge jurors to draw only proper inferences from the evidence. (*People v. Thomas* (1992) 2 Cal.4th 489, 526.) He may not divert jurors from their duty to "weigh the evidence and submit a reasoned decision" concerning the defendant's guilt or innocence. (*United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146, 1153; see also *People v. Fosselman* (1983) 33 Cal.3d 572, 580, 581; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1192). Focusing on a defendant's lack of remorse improperly encourages jurors to react with hostility to a defendant due to his bad character. (E.g., *People v. Jones, supra,* 17 Cal.4th 279, 307 [suggesting that lack of remorse evidence speaks to defendant's bad character].)

Respondent attempts to defend the prosecutor's remarks through a novel interpretation of *People v. Jones, supra,* 17 Cal.4th 279. (RB, p. 207.) *Jones* provides, "unless a defendant opens the door to the matter in his or her case-in-chief ... his or her remorse is irrelevant at the guilt phase." (*Jones, supra,* at p. 307.) According to respondent, *Jones* explains that a prosecutor can admit lack of remorse evidence to rebut a defendant's reliance on remorse. From this, respondent extracts that a prosecutor can admit lack of remorse evidence from the start, to "preemptively rebut" defense remorse evidence. (RB, p. 207.) Presumably, respondent means to imply that a prosecutor can also permissibly comment on this "preemptive rebuttal" evidence. The claim must be rejected because it stretches too far. Allowing a prosecutor to admit and then argue lack of remorse evidence in anticipatory rebuttal swallows the rule that "*unless a defendant opens the door* to the matter *in his or her case-in-chief* ... his or her remorse is irrelevant at the guilt phase." (*Jones, supra,* at p. 307, emphasis added.)

Significantly, *Jones* noted that not just any remorse evidence presented by a defendant will open the door to the prosecution's admission of lack of remorse evidence. (*People v. Jones, supra,* 17 Cal.4th 279, 307.) There, the defendant cried on the stand when he testified. The trial court allowed the prosecution to present evidence that the defendant did not cry when he confessed to the police. (*Id.* at p. 306.) The defendant challenged this ruling on appeal and the People defended it. (*Id.* at p. 307.) *Jones* found that the prosecution's presenting lack of remorse during the confession was not proper to rebut the defendant's crying during his testimony. It explained that the defendant's demeanor on the witness stand, if evidence, "only showed that he currently regretted his conduct." (*Ibid.*) The opinion found, however, that the lack of remorse evidence was properly admitted for another reason, to rebut the defendant's testimony

that he felt remorse during interrogations held the day after the crimes. The prosecution's witness testified that he was present during those interrogations and did not see appellant act remorseful. (*Ibid.*) This was permissible rebuttal because it was specific and related directly to evidence of a particular incident or character trait put into issue by the defendant. (*Ibid.*)

Respondent argues that John Hodges' and Angela Littlejohn's statements that appellant lacked remorse properly rebutted appellant's reliance on the defense theory that he acted under duress from the Hodges brothers. (RB, pp. 206-207.) Under *Jones,* this was not specific rebuttal which related directly to evidence of a particular incident or character trait put into use by appellant. (*People v. Jones, supra,* 17 Cal.4th 279, 307.) Under respondent's approach, it seems that lack of remorse evidence could be presented by the state in virtually any case in which the defendant admits the act but contests his mental state. Again, this stretches *Jones* too far.

Therefore, respondent has failed to demonstrate that the prosecutor's numerous references to appellant's lack of remorse were permissible.

E. Appellant's Claims of Prosecutorial Misconduct Have Been Preserved for Review

Appellant demonstrated in his opening brief that his claims of prosecutorial misconduct were preserved for review even though defense counsel did not object to each challenged remark. (AOB, pp. 443-445.) The trial court erroneously overruled counsel's first objection in a manner that indicated it would handle subsequent objections similarly. Accordingly, further objections must be excused as futile.

Futility also excuses counsel's failure to seek a curative admonition in connection with his first objection. Because the trial court promptly overruled the objection, counsel did not have an opportunity to request an admonition, and the omission is excused as futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Respondent contends that appellant's claims have not been preserved. (RB, pp. 197-198.) Appellant's opening brief thoroughly addresses forfeiture. Hence, appellant respectfully directs this Court's attention to his opening brief.[47] (AOB, pp. 443-445.)

F. Appellant Was Prejudiced by the Prosecutor's Misconduct.

Respondent argues that the prosecutor's misconduct was harmless because the evidence against appellant was overwhelming and the misconduct was a relatively brief part of a lengthy argument. (RB, pp. 207-208.) Appellant has previously responded to the claim of overwhelming evidence. (Arg. I, § C.4, *ante*.) It bears emphasis that appellant's mental state was the key matter in dispute, mental state is a delicate issue for jurors to assess and there was a fair amount of evidence which could have caused rational jurors to doubt that the state had proved all essential mental state elements for robbery and first degree murder. (*Ibid.*)

The misconduct was not simply an isolated remark. It occurred on multiple occasions interspersed during the prosecutor's opening and rebuttal arguments. The prosecutor's impermissible comments about

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[47] If defense counsel failed to sufficiently object to the prosecutor's misconduct in order to preserve appellant's claims for review, then appellant asserts in his petition for writ of habeas corpus that counsel provided ineffective assistance. (PetHC, Claim VII, § G, 384-398.)

appellant's lack of remorse were particularly lengthy and numerous. Further, much of the misconduct occurred during rebuttal argument. (31RT 11339-11341, 11344-11345, 11351, 11353, 11355-11356.) Misconduct during rebuttal is especially damaging because rebuttal directly precedes deliberations. Consequently, the misconduct's impact is fresh on the jurors' minds as they proceed to determine the defendant's fate.

The prosecutor's misconduct was also far-ranging in its nature. It was impermissible for multiple, complimentary reasons which combined to prejudice appellant. In denigrating defense counsel, the prosecutor suggested that counsel was stooping to sleazy, underhanded tactics and sought to subvert justice. Some of the prosecutor's statements of personal opinion encouraged jurors to view the case as a personal contest between the prosecutor and defense counsel. This made it difficult for jurors to identify with the defense which counsel presented and encouraged them to consider matters extraneous to the evidence. Further, by condemning appellant for not showing remorse and questioning if appellant's family cared about him, the prosecutor also made it difficult for jurors to identify with appellant, and hence his defense, and injected extraneous matters into the jurors' consideration. The prosecutor also suggested that the government's case was stronger than the evidence showed because the prosecutor was privy to out-of-court information within his special knowledge. In short, the prosecutor's misconduct wrongly put down defense counsel and appellant wile impermissibly bolstering the strength of the state's case.

Therefore, respondent has failed to persuade that the prosecutor's misconduct was harmless.

XXI.

REVERSAL OF THE JUDGMENT IS REQUIRED DUE TO GUILT PHASE JUROR MISCONDUCT IN REVIEWING NEWSPAPER ARTICLES CONCERNING THE MISTRIAL GRANTED TO THE HODGES AND THE DISMISSAL OF THE CHARGES AGAINST THEM AND ALSO DUE TO THE TRIAL COURT'S INADEQUATE INQUIRY INTO THE MATTER.

The trial court did not inform appellant's jurors that the Hodges disappeared from the trial because they had been granted a mistrial; it simply told them that the Hodges would no longer be in court and the jurors should not speculate about why they had left. (30RT 10867-10868.) A number of the jurors committed misconduct by viewing newspaper articles reporting on the August 23, 1994, grant of a mistrial for Hodges brothers. (29CCT 8605.) The articles came out in a local newspaper, the Sacramento Bee, on August 24 and August 27, 1994. (31RT 11153, 32RT 11390-11391.) Appellant's jury started its deliberations on August 30, 1994. (3CT 670.) The articles contained information extraneous to the evidence. At least one of the articles contained remarks by the Hodges jurors which were damaging to appellant. (32RT 11392-11393.)

Appellant demonstrated that reversal is required due to the jurors' exposure to these newspaper articles. He also showed that he is entitled to relief because the trial court's inquiry into the misconduct was anemic and failed to uncover the key facts necessary to determine if the offending jurors should be discharged. (AOB, pp. 448-460.) Respondent replies that appellant has forfeited review of the adequacy of the trial court's inquiry, the presumption of prejudice from juror misconduct was overcome and the trial court's inquiry was sufficient. (RB, pp. 208-217.)

Respondent contends that appellant's argument challenging the adequacy of the trial court's inquiry into the juror misconduct has been forfeited because defense counsel expressed satisfaction with the inquiry conducted. (RB, pp. 210-211.) The claim has not been forfeited. Once a trial court learns of possible juror misconduct, it has a duty of its own accord to conduct an inquiry sufficient to determine if juror discharge is warranted. "A court on notice of the possibility of juror misconduct must undertake an inquiry sufficient '"to determine if the juror should be discharged and whether the impartiality of other jurors has been affected."' [Citation.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 822.) Likewise, "[o]nce a court is put on notice of the possibility that improper or external influences are being brought to bear on a juror, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of other jurors has been affected." (*People v. McNeal* (1978) 90 Cal.App.3d 830, 839; see also *People v. Burgener* (1986) 41 Cal.3d 505, 519 ["an inquiry sufficient to determine the facts is required whenever the court is put on notice that good cause to discharge a juror may exist"].) These decisions speak to a court's distinct obligation, irrespective of counsel, to conduct a sufficient inquiry into juror misconduct. [48]

Respondent also contends that the trial court's admonition to the jurors to disregard the articles was sufficient to dispel the presumption of prejudice which arose from jurors viewing them. (RB, pp. 214-215.) Not

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[48] In his petition for writ of habeas corpus, appellant argues that if defense counsel "were required to object to the manner of the trial court's inquiry in order to preserve the claim for appeal, they failed to render effective assistance of counsel by failing to do so." (PetHC, Claim VII, § H, 398-408.)

so. The disappearance of the Hodges brothers from the trial was a dramatic event. The Hodges were key players both in what happened to McDade and at trial. They and their entourage (the two defendants, their four attorneys, their investigators and their jury) took up a lot of space in the courtroom. The defense sought to portray the Hodges, who were older and more criminally sophisticated than appellant, as the true culprits who forced appellant to do their dirty work. (See generally, AOB, Arg. I, § C.5 [discussing defense theory].) Appellant's jurors would have unquestionably noticed the Hodges's absence and been naturally curious about why they suddenly vanished from the proceedings.

The newspaper articles were inherently prejudicial because they provided extrinsic information, harmful to appellant, about the individuals whom appellant sought to cast as the truly responsible parties. They indicated that the Hodges had been victimized by legal error (they had deserved a mistrial) and suggested that they were not responsible for the crimes (which is why they were no longer on trial, unlike appellant). The natural inferences which flowed from the Hodges having been granted a mistrial were prejudicial to appellant. They combined with the negative inference jurors would have drawn from the broken promise of appellant's testimony, i.e., that appellant's claim that the Hodges coerced him was false. (See Arg. I, § B.3, *ante.*) This was simply too much for the jurors to put out of their minds. The jurors would have been reminded of the Hodges's mistrial each time they entered the courtroom and saw the emptiness created by the Hodges's disappearance. They would have also recalled the Hodges's mistrial when evaluating the credibility of Leisey and Banks, witnesses to whom the Hodges had supposedly made incriminating admissions about manipulating appellant. The defense which appellant's attorney ultimately presented – that appellant's mind was so clouded by

fear and pressure form the Hodges he did not form the mental state required for robbery and murder – depended significantly on Leisey's and Banks's credibility. (See 31RT 11299-11320 [Castro argues at length in favor of Leisey's and Banks's credibility]; see Arg. I, § C.4, *ante,* and AOB, Arg. I, § C.5.) The negative inferences the jurors would have drawn from the newspaper articles would have arisen frequently. The Hodges's absence from the courtroom was palpable, and it would have been impossible for jurors to ignore that the Hodges were less culpable than appellant when evaluating appellant's defense. It is unrealistic to expect that the jurors were able to follow the trial court's admonitions.

Respondent defends the adequacy of the trial court's general, group inquiries of the jurors concerning the two articles because the trial court determined "the extent of the jurors' exposure" to the stories. (RB, p. 215; 31RT 11155-11156.) The record belies the contention. In regards to the August 27, 1994, article, the record reveals that the trial court asked only if the jurors as a group "read the article or the headline of the short article." (31RT 11155.) In regards to the August 24, 1994, article, the trial court asked only of the jurors as a group if they had "read the headline or the article." (3CCT 669.) Its inquiry did not determine which jurors read which part or parts of the article. Although some jurors apparently said something that defense counsel Holmes overheard about reading just the caption (32RT 11391), the record only contains Holmes's relating this vague, second-hand information. The record does not clearly indicate the accuracy of this statement and, if it was accurate, it does not indicate how many jurors stopped at just the caption. It is feasible that many of the jurors who responded affirmatively to reading the article or headline read both entire articles. The trial court's inquiry was pro forma and, as a consequence, yielded only imprecise information.

Appellant relied on a number of decisions to demonstrate that the trial court's inquiry was inadequate. (AOB, pp. 457-460.) From this authority, several principles emerge. First, a general, group inquiry is typically insufficient; jurors may be reluctant to admit to misconduct or may minimize their misconduct and being asked about it as a group facilitates such reticence. (*United States v. Accardo* (7th Cir. 1962) 298 F.2d 133, 136; *United States v. Davis* (5th Cir. 1978) 583 F.2d 190. 196-198; *Coppedege v. United States* (D.C.Cir. 1959) 272 F.2d 504, 506-508; *People v. Andrews* (1983) 149 Cal.App.3d 358, 366.) Second, jurors are reluctant to admit to being influenced by extrinsic material in a manner impairing their ability to be fair; consequently, their self-assessments are not dispositive. (*Marshall v. United States* (1959) 360 U.S. 310, 312; *Irvin v. Dowd* (1961) 366 U.S. 717, 728; *Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 639.) Third, because of the juror reluctance described above, a trial court inquiring into juror misconduct must seek an objective basis for determining that a juror exposed to extrinsic material can remain impartial. (*Silverthorne, supra,* at p. 639; *Davis, supra,* at p. 196.)

Respondent distinguishes these decisions on random grounds which do not undermine the principles for which they stand. (RB, pp. 216-217.) For example, respondent observes that *United States v. Davis, supra,* 583 F.2d 190 and *Silverthorne v. United States, supra,* 400 F.2d 627 both involved trial court inquiries of prospective jurors into pretrial publicity. (RB, pp. 216-217.) Respondent asserts that the measures recommended in these decisions -- i.e., individual questioning and trial court inquiry to uncover objective reasons for concluding that a juror could be fair – should be more stringent when the inquiry is made of prospective jurors because prospective jurors are more likely to be influenced by news reports than seated jurors. A more lax inquiry for seated jurors who have already heard

the evidence is acceptable, according to respondent, because they have already heard evidence against the accused. (RB, pp. 216-217.) This is nonsense. Assuming, *arguendo,* that prospective and selected jurors can be questioned with different degrees of rigor, then selected jurors should be questioned more rigorously. It is the selected jurors who have actually sworn to properly perform their duties and refrain from misconduct, and it is they who will actually decide the defendant's fate. They perform a far more solemn and important role (especially in a capital case) than do prospective jurors merely being considered for jury service. Where, as here, the selected jurors view news reports on the eve of deliberations, the extrinsic information is especially apt to influence the actual verdict.

Respondent distinguishes several decisions on which appellant relied on the ground that they involved more extensive publicity than in the present case. (RB, pp. 216-217, addressing *United States v. Accardo, supra,* 298 F.2d 133; *Coppedge v. United States, supra,* 272 F.2d 504; *Irvin v. Dowd, supra*, 366 U.S. 717.) Respondent, however, fails to cite any authority declaring that the sufficiency of an inquiry can diminish where jurors have been exposed to newspaper articles on the eve of deliberations which invite them to draw inferences negative to the defendant's theory of defense. As noted, the articles here invited the inferences that the Hodges were not culpable and thus did not exert fear and pressure over appellant to preclude him from forming the necessary mental state for robbery and first degree murder.

For the foregoing reasons, respondent has failed to overcome the presumption of prejudice which arose from jurors reading newspaper articles concerning the Hodges's mistrial on the eve of deliberations. Nor has respondent persuaded that the trial court's inquiry into the jurors'

misconduct was sufficient for it to determine if one or more jurors had to be excused. Accordingly, the judgment must be reversed.

PENALTY PHASE ISSUES

XXII.

THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY INTO THE NATURE AND IMPACT OF PREJUDICIAL PUBLICITY COINCIDING WITH PENALTY PHASE DELIBERATIONS REQUIRES REVERSAL OF THE DEATH VERDICT; REVERSAL IS ALSO REQUIRED DUE TO JUROR MISCONDUCT.

Immediately before and during penalty phase deliberations, publicity surfaced regarding a robbery-murder which occurred at a McDonald's in the same area as the site of the capital crime. (36RT 12563-12655.) Like the instant case, the victim was shot and gang involvement was suggested. (*Id.*, at p. 12655.) Given the strong similarities between that crime and the instant case, defense counsel requested that the court question the jurors concerning their possible exposure to this publicity and its effect. (*Id.*, at p. 12654.) The court did so, but only after the jury rendered its verdict of death, and merely asked, by a show of hands, whether any had been exposed to the reports of the "recent McDonalds fast-food robbery/murder case." (36RT 12662.) Although ten jurors admitted such exposure, the court made no attempt to determine what they had seen or whether they had discussed it during deliberations. (*Ibid.*) The court also failed to meaningfully investigate the impact of the publicity, only asking the jurors to raise their hands if any were influenced. (*Ibid.*) None of the jurors, who had already been excused after rendering their verdict and were ready to leave the courtroom, responded. (*Ibid.*)

Appellant demonstrated in his opening brief that the trial court's inquiry was inadequate in that it failed to uncover the key facts necessary to determine the extent of exposure and impact of this improper influence.

(See AOB 463-466.) He also showed that reversal of the penalty judgment is required because the court failed to conduct a meaningful investigation, the ten jurors' exposure to the prejudicial publicity constituted misconduct raising a presumption of prejudice, and the State failed to rebut that presumption. (AOB 466-468.) Respondent argues that appellant has forfeited this claim, the jurors could not have committed misconduct by reading news reports about an unrelated case, any prejudice was overcome by the court's instructions, and the trial court's inquiry was sufficient. (RB 218-223.) The State is wrong on all counts.

A. <u>This Claim Has Not Been Forfeited</u>.

Respondent argues that appellant has forfeited his claim that the trial court's inquiry was inadequate because he did not object to the manner of that inquiry and the trial court asked the questions proposed by defense counsel. (RB 219.)

Defense counsel may have proposed questions for the court to ask and acquiesced to its manner of inquiry,[49] but it was the trial court's

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[49] MR. HOLMES [Defense counsel]: This is just more of an inquiry to the Court here—and I don't know how the Court would want to handle this – but I'm sure we've all read the incident that happened here the other day, the McDonalds on Florin Road, the shooting and probably some gang relationship to that as well.

> What I'm thinking is, that perhaps the Court might make some inquiry whether the jurors have, number one, have they read that article, and if they did, whether it influenced them in any way. And however the Court wants to handle that, I would leave it up to you.
>
> That's the only incidence that did come up, because it did come out during the time of these deliberations. It happened

responsibility, once it learned that ten jurors had been exposed to the prejudicial publicity, to determine the nature of that publicity and its impact on their deliberations. When "put on notice of the possibility a juror is subject to improper influences, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the jurors should be discharged." (*People v. Burgener*, *supra*, 41 Cal.3d at p. 520; *accord*, *People v. Adcox* (1988) 47 Cal.3d 207, 253; *People v. McNeal*, *supra*, 90 Cal.App.3d at p. 839; see also *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 978 ["[t]he trial judge must assume the 'primary obligation . . . to fashion a responsible procedure for ascertaining whether misconduct

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> during the time when we started our argument, and it continued right to the time that we deliberating. So I would ask the Court if maybe you would make inquiry of, number one, whether they read the article and, number two, if they did, if there was any consideration made on that.
>
> THE COURT: And if I do that, ask the questions of them as a panel, rather than individually? Has anyone read the article, and if they did, whether it had any effect in their decision?
>
> MR. HOMES: Right, right.
>
> THE COURT: Anyway, is that your request?
>
> MR. HOLMES: That's my request.

(36RT 12653-54.)

Mr. Holmes acquiesced when the prosecutor requested that the inquiry be made after the jury rendered its verdict. Holmes merely responded "that's fine" if the Court preferred to make the inquiry after the verdict. (*Id.*, at p. 12656.)

actually occurred and if so, whether it was prejudicial.'"].) As noted in Argument XXI, *supra*, these decisions speak to a court's obligation, irrespective of counsel, to conduct a sufficient inquiry into juror misconduct.

Cases cited by respondent (*People v. Burgener*, *supra*, 41 Cal.3d 505, and *People v. Holloway* (2004) 33 Cal.4th 96) do not support invocation of the waiver doctrine here. In *Burgener*, this Court did not invoke waiver and instead affirmed that it is the court's responsibility to conduct an inquiry sufficient to investigate the possibility of juror misconduct. When the trial court and counsel received information that a juror may have been intoxicated during deliberations, the court wanted to question the juror, but defense counsel objected to any inquiry or admonition and argued that her behavior might not be a symptom of intoxication. (*Burgener*, *supra*, at p. 517.) On appeal, Burgener argued that the trial court erred in failing to conduct a hearing and this Court agreed that the court's failure to do so was error, because it was the court's duty to make a sufficient inquiry once it was put on notice of the possibility that the juror could be subject to improper influences. (*Id.*, at pp. 518, 520.) The Court found, however, that the record on appeal was insufficient to establish that the juror was actually intoxicated or that her ability to deliberate had been affected. (*Id.*, at p. 521.) Observing that counsel's choice appeared to be tactically motivated, this Court stated that "defendant cannot be permitted to prevent an inquiry into the condition of a possibly intoxicated juror on the basis that such an inquiry would 'destroy the jury' and subsequently challenge the verdict of that very jury on grounds that the court's failure to conduct an inquiry prejudiced his interests." (*Ibid.*)

In *Holloway*, this Court reviewed a claim of inadequate inquiry into possible juror bias on its merits despite finding that the claim had been waived. (*People v. Holloway*, *supra*, 33 Cal.4th at pp. 126-127.) *Holloway* predicated its waiver ruling on the fact that the trial court did not indicate any unwillingness to ask additional questions and defense counsel declined to ask further questions even though the court invited questions from counsel. (*Id.*, at pp. 126-127.) *Holloway* cited *People v. McIntyre* (1981) 115 Cal.App.3d 899, 906, another case where the court explicitly extended an opportunity for trial counsel to personally question the juror. (*Holloway*, *supra*, at p. 127.) In *McIntyre*, counsel responded that he was satisfied when the court offered him an opportunity to question the juror further and that he had nothing further when the court inquired whether he had anything else to say after the juror had left the room. (*People v. McIntyre*, *supra*, at pp. 905-906.) The *McIntyre* court found that counsel's silence following the judge's invitation to protest the juror's conduct, renew his motion, or seek placement of an alternate juror constituted a waiver. (*Id.*, at p. 906.)

Thus, in both *Holloway* and *McIntyre*, this Court found waiver, but only where defense counsel declined an express opportunity to pursue further inquiry. Here, however, counsel was not offered an opportunity to question or request the court to further question the jurors after ten of them indicated their exposure to the prejudicial publicity. (36RT 12662.) In fact, counsel was not even provided an opportunity for argument or discussion. (*Ibid.*) After the court asked for a show of hands of those who had been exposed to the publicity and those who had been influenced by it, it simply

excused the jurors and did not invite any further discussion. (*Ibid.*) The issue was over and the court moved on to sentencing matters.[50] (*Ibid.*)

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[50] After the jurors rendered their verdict, were polled and excused, defense counsel asked if the court was going to make "that one inquiry" and the court's inquiry went as follows:

> THE COURT: Oh, before I do that, I had another request, to ask of you, the deliberating jurors, by a show of hands – And we'll record your name – Which, if any of you, were exposed to any of the news reports, newspaper or TV or any other news reports, of the recent McDonalds fast-food robbery/murder case? Were there any of the deliberating jurors who heard or read any of those reports?
>
> All right. I think it would be best just to note the jurors who did not. The ones who don't have their hands up, are Juror No. 3 and Mr. –
>
> JUROR NO. 4: [stating last name]
>
> THE COURT: Juror No. 4
>
> And those who did receive any information about that, were there any of you that were influenced in your decision by any of the news reports concerning that?
>
> If so, raise your hand.
>
> For the record, there is no response.
>
> I will now then at this time than you again, ladies and gentlemen. If you want to leave abruptly, you may do so after you leave the courtroom.
>
> If you want to follow Miss Hollingsworth to the deliberating room, you may do that. Thank you.
>
> (The jurors depart at 10:45 a.m.)
>
> THE COURT: All right. For the record, the jurors are absent, and the defendant will be remanded to that next appearance in Department 23. I'll have the trailing cases calendared for that time as well. Between now and Monday afternoon, counsel, determine your – In

In these circumstances, there was nothing resembling waiver or invited error. Defense counsel asked the Court to investigate the likelihood that one or more of the jurors had been tainted by exposure to the prejudicial publicity, suggested possible questions to ask the jurors, and acquiesced to the court's manner of questioning. There is no suggestion that like counsel in *Burgener*, appellant's counsel made a tactical choice to avoid proper questioning. Rather, he acquiesced to the court's handling of the situation.[51]

Review of this Court's decisions in similar situations suggests that absent invited error, an express objection is not required to preserve the question whether a fully informed trial court erred in failing to adequately investigate juror taint, bias or other misconduct. In *People v. Osband* (1996) 13 Cal.4th 622, defense counsel informed the court that witnesses

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> your respective positions what you request. I presume, among other things, I'll refer to (sic) case to the probation department for their report.

(36RT 12662-12663.)

(As was done in the opening brief, counsel has redacted the jurors' names and replaced them with their identifying numbers. (See 72CT 7A 21373-21374 [counsel has duty to redact juror names in certain parts of record]; 2CT 422 [6/14/94 minute order of jury selection]; 15RT 6282-6283 [jury sworn].).)

[51] Should this Court determine that counsel's acquiescence has resulted in forfeiture of this claim, appellant contends, in his petition for writ of habeas corpus, that counsel rendered ineffective assistance of counsel. (PetHC, Claim VII(I), 415 ["[t]o the extent trial counsel were required to object to the trial court's inadequate inquiry to preserve the claim for appeal, they failed to render effective assistance of counsel by failing to do so."].)

were talking within earshot of the jurors during recess, but did not request a hearing on whether the jurors heard any prejudicial discussions. (*Id.*, at p. 675.) On appeal, when the defendant argued that the court erred in failing to hold a hearing, this Court did not invoke procedural default. It held that the trial court did not abuse its discretion in failing to hold a hearing and that in any event, the court's admonition cured any possible prejudice. (*Id.*, at pp. 675-676.)

In *People v. DeSantis* (1992) 2 Cal.4th 1198, where the trial court was informed that jurors might have heard a witness talking in the hallway, the court ordered the parties to keep their witnesses at a distance from the jury and the matter ended there without any defense objection or material interjection into the discussion. (*Id.*, at p. 1234.) On appeal, in response to the defendant's claim regarding the trial court's failure to inquire into the substance of the overheard remarks, this Court did not invoke waiver, but simply ruled that the record did not support the claim that anything prejudicial occurred: "Under these circumstances we find no error in the court's failure to hold a hearing." (*Id.*, at p. 1235.)

In *People v. Gallego* (1990) 52 Cal.3d 115, where two jurors had received information from an outside source, they were examined and insisted that they could retain their impartiality. Defense counsel, who had been provided a weekend to consider whether he wished to have the jurors replaced with alternates, informed the court that although he believed the information was prejudicial, the jurors' honesty in coming forth on their own "would nullify any damage." (*Id.*, at pp. 187-188.) Counsel requested that the jurors "stay on," and the court responded that it would do nothing so long as defendant had no objection. (*Ibid.*) On review, this Court ruled

that the issue was "waived"[52] because of trial counsel's express desire that the jurors not be discharged. (*Ibid.*)

Similarly, in *People v. Majors* (1998) 18 Cal.4th 385, where a juror inadvertently received outside information concerning the case, defense counsel, when invited to challenge the juror, stated that he did not want to do so and that he had tactical reasons for wanting the juror to remain on the panel. (*Id.*, at p. 427.) On review, this Court cited *People v. Gallego*, *supra*, for the proposition that trial counsel's failure to challenge the juror waived[53] the issue for purposes of the appeal. (*Id.*, at p. 428.)

Thus, California courts have applied procedural default to claims of trial court failure to adequately discharge its duty to investigate improper juror influences only where counsel expressly (1) declines an invitation from the court to pursue further investigation (*Holloway*, *McIntyre*); or (2) states that no further review is necessary or that he/she does not wish the juror(s) to be discharged (*Gallego*, *Majors*). Trial counsel's silence or acquiescence does not merit application of procedural default.

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[52] This specific form of default might more accurately be characterized as "invited error," where review is precluded because counsel acts affirmatively to cause the trial court to err, despite the court's own obligation to apply the law. (*People v. Lara* (2001) 86 Cal.App.4th 139, 164-165 ["The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal."].)

[53] Again, this is more accurately denominated as invited error.

Not only is this rule consistent with this Court's practice, it is consistent with constitutional policy. An impartial jury is the essence of due process and of the Sixth Amendment right to trial by jury. (*Smith* v. *Phillips* (1982) 455 U.S. 209, 217; *Turner* v. *Murray* (1986) 476 U.S. 28, 36.) The right to trial by jury is among that elite of constitutional rights that can be waived only through express, personal waiver by the defendant. (*People* v. *Collins* (2001) 26 Cal.4th 297, 307-308; *People v. Ernst* (1994) 8 Cal.4th 441; *In re Horton* (1991) 54 Cal.3d 82, 95.) This places a high responsibility on the trial court to act without prompting whenever it appears that the right to an impartial jury is about to be compromised. (*People v. Kaurish* (1990) 52 Cal.3d 648, 694 [Whenever court is put on notice of improper or external influences on jurors, it is court's duty to make an adequate inquiry, for such an inquiry "is central to maintaining the integrity of the jury system, and therefore is central to the criminal defendant's right to a fair trial"]; see also *Smith* v. *Phillips, supra,* at p. 217; *King* v. *Lynaugh* (5th Cir. 1988) 850 F.2d 1055, 1058 ["Trial courts bear the principal responsibility to implement" the Sixth and Fourteenth Amendment guarantee of the right to an impartial jury.]; *People* v. *McKenzie* (1983) 34 Cal.3rd 616, 627 ["'The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in appropriate manner, matters which may significantly promote a just determination of the trial.'"].) If an express, personal waiver is required to forgo so fundamental a right, how can counsel's acquiescence to the court's manner of questioning in investigating improper juror influences constitute a waiver of the right to an impartial jury? (*See, e.g. U.S. v. Littlefield* (9th Cir. 1985) 752 F.2d 1429, 1430 ["The interest in fair administration of justice weighs against holding that defendants waived any opportunity to seek second trial

in this case, even though a second trial could perhaps have been avoided had the defense immediately notified the court of the publication of the article."]; *United States v. Rattenni* (2d Cir. 1973) 480 F.2d 195, 197 [Dereliction by defense counsel is not grounds to let tainted verdict stand].)

In sum, there was nothing resembling "invited error" or any tactical choice to avoid a proper inquiry in this case, it was the trial court's responsibility to determine the extent and effect of the jurors' exposure to the prejudicial publicity, and the fundamental nature of appellant's right to an impartial jury requires review.

B. The Exposure of Ten Jurors to Prejudicial Publicity Constituted Misconduct Raising a Presumption of Prejudice, Which the Trial Court Failed to Adequately Investigate.

Respondent contends that the jurors could not have committed misconduct by reading or viewing news reports about an unrelated crime. (RB 220.) Not so. In *People v. Pinholster* (1992) 1 Cal.4th 865, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459, where two prospective jurors read a newspaper article relating the ambivalence of another capital defendant toward his death sentence, this Court acknowledged that while the article, on its face, "had absolutely nothing to do with defendant's case," "to the extent that the article implied that a trial court could reduce a sentence of death to a life term, or that a conviction might be reversed on appeal, it could be considered extraneous legal information that would be misconduct for a juror to consider." (*Pinholster, supra*, at pp. 924-925.)

Indeed, the State acknowledges that the standard for misconduct stemming from a juror's exposure to extraneous influences encompasses exposure to a broad category of publicity and is not limited merely to news

articles concerning the case on which the jurors are sitting. (RB 220.) As stated by this Court in *People v. Holloway* (1990) 50 Cal.3d 1098, disapproved of on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, "if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial." (*Id.*, at p. 1108.) Respondent, however, asks this Court to create a new rule limiting a finding of misconduct based on exposure to extraneous materials "to media accounts pertaining to the case on which the jurors are sitting." (RB 220.) According to the State, the Court articulated this standard in *People v. Stanley* (1995) 10 Cal.4th 764, when it stated: "'It is well settled that it is misconduct for a juror to read newspaper accounts' - or, one could add, to listen to broadcast media reports or otherwise to acquire extrajudicial information regarding-'a case on which he is sitting....'" (*Id.*, at p. 836; see RB 220.)

Stanley, however, does not stand for such a proposition and did not articulate any new standard. Stanley argued that an extended hiatus before the penalty phase created a risk that his jurors would be exposed to prejudicial extraneous information about the case and complained that the trial court erred in refusing his request to question the jurors as to whether anything had occurred during the interruption. (*Stanley*, *supra*, 10 Cal.4th at p. 836.) This Court merely quoted the above language from *People v. Holloway*, *supra*, 50 Cal.3d 1098, and found that Stanley had made no showing that the jurors were exposed to improper material. (*Ibid.*) There was no issue in *Stanley* concerning improper influences stemming from news articles about other cases. This Court had no reason to articulate a new standard concerning exposure to such publicity.

This Court has never set a standard limiting a finding of misconduct to media accounts pertaining to the case on which a juror is sitting, for the issue is whether any improper or external influence has been brought to bear on a juror which either is inherently likely to have influenced the juror or has been shown to have influenced the juror. As explained by the Court in *People v. Williams* (1988) 44 Cal.3d 1127:

> "[W]hether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed. On the other hand, since jury misconduct is not per se reversible, if a review of the entire record demonstrates that the appellant has suffered no prejudice from the misconduct a reversal is not compelled." (Citation omitted.) When a court perceives that the jury has been exposed to extraneous material, it is the court's duty to ascertain the nature of that evidence and its effect on the jurors' ability to deliberate impartially.
>
> (*Id.*, at p. 1156.)

California and federal courts have considered numerous claims of "misconduct" stemming from a juror's exposure to news articles concerning other cases or matters. In doing so, the courts have not rejected a claim of misconduct on the basis that the publicity did not concern the case at hand, but rather analyzed the totality of circumstances, including the nature of the publicity, the extent of the juror's exposure, and the effect of the exposure, to determine whether the juror's impartiality had, or could have, been adversely affected. (See, e.g., *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 923-928 [Presumption arising from exposure of two

prospective jurors to article regarding another capital defendant was dispelled because neither served on the jury, there was no indication that any other venireperson saw the article, and the court admonished the entire panel to disregard the article, that it contained errors, and that only the evidence at trial was to be considered]; *People v. Clark (Royal)* (2011) 52 Cal.4th 856, 964-968 [No error in court's refusal to question jurors about possible exposure to media coverage on other murders (Polly Klass and Kimber Reynolds) and efforts to enact "Three Strikes" sentencing law because the publicity did not contain anything innately prejudicial to defendant and defense request was based on pure speculation]; *People v Gates* (1987) 43 Cal.3d 1168, 1198-1199 [No error in denial of defense request to re-voir dire the jury based on general publicity regarding crimes and criticism of the judicial system because the publicity presented no cause for concern and defendant's attempt to show otherwise was purely speculative]; *U.S. v. Littlefield*, *supra*, 752 F.2d 1429 [Defendants were entitled to new trial because during deliberations, jurors were exposed to article concerning tax shelter frauds similar to the one defendants were charged with].)

Here, ten jurors admitted their exposure to publicity about a crime similar to the capital crime – a shooting and robbery at another fast-food establishment in the same area as the McDade's KFC, likely committed by young gang members. (36RT 12653-12655, 12662.) Like *Littlefield*, appellant's jury was exposed to this evidence of a very similar tragic crime at a critical time – when they were deliberating whether to impose a death sentence. (*Id.*, at p. 12654; see *Littlefield*, *supra*, 752 F.2d at p. 1430.) This publicity was likely to cause fear and outrage and, similar to *Littlefield*, move the jurors to send a message to Sacramento's gang community by imposing a sentence of death. (*Id.*, at p. 1432 [no juror could have read

article describing tax frauds as a growing national concern and deploring light sentences "without instantly receiving message that here was something important related to the very case they were trying"].)

Respondent argues that *Littlefield* is non-binding. (RB 221.) Although lower federal court decisions are not binding on this Court, this Court "consider[s] them carefully for the guidance they provide." (*People v. Cleveland* (2001) 25 Cal.4th 466, 480 [Considering and quoting decisions by the District of Columbia Circuit, the Second Circuit, and the Ninth Circuit Courts of Appeal].) As demonstrated in the opening brief, given the similarities between this case and *Littlefield*, its principles and holding are equally applicable here. (See AOB 467-468.)

Respondent attempts to distinguish *Littlefield* on the basis that the showing of misconduct was much greater there because there was evidence that the jurors discussed the tax fraud article during deliberations. (RB 222) However, where the trial court has failed to discharge its duty to adequately investigate allegations of juror taint or bias, a defendant cannot be faulted for not pointing to facts which could make the claim stronger. (*People v. McNeal*, *supra*, 90 Cal.App.3d at p. 839 [In response to State's argument that further inquiry was not required because juror stated she could be fair and impartial and there was no indication that the juror had information as to facts which could be evidence in the case, court stated that defendants cannot be faulted for not pointing to such facts where trial court avoided questioning the juror about them].) It is the trial court's obligation to develop the relevant facts on the record. (*Ibid.*; see also *Dyer v. Calderon*, *supra*, 151 F.3d 970, 979 [Where state court failed to properly develop the facts underlying claim of juror misconduct because of inadequate inquiry, its finding that juror was unbiased was not entitled to a presumption of

correctness and federal court addressed the question de novo].) Moreover, as argued in the opening brief, the burden is on the State, not appellant, to prove that the jurors' exposure to the publicity was harmless. (See AOB 454.)

A critical component of this claim is that the trial court's inquiry was inadequate and thus, it failed to develop all relevant facts, including whether the jurors discussed the publicity during their deliberations. Although the court had learned of the exposure of the majority of the jurors to prejudicial publicity likely to cause concern and outrage and heighten their sense of responsibility to impose the sternest sentence possible, it asked no questions regarding the content of the publicity, failed to inquire whether it had been discussed during deliberations, and failed to conduct any meaningful questioning to determine the impact of the publicity on the jurors. (36 RT 12662.) It merely inquired of the jurors as a group whether any had been exposed to publicity regarding the similar crime and if so, whether they had been influenced by any of the news reports, asking for a show of hands. (*Ibid.*)

Respondent acknowledges that this inquiry was "limited," but nonetheless, argues that it was adequate because the McDonald's crime was unrelated to the present case and the trial court's penalty instructions prohibited the jury from considering extraneous information.[54] (RB 222.) As discussed above, regardless of whether the publicity was about the instant case, its potential to influence the jurors, especially at the time that they were debating the appropriate penalty to be imposed, required an

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[54] This contention is discussed below, under prejudice. (See Argument XXII(C), *supra*.)

adequate inquiry, including what specifically they read or heard and whether they discussed it during their deliberations.

In response to appellant's argument that careful inquiry was especially critical given the jurors' exposure to the harmful publicity before and during their penalty phase deliberations, the State responds only that "it was reasonable for the court to accept the jurors' indication that they had not been influenced by the news reports of the McDonald's crime." (RB 223.) However, as stated by this Court in *People v. Cleveland*: "It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality. [Citation.]" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 477, quoting *People v. McNeal*, *supra*, 90 Cal.App.3d at p. 838.)

The State made this same argument in *McNeal*, where the trial court failed to inquire into the facts of the juror's knowledge and instead simply inquired whether the juror could set the information aside and deliberate fairly and impartially. (*McNeal*, *supra*, at pp. 835, 838.) *McNeal* soundly rejected the argument that this inquiry was sufficient for the court to conclude that the juror could be fair and impartial, because it failed to ascertain the factual basis for the possibility that the juror would be unable to discharge her duties properly. (*Id.*, at pp. 837-839.) As explained by *McNeal*, it is the court's obligation to determine the factual basis and then determine, for itself, whether impartiality has been affected. It is not the province of the juror to make the ultimate determination whether her impartiality has been impaired. (*Id.*, at p. 839; *see also People v. Holloway*, *supra*, 50 Cal.3d at p. 1109 [Court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror].)

The United States Supreme Court and several federal circuit courts have also recognized that in order to make a determination whether a juror's impartiality has been affected, a court must do more than inquire whether the juror has been affected by his exposure or whether he can remain impartial despite such exposure. (See, e.g., *Marshall v. United States*, *supra*, 360 U.S. at p. 312 [Supreme Court, in setting aside conviction where jurors were exposed to prejudicial news accounts, did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles."]; *Irvin v. Dowd*, *supra*, 366 U.S. 717, 728 [Supreme court set aside conviction even though each juror indicated he could render an impartial verdict despite exposure to prejudicial newspaper articles.]; *United States v. Davis*, *supra*, 583 F.2d at p. 197 [A "juror is poorly placed to make a determination as to his own impartiality. Instead the trial court should make this determination."]; *Silverthorne v. United States*, *supra*, 400 F.2d at p. 638 ["[I]n the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient (to test that impartiality).'(citation omitted)"]; *U.S. v. Williams* (5th Cir. 1978) 568 F.2d 464, 471 ["'[i]t is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they have been exposed to.'(Citation omitted)".)

In Arguments XXI and XXII of the opening brief, appellant discussed several cases which demonstrate the inadequacy of the inquiry in this case. (See AOB 452-453, 457-460, 463-466.) Respondent argues that these "cases are distinguishable and inapposite because they involved

publicity concerning the case which the jury was deciding or the same defendant." (RB 222.) It also advances the same argument made in response to Argument XXI – that appellant relies mainly on lower federal court decisions, all of which are factually distinguishable and non-binding. (RB 216-217, 222.)

Here, again, these factual differences do not undermine the following principles for which these cases stand and which govern resolution of this issue: (1) A juror's exposure to publicity constitutes misconduct if the publicity pertains to the case at hand or contains any matter in connection with the subject-matter of the trial which would be at all likely to influence the juror in the performance of duty; this is so regardless of whether the article is an account of the case on which the juror is sitting or pertains to another case or matter which may affect the juror's attitude toward the case at hand (*People v. Holloway*, *supra*, 50 Cal.3d at p.1108; *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 924-925); (2) Once a court has been put on notice of the possibility that a juror may have been exposed to improper influences, it is the court's obligation to make whatever inquiry is reasonably necessary to determine if the juror should be discharged; its inquiry must be sufficient to uncover the key facts concerning the exposure so that the court can make its own determination whether the juror's impartiality has been affected and its failure to conduct a sufficient inquiry is error (*Remmer v. United States* (1954) 347 U.S. 227; *People v. McNeal*, *supra*, 90 Cal.App.3d at pp. 838-840; *People v. Burgener*, *supra*, 41 Cal.3d at pp. 519-520; *People v. Davis* (1995) 10 Cal.4th 463); (3) A court's inquiry to jurors as a group to indicate both exposure and impartiality by a show of hands is inadequate to discharge the court's obligation (*Silverthorne v. United States*, *supra*, 400 F.2d at pp. 639-640; *United States v. Accardo*, *supra*, 298 F.2d at p. 136; *United States*

v. Davis, *supra*, 583 F.2d at pp. 196-198; *Coppedge v. United States*, *supra*, 272 F.2d at p. 504; *People v. Andrews*, *supra*, 149 Cal.App.3d at p. 366); and (4) A court cannot rely on a juror's assurance of impartiality, but rather must make its own determination whether the juror can remain fair and impartial (*People v. McNeal*, *supra*, at p. 838; *Marshall v. United States*, *supra*, 360 U.S. at p. 312; *Irwin v. Dowd*, *supra*, 366 U.S. at p. 728; *Silverthorne*, *supra*, at pp. 639-640; *United States v. Davis*, *supra*, at pp. 196-198). (See AOB 452-453, 457-460, 473-466.) As is evident, each of these principles is supported by either California or United States Supreme Court case law, as well as by decisions by the lower federal courts.

As demonstrated by this case law, the exposure of ten jurors at the crucial juncture of penalty phase deliberations to prejudicial publicity constituted misconduct raising a presumption of prejudice and the court's general group inquiry asking only for a show of hands was patently inadequate. (See AOB 452-453, 457-460, 463-466.)

C. The State Has Failed to Show that the Exposure of Ten Jurors to the Prejudicial Publicity Was Harmless Error.

Respondent argues that any prejudice has been dispelled by the trial court's general penalty phase instructions. (RB 221.) These instructions merely told the jurors that they were to determine the facts from the evidence received during the trial and not from any other source, to consider all the evidence received during the trial in determining the penalty, and what factors were relevant to their penalty decision. (3CT 695-696, 699, 742-732; 36RT 12625-12626, 12629-12631; see RB 221.) Although California courts have found that the presumption of prejudice may be dispelled by a specific admonition to disregard the improper

information,[55] appellant's research has revealed no case where this Court has stated that such general instructions are sufficient to dispel prejudice resulting from the taint of prejudicial publicity. In fact, in *People v. Holloway*, *supra*, 50 Cal.3d 1098, this Court rejected the State's argument that the court's general admonishment of the jurors to refrain from reading newspaper articles or listening to other media reports was sufficient to dispel the prejudice resulting from a juror's exposure to a newspaper article about the defendant. Contrasting situations "in which the presumption of prejudice has been rebutted by the inherently nonprejudicial value of the evidence improperly considered or where the court has admonished jurors to disregard such evidence," *Holloway* found that the court's general instructions were insufficient to dispel the prejudice caused by the juror's exposure to prejudicial information. (*Id.*, at pp. 1111-1112; *accord*, *People v. Lambright* (1964) 61 Cal.2d 482, 486 [prejudicial effect of failure to poll jurors regarding possible exposure to prejudicial publicity about the case

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[55] See, e.g. *People v. Pinholster*, *supra*, 1 Cal.4th at p. 925 [prejudice dispelled where court admonished entire panel to disregard the article, that it contained errors, and that only the evidence presented at trial was to be considered and problem arose at an early stage of the proceedings when attention was not focused on the sentence to be imposed]; *People v. Holloway*, *supra*, 50 Cal.3d at pp. 111-1112 [prejudice might be dispelled where court admonishes the jurors to disregard the improper information]; *People v. Cooper* (1991) 53 Cal.3d 771, 838 [court's admonishment of jurors to disregard improperly admitted exhibit reduced the danger of prejudice]; *People v. Craig* (1978) 86 Cal.App.3d 905, 919 [immediate admonishment cured potential prejudice]; *People v. Harper* (1986) 186 Cal.App.3d 1420, 1426-1430 [prompt admonition not to consider dictionary definitions rebutted presumption of prejudice].

was not removed by the general admonition to the jurors not to consider such evidence in their deliberations].)

Respondent cites two cases, *People v. Tafoya* (2007) 42 Cal.4th 147, 192-193 and *In re Carpenter* (1995) 9 Cal.4th 634, 654, for its assertion that these general instructions were sufficient to dispel any prejudice (RB 221), but neither case supports this proposition. In *Tafoya*, the Court applied the principle discussed above, that an admonition to disregard the improper extraneous information may be sufficient to dispel the prejudice, and concluded that the trial court's removal of the offending jurors and admonishment to the remaining jurors to disregard that juror's improper comments rebutted the presumption of prejudice. (*Tafoya*, *supra*, at pp. 192-193.) In *Carpenter*, this Court merely stated that if the extraneous information was not so prejudicial, in and of itself, as to cause inherent bias, the totality of the circumstances must be examined to determine actual bias. (*Carpenter*, *supra*, at p. 654.) This requires review of the entire record, including the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, and the nature of the evidence and issues at trial. (*Ibid.*)

For the reasons expressed herein and in the opening brief, respondent has failed to overcome the presumption of prejudice which arose from the exposure of ten jurors at such a critical juncture to the prejudicial publicity regarding the McDonald's robbery/murder. Nor has respondent persuaded that the trial court's inquiry into the jurors' misconduct was sufficient. Accordingly, the penalty phase judgment must be reversed.

XXIII.

THE TRIAL COURT ERRED IN PLACING SIGNIFICANT RESTRICTIONS ON THE TESTIMONY OF APPELLANT'S MENTAL HEALTH EXPERT, VIOLATING APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In order to support the heart of its mitigation case, that the older, experienced Hodges brothers used and compelled appellant to shoot McDade, the defense presented testimony by psychologist Larry Nicholas. (33RT 11819-11826; 34 RT 12002-12047; 35RT 12435-36, 12440.) Although the court allowed Dr. Nicholas to testify to his test results, which showed that appellant's low I.Q. and personality rendered him ripe for manipulation and intimidation by the two brothers, it excluded testimony regarding appellant's statements to the doctor about the offense, evidence which was necessary to support the doctor's opinion that appellant was coerced by the Hodges brothers to kill McDade. (34RT 11988-11990, 12002, 12006-12007, 12032, 12040-12041, 12046-12047, 12083, 12114.) The trial court excluded that proposed testimony on the erroneous belief that this Court's decisions in *People v. Coleman* (1985) 38 Cal.3d 69, 81-93, and *People v. Price* (1991) 1 Cal.4th 324, 415-416, mandated exclusion of a defendant's hearsay statements to an expert witness unless they are admissible under a recognized hearsay exception. (33RT 11845, 11846; 34RT 11988-11993.)

As explained in appellant's opening brief: (1) the Evidence Code authorizes an expert to base his opinion on inadmissible hearsay and to testify to that hearsay in support of his opinion; and (2) California case law does not mandate automatic exclusion of a defendant's extrajudicial statements to an expert witness; rather, such hearsay can be admitted to

support and explain an expert's opinion and a trial court must exercise its discretion pursuant to Evidence Code section 352 before determining whether to admit or exclude it. (See AOB 475-485.)

Appellant demonstrated in that brief that the court never exercised discretion to admit Dr. Nicholas's testimony regarding appellant's statements because of its erroneous belief that case law mandated its exclusion. (See AOB 477-479.) This ruling, which rested on a demonstrable error of law, constituted an abuse of discretion (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49), and the trial court's exclusion of appellant's statements, which were highly relevant to critical penalty phase issues, violated Due Process under the Fourteenth Amendment. (*Green v. Georgia* (1979) 442 U.S. 95, 97.)

A. The Trial Court Erred in Excluding Dr. Nicholas's Testimony Regarding Appellant's Statements About the Offense As Part of the Basis for the Doctor's Opinion.

Respondent argues that "the trial court's interpretation of the law [*People v. Price* and *People v. Coleman*] was correct; accordingly, the court acted within its discretion." (RB 225.) Respondent is wrong. The trial court's interpretation of the law was not correct and the trial court did not, in fact, exercise discretion. The trial court interpreted *Coleman* and *Price* to forbid admission of a defendant's hearsay statements to a mental health expert unless they are admissible under an established hearsay exception:

> "The cases I have read[56] have stood for the proposition that the expert cannot base an opinion upon inadmissible evidence and

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[56] Later, when the court gave its formal ruling, it identified these cases as *Coleman* and *Price*. (34RT 11988-11989 ["Pursuant to People versus Coleman, 38 Cal.3rd, 69, and People versus Price, 1 Cal. 4th, 324, and other

> cannot, through testifying as to his opinion, put before the jury the inadmissible hearsay evidence. [¶] And if you can give me any cases or authority that allows it in the context of this case in a criminal prosecution, a defendant's statement to a psychologist or psychiatrist, I'll reconsider that. But I have not seen any cases that would permit it, and the cases I've seen have been sufficiently analogous to disallow it."

(33RT 11845; see also *id.*, at p. 11846 [court clarifies that statements which qualify under exceptions to the hearsay rule can be admitted].) Based on this misinterpretation, the court excluded Dr. Nicholas's proposed testimony. (34RT 11988-11990.)

As made clear by the authorities discussed in the opening brief, the court was wrong in its belief that *Coleman* and *Price* mandated automatic exclusion of appellant's statements to Dr. Nicholas. (See AOB 6-7, 9-14.) Evidence Code section 801, subd. (b), authorizes an expert to base his opinion on "hearsay not otherwise admissible" and case law has allowed experts to testify to otherwise inadmissible hearsay statements made in a variety of situations, including a defendant's statements to a defense psychiatrist regarding his offense behavior in order to support the expert's testimony regarding the defendant's mental state at the time of the crime. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1010-1012; see cases cited in AOB at pp. 6-7, 10-14.)

A careful examination of this Court's jurisprudence reveals that contrary to the trial court's belief, California law does not hold that hearsay

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material, I have considered, including counsel's argument, that this issue is clearly on point in those cases, that otherwise inadmissible hearsay that prejudices one side, whether it was to the D.A.'s prejudice or to the defendant's prejudice –"].)

statements are never admissible to support and explain an expert's opinions. In *Price*, the defendant argued on appeal that the trial court erred in precluding a defense mental health expert from testifying to inadmissible hearsay materials considered in forming his opinions unless such evidence was already before the jury. (*Price*, *supra*, 1 Cal.4th at pp. 415-416.) In finding no error, this Court stated:

> "On direct examination, an expert may give the reasons for an opinion, including the materials the expert considered in forming the opinion, but an expert may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence. (*People v. Coleman* (1985) 38 Cal.3d 69, 92 [695 P.2d 189].) A trial court has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay. (*Ibid.*) Here, the restrictions imposed on counsel's examination by the trial court's rulings, which permitted the main features of the case to be presented in the form of hypothetical questions, were reasonable and within the court's discretion."

(*People v. Price*, *supra*, at p. 416.)

In *Coleman*, this Court agreed with the defendant that the trial court erred in admitting the contents of inflammatory letters written by the defendant's wife for the purpose of impeaching the defendant's credibility and to explain and challenge opinions of psychiatric experts. (*People v. Coleman*, *supra*, 38 Cal.3d at p. 81.) *Coleman* held that the trial court abused its discretion in admitting the letters because the risk that they would be considered for improper, prejudicial purposes greatly outweighed their probative value. (*Ibid.*) In so ruling, this Court did not hold that hearsay statements to an expert are never admissible. Rather, *Coleman* held that "California laws gives the trial court discretion to weigh the probative value of inadmissible evidence relied upon by an expert witness as a partial

basis for his opinion against the risk that the jury might improperly consider it as independent proof of the facts recited therein." (*Id.*, at p. 91.) In its thorough analysis of prior case law, *Coleman* did quote discussion from a court of appeal decision suggesting an automatic rule of exclusion,[57] but concluded: "Nevertheless, the trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit the evidence to its proper uses." (*Id.*, at p. 92.)

Subsequently, in *People v. Mickey*, this Court affirmed that *Coleman* "does not stand for the proposition that on direct examination an expert may *never* testify to extrajudicial statements when he gives "the reasons for his opinion and the matter ... upon which it is based." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, emphasis in original.) And in *People v. Montiel* (1993) 5 Cal.4th 877, this Court cited *Coleman* or cases citing *Coleman,* in addition to the Evidence Code, for the following principles: (1) an expert may explain the reasons for his opinions, including inadmissible hearsay; (2) prejudice may arise if an expert's explanation introduces incompetent hearsay evidence; (3) most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth; and (4) in cases where a limiting instruction may not be enough cure the problem, Evidence Code section 352 authorizes the court to exclude from an expert's opinion

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[57] *Coleman* quoted the following statement from *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 788-89: "While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible." (*Coleman, supra*, 38 Cal.3d at p. 92.)

any hearsay matter whose irrelevance, unreliability or potential for prejudice outweighs its probative value. (*Id.*, at 918-919.)

Accordingly, this Court's jurisprudence has made it abundantly clear that (1) hearsay statements can be admitted to support an expert's opinion; and (2) in order to exercise its discretion whether to admit or exclude extrajudicial statements to an expert witness, the court must conduct a 352 analysis, considering their relevance, reliability, and potential for prejudice. This Court has cautioned in *Montiel* and several other cases that "[b]ecause an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment." (*People v. Montiel*, *supra*, 5 Cal.4th at p. 919; *People v. Carpenter* (1997) 15 Cal.4th 312, 410; *People v. Valdez* (1997) 58 Cal.App.4th 494, 510.)

Here, however, the trial court did not exercise its sound judgment to determine whether appellant's statements to Dr. Nicholas should be admitted or excluded, because it mistakenly believed that case law required their exclusion unless they could be admitted under a recognized hearsay exception. (33RT 11844-11846.) When a trial court is called upon to conduct a 352 analysis, the court must weigh the probative value of the proffered evidence against its potential for prejudice. Although "the trial judge need not *expressly* weigh prejudice against probative value – or even *expressly* state that he has done so," "[t]he record must demonstrate affirmatively that the court did in fact weight prejudice against probative value." (*People v. Crittenden* (1994) 9 Cal.4th 83, 135.) This showing may be satisfied where arguments concerning the relevance and/or prejudicial effect of the evidence suggest that the trial court knew it was required to

engage in the weighing process or where comments by the court, such as a finding that the evidence is not unduly prejudicial, illustrate that the court did, in fact, engage in the required weighing process. (*Id.*, at pp. 135-136.)

In this case, however, the record demonstrates the opposite. Initially, when defense counsel presented his offer of proof regarding appellant's statements to Dr. Nicholas, the court asked questions about their probative value versus their potential to prejudice the People and based on counsel's arguments, appeared open to admitting the statements for the limited purpose of supporting the doctor's opinion. (33RT 11822-11832; see 33 RT 11831-11832 ["So for the record when I indicated some prospect of allowing the evidence it would be for the limited purpose."].) Following the State's arguments why the statements should be excluded, the court indicated that it could cure any potential for prejudice by "admonish[ing] the jury not to consider the defendant's statements to the doctor for the truth of their content." (*Id.*, at p. 11831.) At the end of that initial discussion, the court stated its intent to do some research and review appellant's statements to Dr. Nicholas during the noon recess. (*Id.*, at p. 11840.) After the noon recess, however, the court stated that based on its research, it was clear that an "expert cannot based an opinion upon inadmissible evidence and cannot, through testifying as to his opinion, put before the jury the inadmissible hearsay evidence." (33RT 11845.) On the basis of that research, the court excluded appellant's statements to Dr. Nicholas and ruled that Dr. Nicholas could testify only to nonhearsay statements or hearsay statements that were admissible under an exception to the hearsay rule. (*Id*, at pp. 11844-11846; 34RT 11988-11990.) The record therefore establishes that the trial court never conducted a 352 analysis and thus failed to exercise its discretion as required under this Court's jurisprudence.

In his opening brief, appellant discussed a number of cases[58] in which this Court has approved the admission of hearsay statements to an expert witness. (See AOB 480-484.) These cases involved statements by a criminal defendant to a mental health expert to support the expert's opinion regarding the defendant's mental state capacity (*Ainsworth*, *supra*, at pp. 1011-1013), statements by a defendant's ex-wife to a prosecution mental health expert regarding the defendant's drug use (*Mickey*, *supra*, at pp. 686-688), testimony by a jailhouse informant at a prior trial and details of prior unfavorable psychological reports (*Montiel*, *supra*, at pp. 918-925), prosecution expert's testimony regarding hearsay statements that the defendant discussed committing perfect crimes and bragged about Mafia connections (*Carpenter*, *supra*, at p. 410), victim's statements to a doctor (*Brown*, *supra*, at pp. 585-586), and gang expert's opinion testimony relating the contents of his interview of an individual involved in the crime and hearsay concerning other attacks by the same gang (*Gardeley*, *supra*, at pp. 611-613).

Respondent attempts to distinguish these cases on the basis of factual differences. (RB 226-228.) But the point of appellant's citation of these cases is to (1) illustrate that automatic exclusion of hearsay statements to an expert witness is not required, (2) demonstrate the variety of types of extrajudicial statements that have been admitted in this State, and (3) demonstrate that each case must be decided on the basis of its own facts

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[58] These cases included *People v. Ainsworth*, *supra*, 45 Cal.3d at pp. 1010-1013; *People v. Mickey*, *supra*, 54 Cal.3d at pp. 686-688; *People v. Montiel*, *supra*, 5 Cal.4th at pp. 918-925; *People v. Carpenter*, *supra*, 15 Cal.4th at p 410; *People v. Brown* (1958) 49 Cal.2d 577, 584-587; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-620.

after a careful analysis of the probative value of the statements, the potential for prejudice, and the reliability of the statements.

Here, had the trial court conducted a 352 analysis, it is quite likely that it would have admitted the statements. As noted above, before it concluded that it had no discretion to admit the statements, the court indicated that it was receptive to allowing Dr. Nicholas to testify to appellant's statements for the limited purpose of supporting his opinion. (33RT 11831-11832.) The court indicated its intent to cure any possible concern that the jury would consider the evidence for its truth by admonishing them to consider the statements only as a basis for the doctor's opinions. (*Ibid.*) As argued in the opening brief, there were sound bases for the court to so rule: (1) it was reasonable for Dr. Nicholas to rely on appellant's statements in forming opinions about his mental condition (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155); (2) appellant's account of his actions and thought processes were not only relevant but critical to the doctor's ability to formulate an opinion whether appellant was manipulated by the Hodges brothers; (3) the doctor's opinions concerning duress and domination by the Hodgeses was one of the foundations of appellant's case in mitigation; (4) as found by the trial court, any potential prejudice could be cured by proper instruction;[59] and (5) substantial reasons existed to

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[59] Respondent disagrees that any prejudice could have been cured by an instruction, arguing "[u]nder *Price* and *Coleman*, the trial court had a duty to exclude incompetent, unreliable hearsay (i.e., appellant's statements)." (RB 228.) However, as stated by this Court, "[m]ost often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth." (*People v. Montiel*, *supra*, 5 Cal.4th at p. 919, citing *People v. Coleman*, *supra*, 38 Cal.3d at p. 92.) Moreover, as demonstrated here and in the opening brief, appellant's statements were not

assume the reliability of appellant's statements to the doctor. (See AOB 485, 487-488, 490-492.)

Respondent characterizes appellant's statements to Dr. Nicholas as self-serving and unreliable and argues that all of the cases cited in the opening brief involved extrajudicial statements which were more reliable. (RB 226-229.) Not so. As pointed out in that brief, the statements were against his interest in that he admitted committing the capital crime, committing the thefts charged in Counts 3, 4, and 5, and assaulting Hernandez, one of the aggravating circumstances introduced by the prosecution. (See AOB 490.) Respondent argues that appellant was merely attempting to minimize his culpability by claiming that the Hodges brothers coerced him into shooting McDade. (RB 229.) However, appellant admitted not only his culpability in the capital crime -- that he was the one who shot and killed McDade, but also admitted committing additional crimes not involving the Hodgeses. Moreover, the prosecutor obviously thought appellant's statements were reliable enough to want to introduce them during the guilt phase against the Hodges brothers. As explained in the opening brief, the prosecutor's guilt phase opening statement account of what he anticipated appellant to testify during the People's case-in-chief mirrored appellant's statements to Dr. Nicholas. (See AOB 491; 15RT 6344-6345.) The State cannot have its cake and eat it too. If the statements were reliable enough for the State to use to convict the Hodges brothers of capital murder, they should have been sufficiently reliable to support the opinions of the defense mental health expert.

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unreliable and neither *Coleman* nor *Price* mandated their exclusion simply because they constituted hearsay.

Moreover, appellant's statements to Dr. Nicholas were at least as reliable as, if not more so, as the extrajudicial statements at issue in *Mickey* and the other cases discussed in the opening brief. In *Mickey*, this Court approved the admission of hearsay statements by the defendant's ex-wife to a prosecution mental health expert, finding the statements sufficiently reliable for the basis of a psychiatric opinion. (*Id.*, at p. 688.) The State attempts to distinguish *Mickey* on the basis that appellant's statements were unreliable, whereas "there was no evidence that the ex-wife's statements were unreliable." (RB 226.) Respondent is wrong. In *Mickey*, the defense presented expert opinion testimony that the defendant's mental state was significantly impaired by psychopathology and long-term, heavy substance abuse. (*People v. Mickey, supra*, 54 Cal.3d at pp. 685-86.) The prosecution presented rebuttal testimony by a prosecution expert who disputed the defense experts' opinions, based in large part on hearsay statements by Mickey's ex-wife minimizing his drug consumption. (*Id.*, at p. 687.) Given that the ex-wife, a Lieutenant in the U.S. Air Force, was married to, and living with Mickey, as well as her two children, in military housing at the Yokata Air Force base in Japan before and during the time of the capital crime, she certainly had motive to discount Mickey's substance abuse. (See *id.*, at pp. 637, 687.) Even the prosecution's expert conceded that "perhaps the drug history [she] got from [the ex-wife was] very incomplete." (*Id.*, at p. 687.)

Ainsworth involved a co-defendant's statements regarding his involvement to his mental health expert to support his diagnosis of diminished capacity. (*People v. Ainsworth*, *supra*, 45 Cal.3d at pp. 1010-1011.) Respondent argues that because the co-defendant testified at the guilt phase, this was not a case of a defendant attempting to get his statements before the jury. (RB 226.) However, the co-defendant certainly

had motive to color his statements to the doctor, as well as his trial testimony during his capital prosecution. Therefore, it cannot be claimed that his statements were any more reliable than appellant's statements to Dr. Nicholas. In fact, there is no logical way to distinguish the two cases and if the co-defendant's statements were admitted in *Ainsworth*, appellant's statements should have been admitted in this case.

Montiel involved a doctor's testimony about details of prior unfavorable psychological reports and testimony by a jailhouse informant at a prior trial that Montiel described his commission of a premeditated killing. (*People v. Montiel*, *supra*, 5 Cal.4th at pp. 920-922.) Respondent argues that this evidence would have been more reliable than appellant's statements. (RB 227.) However, as recognized by the Legislature in enacting Penal Code section 1127a [requiring that jury be instructed to view testimony of in-custody informants with caution and scrutiny], statements from jailhouse informants are of questionable reliability. And, given the opinion's lack of identifiable sources for the hearsay details in the prior reports, the reliability of those details cannot be assumed.

Carpenter involved testimony from a prosecution expert about hearsay statements that the defendant had referred to himself as "Devious Dave," bragged about his Mafia connections, and frequently discussed committing perfect crimes. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 410.) Respondent argues that these statements, which were not exculpatory and appear to be from other people who had heard Carpenter make such statements, are not as unreliable as appellant's statements to Dr. Nicholas. (RB 227.) The question of reliability, however, concerns the person or persons who attributed these statements to Carpenter. Given that there is no

identification of this person or persons in the opinion, the reliability of the statements cannot be assumed.

Respondent also attempts to distinguish the cases discussed in appellant's opening brief on the basis that they did not involve a defendant attempting to get his own statements before the jury without testifying. (RB 226-227.) However, one of these cases, *Ainsworth*, did involve testimony by a defense mental health expert regarding a defendant's extrajudicial statements.[60] (*People v. Ainsworth*, *supra*, 45 Cal.3d at pp. 1010-1012.) Notably, like the codefendant Bayles in *Ainsworth*, appellant was not attempting to get his own statements before the jury to be considered for their truth; rather, the statements were to be introduced solely as support for Dr. Nicholas' opinions.

Respondent asserts that *People v. Edwards* (1991) 54 Cal.3d 787, 838-838, supports the trial court's exclusion of Dr. Nicholas' testimony, but *Edwards* did not concern the admission of a defendant's statements as the basis for an expert's opinion and thus has no applicability here. (RB 225.)

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[60] Respondent argues that *Ainsworth* is distinguishable because Bayles testified about the crime and was thus "available for cross-examination, unlike appellant in the present case." (RB 226.) However, this did not appear to play any consideration in the Court's conclusion that there was no error in the admission of the expert's testimony in *Ainsworth*. (*People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1012.) Rather, the Court stated that "[a]n expert should be allowed to testify to all the facts upon which he bases his opinion, including relevant declarations" and then simply determined that the expert's "testimony was relevant to Bayles' defense of diminished capacity and Bayles' extrajudicial statement was clearly admissible as relevant to the development of [the doctor's] diagnosis of Bayles' mental state." (*Ibid.*) *Ainsworth* noted that Bayles' hearsay statements were admissible not as proof of the facts stated but to enable his expert to explain, and the jury to appraise, the basis of the expert's opinion. (*Ibid.*)

In *Edwards*, the defendant requested admission of his taped statements to the police and a notebook compiled after the capital crime, in which he recorded his thoughts, at both the guilt and penalty phases. (*Edwards*, 54 Cal.3d at pp. 819, 837.) The defense argued for admission under Evidence Code sections 1250 or 1251 (statement of declarant's then existing or previously existing mental or physical state) and as constitutionally-required mitigation under *Green v. Georgia*, *supra*, 442 U.S. 95 (discussed below). (*Id.*, at pp. 819-821, 837.) This Court upheld the trial court's exclusion of the evidence because the defendant's statements were "inherently untrustworthy" and thus not sufficiently reliable to warrant admission under those hearsay exceptions or *Green v. Georgia*. (*Ibid.*) Here, however, as argued above, substantial reasons existed to assume the reliability of appellant's statements to Dr. Nicholas and the statements were properly admissible as a basis for his opinions.

Accordingly, contrary to respondent's contentions, the trial court's interpretation of the law was not correct and the trial court erred in excluding Dr. Nicholas's testimony regarding appellant's statements about the offense in order to support his opinion that appellant was coerced by the Hodges brothers to commit the killing .

B. <u>The Exclusion of Dr. Nicholas's Testimony Violated the Due Process Clause of the Fourteenth Amendment</u>.

Appellant further established in his opening brief that the exclusion of his statements to Dr. Nicholas constituted a violation of Due Process under the Fourteenth Amendment pursuant to *Green v. Georgia*, *supra*, 442 U.S. 95, 97. (See AOB 488-492.) Respondent's attempt to distinguish *Green* is unavailing. As pointed out in the opening brief, this case is indistinguishable from *Green* in that like that case, appellant's statements

were against interest and highly relevant to critical penalty issues; moreover, the State considered the statements sufficiently reliable to want to introduce them against the Hodges brothers during the guilt phase. (*Green v. Georgia*, *supra*, at pp. 490-492; see AOB 489-492.) Respondent's argument that appellant's statements were not against his interest (RB 229) has been rebutted *supra*. Respondent also argues that the State's intent to use appellant's statements against the Hodges brothers did not mean that those statements were "100 percent reliable." (RB 229.) According to respondent, had appellant testified at the guilt phase, the State could have cross-examined him regarding any weaknesses in his testimony. (*Ibid.*) Characterizing appellant's claim that the Hodges brothers coerced him to do the killing as a "weakness" in his statements, respondent implies that this claim was not reliable. (*Ibid.*) However, what the State now characterizes as a weakness in the statements is exactly what the State would have relied upon to convict the two brothers of the capital crime had appellant testified. Here, again, the State wants to have its cake and eat it too.

Moreover, *Green* doesn't require such absolutes. (*Green*, *supra*, 442 U.S. at p. 97 ["most important, the State considered the testimony sufficiently reliable to use it against [the co-defendant"].) The point is that the State found appellant's statements sufficiently reliable to want to introduce them at the guilt phase and secure capital convictions of the Hodges brothers on their basis. Accordingly, under *Green*, the exclusion of Dr. Nicholas's testimony regarding those statements as a basis for his opinions constituted a violation of the Due Process Clause.

C. The Trial Court's Erroneous Restriction of Dr. Nicholas's Testimony Was Prejudicial, Requiring Reversal of Appellant's Sentence.

Respondent argues that prejudice should be assessed under the *Watson*[61] "reasonable probability" harmless error standard on the basis of this Court's statement in *Benavides* that "'generally, violations of state evidentiary rules do not rise to the level federal constitutional error.'" (RB 230, quoting *People v. Benavides* (2005) 35 Cal.4th 69, 91.) This statement in *Benavides*, which concerned the admission of irrelevant evidence at the guilt phase, is inapplicable here. (*Id.*, at pp. 89-91.) The erroneous exclusion of potentially mitigating evidence during the penalty phase of a capital trial is subject to the *Chapman*[62] harmless error standard of review. (*People v. Frye* (1998) 18 Cal.4th 894, 1017; *People v. Whitt* (1990) 51 Cal.3d 620, 647-648; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032.) Under *Chapman*, the question is not whether the State's evidence and arguments supported a death sentence, but instead whether the State can "prove beyond a reasonable doubt that the [exclusion of mitigating evidence] did not contribute to the [death] verdict obtained." (*Chapman, supra,* 386 U.S. at p. 24.) Reversal is required if there is a reasonable possibility that the error complained of could have affected the jury's decision to impose the death penalty.[63] (*Ibid.*; *People v. Frye, supra,* 18 Cal.4th at p. 1017.)

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61 *People v. Watson, supra*, 46 Cal.2d 818.

62 *Chapman v. California, supra,* 386 U.S. 18.

63 Notably, even under the state-law standard used to assess other penalty phase errors, reversal is required if there is a reasonable possibility that the jury could have reached a different sentencing decision. In *People v. Brown* (1988) 46 Cal.3d 432, this Court held that a death judgment will be reversed for state law error in the penalty phase of a capital trial where there is a "reasonable possibility" that the jury would have rendered a different verdict had the error(s) not occurred. (*Id.* at p. 446-448.) This

Respondent next contends that the restrictions on Dr. Nicholas' testimony were harmless because there was overwhelming evidence of appellant's guilt, his claim of duress was undermined by other evidence, and the testimonies by Leisey and Banks did not support the conclusion that the Hodges brothers coerced appellant into killing McDade. (RB 230.)

The State is wrong, both factually and legally. First, the factual errors: Yes, there was strong evidence that appellant shot Keith McDade, but the centerpiece of appellant's mitigation case was his argument that the Hodgeses used and compelled him to kill McDade. Contrary to respondent's contention, the testimonies from Leisey and Banks did lend support to this claim of coercion. (See 31CCT 9146, 9151, 9154; 25RT 9426 [Banks' testimony that John Hodges told him that the youngster was easy to manipulate; he did not want to kill, but John gave the order]; 32CCT 9303-9306, 9311, 9315; 25RT 9494, 9498; 27RT 9869, 10032-10034 [Leisey's testimony that Terry Hodges told him that he gave the boy a pistol; he had to coach the boy like a child because he was a "wimp;" the boy was taking too long, so Terry had to "jack him up" and tell him to get it over with and just "whack the motherfucker" so there would be no witnesses].)

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standard is a more exacting standard than that used for assessing prejudice for guilt phase error under *Watson*. (*Id.*, at p. 447.) It is "the same in substance and effect" as *Chapman*'s "beyond a reasonable doubt" standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 990, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Moreover, respondent's contention that Littlejohn's testimony undermined appellant's claim of duress is belied by the evidence. (RB 230.) Although Littlejohn stated that appellant took credit for the killing, she believed that his confederates "probably ... forced him to do it" because appellant is "weak. He's a follower and not a leader .... He's a weak person." (31CCT 9261, 9268, 9270; see also 31CCT 9288.) Littlejohn also thought appellant was "slow," "stupid," and "mental" because he acted like he did not realize the gravity of what he had done. (31CCT 9263, 9265-9266, 9269, 9291.)

Although the testimonies from Leisey, Banks, and Littlejohn did lend support to appellant's claim of coercion, as explained in the opening brief, Dr. Nicholas's excluded testimony was critical to support his opinion that the Hodges brothers manipulated and pressured appellant to kill McDade. (AOB 491-492.) Given that this testimony would not only have provided the support for the mainstay of the defense case in mitigation but would also have effectively destroyed the State's strongest argument why this particular murder was so aggravating (see AOB 493-494), the State cannot establish beyond a reasonable doubt that its exclusion did not contribute to the death verdict here.

Second, respondent's harmless error argument is founded on an erroneous legal basis. As noted above, *Chapman*'s harmless error standard, not the *Watson* standard, applies. Respondent argues that this error is harmless because "there was overwhelming evidence of appellant's guilt (including his culpable mental state)" and admission of the excluded evidence would not have altered the balance of aggravating and mitigating evidence, because that evidence was counterbalanced by evidence of a

culpable mental state. (RB 230.) However, as explained by this Court in *People v. Hines*:

> "We cannot determine if *other* evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment."

(*People v. Hines* (1964) 61 Cal.2d 164, 169, disapproved of on other grounds by *People v. Murtishaw* (1981) 29 Cal.3d 733.)

Respondent's argument incorrectly asks this Court to focus on the strength of the evidence and make a comparison which, as a matter of federal constitutional law, can be made only be a jury which hears all the evidence, not by an appellate court. The decision whether to sentence a defendant to death or to life without the possibility of parole is a normative decision, which requires jurors to make individual determinations based on their own understanding of the penalty factors. The jury's sentencing decision is a discretionary, fact-specific determination (see *Tuilaepa v. California* (1994) 512 U.S. 967, 974), which requires the personal moral judgment of each juror. (*People v. (Albert) Brown* (1985) 40 Cal.3d 512, 541, revd. on other grounds *McKoy v. North Carlonia* (1987) 494 U.S. 433, 442-443.) In a death penalty case, "individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp* (1987) 481 U.S. 279, 311, internal citation omitted.) Different jurors

will have different interpretations of and assign different weights to the same evidence. (*United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.) And as recognized by this Court in *People v. Hamilton* (in discussing the state-law "reasonable possibility" harmless error standard):

> "[I]n determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming, as here, or that the crime involved was, as here, particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial."

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-37, overruled on other grounds by *People v. Morse* (1964) 60 Cal.2d 631.)

Respondent's invitation to the Court to find this error harmless by simply assessing the strength of the evidence violates *Chapman*. *Chapman* requires an inquiry into the impact this error has had on the jury, regardless of the weight of the evidence. As explained by the United States Supreme Court in *Sullivan v. Louisiana*:

> "[T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which `the jury actually rested its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original; see also *People v. Sims* (1993) 5 Cal.4th 405, 476 (dis. opn. of Mosk, J.), quoting *Chapman v. California, supra,* 386 U.S. at p. 23 ["By its very terms, *Chapman* precludes a court from finding harmlessness based simply 'upon [its own] view of "overwhelming evidence." ' "].) "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question ...." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved of on other grounds by *Estelle v. McGuire* (1991) 502 U.S. 62.)

In this case, the exclusion of mitigating evidence critical to supporting appellant's claim that he was coerced to commit the killing cannot be held harmless beyond a reasonable doubt. To be sure, the prosecution introduced evidence to discount that claim. But that evidence did not, and could not, render "unimportant" the excluded testimony by Dr. Nicholas as to the basis for his opinion that appellant was coerced to shoot McDade. Any assertion to the contrary blinks reality. Absent this excluded testimony, the jury was precluded from fully exercising its discretion in determining appellant's penalty. Notably, the United States Supreme Court has found little need to conduct detailed prejudice analyses in its cases reversing death judgments due to the erroneous exclusion of mitigating

evidence. In its leading case on the subject, the high court applied no prejudice analysis whatsoever. (*Lockett v. Ohio* (1978) 438 U.S. 586, 608.) When faced with the issue now before this Court - the erroneous exclusion of evidence that could have served as a basis for a sentence less than death and rebutted the prosecutor's arguments for a death sentence - the Supreme Court held that, "under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 8.)

Appellant provided a detailed analysis in his opening brief, demonstrating why there is a reasonable possibility that the exclusion of Dr. Nicholas' proposed testimony contributed to the death verdict in this case. (AOB 491-495.) The Attorney General's meager response (RB 230) does nothing to demonstrate otherwise. Because the penalty of death is qualitatively different than any other sentence, the utmost scrutiny must be employed when considering the effect the trial court's error had on the jury's decision to impose death. (*Woodson v. North Carolina* (1976) 428 U.S. at 280, 304-305.) Appellant's death judgment cannot withstand that scrutiny and should be reversed.

XXIV.

REVERSAL IS REQUIRED DUE TO PROSECUTORIAL MISCONDUCT DURING PENALTY PHASE CLOSING ARGUMENT.

In the opening brief, appellant demonstrated that the prosecutor engaged in multiple flagrant and incurably prejudicial misconduct during his penalty phase arguments. (AOB 496-575.) Respondent replies that the prosecutor did not commit misconduct and any error was forfeited and harmless. (RB 230-264.)

Appellant addresses respondent's contentions regarding error under each individual subheading, but will address harmless error cumulatively at the end of this argument.

A. Bengal Tiger Argument

In the opening brief, appellant established that the prosecutor's argument likening appellant to a "Bengal tiger" constituted serious misconduct, because it was (1) a thinly-veiled racist allusion, which injected racial bias into the jury's sentencing decision; (2) a dehumanizing characterization of appellant designed to inflame the jury, desensitize them, and lessen their sense of responsibility for imposing a sentence of death; and (3) an improper argument regarding future dangerousness. (AOB 498-516.)

Appellant acknowledged that in *People v. Duncan* (1991) 53 Cal.3d 955, 976-977, the Court rejected a claim that a similar "Bengal tiger" argument was racist, but asked the Court to reconsider the propriety of this argument on the basis of several reasons articulated in the opening brief. (See AOB 504-507.) The State responds that the Court affirmed its *Duncan*

ruling in *People v. Brady* (2010) 50 Cal.4th 547, and argues that "[t]he reasoning of *Duncan* and *Brady* is sound: comparing a vicious murderer to a dangerous animal is permissible." (RB 233.) As explained in the opening brief, however, the particular animal metaphor at issue here, "Bengal tiger," when used to describe a Black defendant, *is* racist; it likely to be viewed by many as a derogatory reference to African-Americans because it evokes other derogatory racial slurs commonly used during this country's history by White people to refer to African-Americans. (See AOB 506.) In *Brady*, where the defendant claimed that the prosecutor's use of the "Bengal tiger" metaphor was a racist allusion to his Vietnamese heritage, this Court responded: "As we noted in *Duncan,* likening a murderer to a wild animal does not necessarily invoke racial overtones." (*People v. Brady*, *supra*, at p. 585.) *Brady* is not applicable here where the epithet was applied to a Black man.

Respondent also argues that the Bengal tiger metaphor was "used for a legitimate purpose: to explain that a defendant's behavior on the streets may be different from the behavior he exhibits in the courtroom." (RB 233-234.) But the prosecutor could have made this point without comparing appellant to a vicious, jungle animal – an analogy which was likely to remind many of the racist stereotype of the Black man as a biologically primitive and tough, mean street person.

In the opening brief, appellant argued that regardless of whether this Court finds the Bengal tiger story to invoke racial overtones, it was a dehumanizing characterization of appellant, designed to inflame the jury's fears and emotions, desensitize them and lesson their sense of responsibility for imposing a sentence of death. (AOB 507-510.) Respondent counters that the Court has declined to find misconduct in cases involving other

epithets, citing *People v. Thomas* (1992) 2 Cal.4th 489, 537 [perverted murderous cancer and a walking depraved cancer], *People v. Sully* (1991) 53 Cal.3d 1195, 1249-1250 [human monster and mutation], and *People v. Farnam* (2002) 28 Cal.4th 107, 167-168 [monstrous and a predator]. (RB 234.) In *Farnam*, this Court stated:

> Additionally, there was nothing inappropriate about the prosecutor's use of epithets in describing defendant's actions, or her characterization of the evidence as "horrifying" and "more horrifying than your worst nightmare." Prosecutors "are allowed a wide range of descriptive comment and the use of epithets which are reasonably warranted by the evidence" (Citation.), as long as the comments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury (Citation). Here, the prosecutor's statements were no more than fair comment on what she anticipated the evidence would show. In light of the record, the comments were neither deceptive nor reprehensible. (Citation.) Nor were they so unfair as to deny defendant due process. (Citation.)

(*People v. Farnam*, *supra*, at pp. 168-69.)

Here, however, the epithets were not reasonably warranted by the evidence and were, in fact, inflammatory and designed to arouse the passion and prejudice of the jury. (See AOB 507-510.) The prosecutor created a picture of appellant as a dangerous, cold-blooded beast: passive and docile in front of the jury, yet – underneath – an aggressive violent animal with "the eyes of death" who would kill again. (35RT 12488-12489.) And, unlike *Sully*, the prosecutor's comments were neither brief nor isolated instances. (*People v. Sully*, *supra*, 53 Cal.3d at pp. 1249-1250 [there was no possible prejudice from the prosecutor's remarks because the expressions, albeit exaggerated, were brief and isolated instances].) Three times, the prosecutor returned to this metaphor, using it to portray appellant

as dangerous animal with "the eyes of death," to counter testimony by jail officers that appellant could function well in an institutional setting, and to argue that appellant lacked remorse. (35RT 12488-12489, 12492; 36RT 12608-12609.) These repeated and extended references to appellant as a dangerous, cold-blooded jungle animal do not compare, in any manner, to the derogatory name-calling exhibited in *Farnam*, *Sully*, or *Thomas*.

The opening brief further established the impropriety of the prosecutor's argument that once appellant adjusted to the institutional setting, he would "become the Bengal tiger out in the street" and pose a future danger in prison. (AOB 511-514.) As argued there, this argument was improper because there was no evidence in the record to support it. (*Ibid.*) The State's response to this argument, at RB 234-235, has been addressed by the argument in the opening brief and does not require further discussion here.

Accordingly, for the reasons expressed above and in the opening brief, the prosecutor's Bengal Tiger argument was highly improper and should be condemned.

B. Urging Jury Not to Consider Sympathy or Mercy Because None Was Showed to the Victim

In the opening brief, appellant established that the prosecutor's argument urging the jury not to consider any sympathy or mercy to appellant because none was shown to the victim (1) improperly appealed to the passions and prejudice of the jury; and (2) asked them to ignore the guided discretion of federal and California death penalty law and decide appellant's fate based on emotion and vengeance rather than as a reasoned moral response to the evidence, thereby violating the principles of the Fourteenth and Eighth Amendments. (AOB 516-522.) Appellant

acknowledged that the Court has rejected this argument in prior cases, but asked the Court to reconsider the propriety of this argument in light of substantial authorities from other jurisdictions condemning similar arguments and the Court's own precedents condemning reliance on extra-judicial authority and appeals to passion and prejudice. (*Ibid.*) Respondent argues that the claim should be rejected on the basis of this Court's precedents. (RB 236-237.)

Respondent also asserts that the prosecutor's argument was a comment on the callousness of the offense, thus constituting a permissible argument regarding the circumstances of the offense. (RB 237.) Not so. The prosecutor argued: "Is that sympathy deserved? What sympathy did he give Keith McDade? [¶] If you deliberate for more than five minutes, you'll have deliberated longer about the fate of Carl Powell than Carl Powell ever thought about the fate of Keith McDade." (35RT 12487.) This was not a mere comment regarding the circumstances of the offense, but rather an appeal to vengeance. The prosecutor was imploring the jury to make its death penalty determination in the same manner which he argued was shown by appellant to McDade, thus inciting the jury to make "an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." (*Lesko v. Lehman* (3d Cir. 1991) 925 F.2d 1527, 1540, 1545 [Condemning similar argument ("So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No more. No more.") as an improper appeal to the jury to make a retaliatory sentencing decision].)

Respondent further claims that the argument did not invoke Biblical concepts of vengeance, but was instead an "equal-mercy" argument

"premised upon a notion of proportionality which is a principle underlying our system of criminal law." (RB 237.) As stated by the United States Supreme Court, however, "Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law." (*Harmelin v. Michigan* (1991) 501 U.S. 957, 989.) Certainly, respondent can't be suggesting that if appellant had maimed or disfigured McDade before shooting him, a prosecutor could properly exhort that the same should be done to appellant.

For the reasons expressed in the opening brief, this argument was improper and appellant respectfully requests the Court to reconsider its propriety. Prosecutors should not be allowed to withdraw one of the most critical mitigating factors for a defendant facing death on the basis of such emotional appeals to vengeance. For, as explained by the Eleventh Circuit:

> The ultimate power of the jury to impose life [imprisonment], no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale.... Thus, the suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life.

(*Drake v. Kemp* (11th Cir.1985), 762 F.2d 1449, 1460.)

C. Improper Appeal to See Crime Through Victim's Eyes Via Graphic, Invented Script

In the opening brief, appellant established that the prosecutor committed misconduct when he made an improper appeal to the jurors to see the crime through the victim's eyes via the vehicle of a graphic, invented script. (AOB 522-528.) Appellant acknowledged that the Court

has approved "Golden Rule" arguments (arguments inviting the jurors to view the crime through the eyes of the victims) in several cases, but explained that the argument here was much different from those approved in other cases. (AOB 525-528.) The prosecutor went beyond a mere invitation to the jurors to place themselves in McDade's shoes: (1) He graphically detailed every inch of the crime through McDade's eyes and invented a script putting his own imaginary thoughts into McDade's head; and (2) He created a scenario of facts not in the record and asked the jurors to rely on that hypothetical situation in determining whether appellant should live or die. (*Ibid.*; 35RT 12448-12451.) Moreover, the prosecutor's graphic script was inflammatory. (*Ibid.*)

The State responds that the Court has approved of similar arguments, citing *People v. Dykes* (2009) 46 Cal.4th 731, 793-794, and *People v. Bennett* (2009) 45 Cal.4th 577, 617. (RB 238.) Neither case supports approval of the argument in this case. In *Bennett*, the Court approved an argument that the victim likely sought mercy before being killed because it was a reasonable inference based on the record. (*Bennett*, *supra*, at p. 617.) In *Dykes*, the Court approved an argument requesting the jury to imagine what it must have felt like for the victim "to have a hot piece of lead tear through his chest, go through his heart, his lungs, his liver and come out his back" on the basis that there was no allegation that the argument misstated the evidence and the prosecutor is permitted to ask the jury to consider the pain suffered by the victim. (*Dykes*, *supra*, at pp. 793-794.)

In this case, however, the prosecutor's argument did misstate the record and did so in a significant manner. As explained in section (J), *post*, the prosecutor misrepresented the record when he argued that appellant acted alone in committing the crime. The prosecutor's script, which placed

appellant alone at McDade's car when he both robbed and shot McDade, was contradicted by evidence that Terry Hodges was present, at a minimum, when McDade was robbed. (32CCT 9307-9308.) This was a critical misrepresentation that the prosecutor used to strike at the heart of appellant's mitigation case – that the Hodges pressured him to rob and kill McDade.

For these reasons and those expressed in the opening brief, the prosecutor's improper appeal to the jurors to see the crime through McDade's eyes via a graphic, invented script, was improper and should be condemned.

D. Urging Jurors to Speculate that Appellant Could Have Killed Others

Respondent's contentions (RB 239-240) have been fully met at AOB 528-530. Appellant submits this issue on the basis of that briefing in his opening brief.

E. Encouraging Jurors to Make Sentencing Decision on Basis of Their Fears of Gang Violence

In the opening brief, appellant established that the prosecutor committed misconduct by repeatedly emphasizing highly-charged gang-affiliation evidence, thereby encouraging the jurors to make a sentencing decision based on their fears of gangs and gang violence. (AOB 530-538.) Respondent merely argues that the gang evidence was properly admitted, the prosecutor was entitled to refer to it, and the prosecutor did not mischaracterize it. Thus, according to the State, the prosecutor's argument did not constitute misconduct. (RB 240-243.)

Appellant's argument, however, is that the prosecutor used the gang evidence during his penalty phase arguments in an inflammatory manner to arouse the jurors' fears of gangs in order to secure a sentence of death. As demonstrated in the opening brief, the prosecutor repeatedly emphasized appellant's gang affiliation, as well as the gang affiliation of appellant's associate, William Akens, during his penalty phase arguments and did so with inflammatory references -- "long-time gang banger," "involved with his Crip buddies," "tough, sophisticated gang criminal," "hard-core gang members," "vicious," and "street punk." (See AOB 531-535.) Moreover, the prosecutor's dramatic appeal, in which he displayed the photograph of appellant and Akens making gang signs and pointing guns at each other and then compared appellant to a Bengal tiger, was calculated to elicit an irrational, purely subjective response. (AOB 534-537; 36RT 12608-12609.) By painting and constantly emphasizing this picture of appellant as a vicious gang-banger, the prosecutor improperly appealed to the passions, prejudices and vulnerabilities of the jury, seeking to elicit a sentencing determination based on fear and vengeance, rather than a reasoned moral response to the evidence as required by the Eighth Amendment. The State's response does not meet this argument and accordingly fails to refute it.

F. Improperly Arguing Lack of Remorse as a Factor in Aggravation

In the opening brief, appellant established that the prosecutor committed misconduct by arguing lack of remorse as a factor in aggravation. (AOB 538-543.) In fact, as demonstrated by the number of times in which the prosecutor discussed and emphasized this issue, it was one of the central themes of his case in aggravation. This argument was improper, for lack of remorse is not a statutory aggravating factor and thus a prosecutor may not argue that a defendant's post-crime remorseless is an

aggravating factor. (*People v. Jurado* (2006) 38 Cal.4th 72, 141; *People v. Boyd* (1985) 38 Cal.3d 762, 773-775.)

Respondent contends that the prosecutor's argument was proper, because he was merely arguing that remorse should not be considered as a factor in mitigation. (RB 243-244.) It is true that this Court has held that a prosecutor is entitled to note the absence of the mitigating circumstance of remorse. (*People v. Burney* (2009) 47 Cal.4th 203, 266; *People v. Salcido* (2008) 44 Cal.4th 93, 160.) However, this is permitted only if the argument "lack[s] any suggestion that the absence of remorse should be deemed a factor in aggravation." (*Salcido*, *supra*, at p. 160; *accord*, *Jurado*, *supra*, at p. 141; *People v. Mendoza* (2000) 24 Cal.4th 130, 187; *People v. Holt* (1997) 15 Cal.4th 619, 691.) That is not the case here.

Respondent argues "[l]ooking at the prosecutor's argument as a whole, the main thrust of the comments on remorse was that it was not a mitigating factor." (RB 244.) Not so. As pointed out in the opening brief, the bulk of the prosecutor's argument concerning remorse occurred during his discussion of the aggravating factors. (AOB 543.) The prosecutor divided his argument into sections, first discussing the aggravating evidence and then discussing the mitigating factors. (35RT 12443.) The prosecutor devoted a lengthy portion of his argument to dismissing appellant's offered factors in mitigation [see 35RT 12475-12493] and only once did he mention appellant's remorselessness in that section. (*Id.*, at 12484.) Instead, the prosecutor discussed appellants' remorselessness during the portion of his argument devoted to the discussion of aggravating factors. (See 35RT 12443-12461.)

Respondent counters that even though the prosecutor was discussing factors in aggravation, he was merely arguing that remorse was not a

mitigating factor because he first told the jury it could consider remorse as a factor in mitigation. (RB 244; 35RT 12451-12452.) Thus, respondent argues, "[a]ll of the prosecutor's subsequent comments on remorse must be viewed in light of that preface." (RB 244.)

The record belies this interpretation. It makes it very clear that the prosecutor was not merely urging the jury to reject remorse as a mitigating factor, but urging them to consider appellant's remorselessness as aggravating evidence of the circumstances of the crime. At the beginning of his opening penalty phase argument, before he began his discussion of remorse, the prosecutor said:

> I submit to you that there is going to be two sets of circumstances that are circumstances in aggravation. The first thing you can consider is the – are the circumstances of the crime.
>
> Now, where did you get that from? You get that from the guilt phase of the trial. You've sat through the entire trial. And you can consider all of the facts you heard in this case as circumstance A of the case, the circumstances of the crime.
>
> Now, in addition to that you can consider victim impact evidence, in other words, what impact this crime had on the victim Keith McDade. And of course that's very obvious. And also you can consider what impact it had on the family of Keith McDade.
>
> *So there are two – there are two facets of the circumstances of the crime, the actual circumstances of the crime.*
>
> *You can consider remorse – did the defendant show any remorse – how cold-blooded it was, these kinds of things.*
>
> All right. You can also consider other criminal activity. And I'm – I'm just prefacing now. Then I'm going to go in detail on all those issues.

(35RT 12433-12434, emphasis added.) Thereafter, during his discussion of the aggravating evidence, the prosecutor did go into detail regarding appellant's lack of remorse, as quoted at AOB 538-540, and concluded his argument regarding the aggravating circumstances of the crime as follows:

> "So they are the circumstances of the crime. And I submit to you that they were – they are so outrageous, so horrendous, so cold-blooded, so heartless that you can consider that circumstance alone as so far outweighing any mitigating circumstance you might find in this case that you can impose the death penalty based on the circumstances of the crime including the victim impact – including what he did to the McDade family."

(35RT 12459.)

Thus, the prosecutor used his discussion of remorselessness to argue that appellant's behavior was so cold-blooded and heartless that he deserved a sentence of death.[64] On the basis of this record, the State cannot demonstrate that the prosecutor's argument lacked any suggestion that the absence of remorse should be deemed a factor in aggravation of the offense.

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[64] Although the prosecutor referenced his lack-of-remorse argument as part of his discussion of the circumstances of crime, as demonstrated in the opening brief, he did not limit his argument to evidence which he contended demonstrated remorselessness at the time of the crime. Instead, he argued on the basis of testimony by the defense mental health expert and the videotape of appellant's arrest, that appellant was a sophisticated criminal, a street punk, with no remorse. (AOB 541-543; 35RT 12454; 36RT 12609.) As argued in the opening brief, this argument violated the proscription of arguments that a defendant's post-crime remorselessness constitutes aggravation. (AOB 541-543.) Respondent offers no response and accordingly, appellant's argument on this point stands unrefuted.

Respondent argues that this case is similar to *Jurado*, where the prosecutor noted that the defendant played darts and enjoyed pizza and beer after the murder. (RB 244, citing *People v. Jurado*, *supra*, 38 Cal.4th at p. 141.) However, in *Jurado*, this Court found that the prosecutor merely argued lack of remorse was relevant to the evaluation of mitigating factors because:

> The prosecutor here never suggested that lack of remorse was an aggravating factor, and he did not refer to lack of remorse during the portion of his argument devoted to the discussion of aggravating factors. Instead, the challenged argument occurred during the course of the prosecutor's review of the defense case in mitigation and the potential mitigating factors. A reasonable juror would have understood the prosecutor's argument to be that defendant's failure to demonstrate any concern for the woman he had killed meant that 'remorse was not available as a mitigating factor and also that defendant was not entitled to the jury's sympathy.'"

(*Jurado*, *supra*, at p. 141.) *Jurado* provides no support for the State's argument.

Accordingly, for the reasons expressed above and in the opening brief, the prosecutor's argument that appellant's remorselessness should be considered by the jury as aggravating evidence was improper and should be condemned.

G. Boyd Error – Improper Conversion of Mitigating Evidence into Aggravation

In the opening brief, appellant established that the prosecutor committed misconduct when he urged the jurors to consider the details of appellant's impoverished childhood, his growing up without a father in a dangerous, gang-infested area of Los Angeles, and his family's love of, and

support for, him as aggravating evidence by arguing (1) there are "far, far worse situations in life than he had, and yet people don't wind up executing somebody"; (2) appellant's brothers both had good jobs and were responsible, contributing citizens; and (3) it was appellant's fault for not graduating from high school and failing to afford himself of all the opportunities his brothers would have provided to him. (AOB 543-545; 35RT 12438.) As argued there, evidence offered by the defense in support of factor (k) can only be used in mitigation and it is improper for the prosecutor to urge that such evidence should be considered in aggravation. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.)

Respondent maintains that the prosecutor was merely arguing that the mitigating evidence regarding appellant's childhood should be given little weight. (RB 245.) The prosecutor's argument, however, went beyond suggesting the absence of a mitigating factor. The prosecutor did not merely argue that appellant's childhood was not mitigating. He compared appellant to his brothers and argued that they, unlike appellant, were responsible, contributing citizens. The prosecutor also turned the love of appellant's family against him, essentially arguing that he was so loved, he should have turned out better – like his brothers. The implication of this argument was clear: appellant's failure to turn out like his brothers and to take advantage of the opportunities they could have provided to him, should be considered as aggravating evidence.

For the reasons expressed above and in the opening brief, this argument was improper and should be condemned.

H. Misrepresentations Designed to Distort Appellant's Relationship with the McDades

In the opening brief, appellant established that the prosecutor deliberately distorted facts and made assertions not supported by the record regarding appellant's relationship with the McDades in order to aggravate the circumstances of the crime, outrage the jurors and prevent them from considering sympathy as a mitigating factor. (AOB 546-548.) The State contends otherwise by twisting the prosecutor's words and arguing that the prosecutor's literal words were not really what he was arguing. (RB 246-248.) The prosecutor's arguments speak for themselves. Appellant stands by his argument in the opening brief at AOB 546-548, which fully meets respondent's contentions. Appellant submits this issue on the basis of that briefing in his opening brief.

I. Misstatements Concerning Defense Mental Health Expert's Testimony.

In the opening brief, appellant established that the prosecutor improperly denigrated the defense case in mitigation by misstating the defense mental health expert's testimony to persuade the jury to reject his opinions. (AOB 548-551.) Respondent's contentions (RB 248-250) have been fully met at AOB 548-551. Appellant submits this issue on the basis of that briefing in his opening brief.

J. Improper Argument that Appellant Acted Alone Based on Misrepresentations of the Record.

In the opening brief, appellant established that the prosecutor committed misconduct when he misrepresented the record in arguing that appellant acted alone in committing the crime: the Hodges's brothers were back in the car when appellant robbed and shot McDade. (AOB 551-556.) Specifically, the prosecutor misstated the record when he argued that the Hodges brothers "were back in the car. They all say that. . . . [i]f you look

at what Terry Hodges says to Daryl Leisey, what John Hodges says to Eric Banks, they are back in the car. Carl Powell was alone at the time." (35RT 12447.) Furthermore, the prosecutor later repeated the misrepresentation by appearing to quote Leisey's account of what Terry Hodges had told him about the crime but, in doing so, taking Leisey's statements out of context in order to make it appear that appellant was all alone when he both robbed and shot McDade. (See AOB 553-556; 32CCT 9306-9308; 35RT 12486.) In fact, the omitted statements make it clear that Terry told Leisey that he and the boy robbed the guy and Terry turned around and told the boy to whack him. (32CCT 9308.)

Respondent's position is that the prosecutor properly argued that appellant acted alone, because the record supports the argument that appellant was alone when he shot McDade. (RB 250-251.) Specifically, respondent contends that appellant's police interview and Leisey's pretrial statement supported the prosecutor's argument. (*Ibid.*) Respondent acknowledges that "Leisey's trial testimony was more ambiguous," but argues that "a close reading indicates that Terry had returned to the car when the shooting occurred." (RB 252.) Respondent ignores, however, Leisey's testimony that Terry Hodges made statements to him which indicated that Terry was present when McDade was shot, including the following: Terry said he had to "coach him on," Terry "didn't want no witnesses at all," Terry "wasn't going to leave no witnesses,"[65] and Terry told "Mr. Powell to get it over with so we can get the hell out of here."

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[65] As explained in Argument VI, *ante*, Terry Hodges would not have been so concerned about McDade identifying him unless he had been present with appellant during the crime.

(27RT 10031.) Leisey testified that based on those statements, he felt that Terry Hodges was present with appellant when McDade was shot. (*Ibid.*)

More importantly, however, the State's response ignores a significant part of the prosecutor's misrepresentation. Respondent expends significant effort in attempting to show that the record supported the prosecutor's argument that appellant acted alone in shooting McDade. Its entire response is devoted to arguing that the record was sufficient to show that the Hodges were back at the car when the actual shot was fired. (See RB 250-252.) But the prosecutor's misrepresentation was not limited to his argument that appellant acted alone in shooting McDade. The prosecutor also argued that appellant acted alone in robbing McDade. (35RT 12446 ["Now, let's talk about the crime itself. First of all Powell acted alone. The Hodges brothers were there. But they were back in the car. They all say that."]; see also *id.*, at pp. 12448-12451 [in describing crime, prosecutor tells the jurors that Powell alone confronted McDade at his car].) As demonstrated in the opening brief, the prosecutor took Leisey's statements out of context in order to make it appear that appellant was all alone when he robbed McDade and that the Hodges were back at the car when the robbery occurred. (See AOB 553-555; 32CCT 9306-9308; 35RT 12486.) This was patently false, for Leisey stated:

> "Yeah. Terry and the other guy got out. Okay? The whole deal was Terry and the boy robbed the guy, were standing there robbing the guy, and Terry turned around and told him, 'Hey, just what the – the motherfucker,'. . . ."

(32CCT 9307.) The prosecutor, however, in quoting Leisey's statements, omitted the language "The whole deal was Terry and the boy robbed the guy, were standing there robbing the guy, and. . . ." What the prosecutor quoted, during his argument, was:

"And then Terry says, 'I was hanging out, waiting for the boy to get back.'

So Terry confirms what Carl Powell says: Terry was not there because he was back in the car.

Daryl Leisey: 'John – John was the driver. John was sitting behind, was in the car waiting for Terry.'

So John's back in the car, according to this version of the events too.

And then Mr. Leisey says, 'Okay,' and Terry said, '"Just whack the motherfucker and be done with it."'"

(35RT 12486.) This was significant, because the prosecutor used this latter misrepresentation to strike at the heart of appellant's mitigating argument that the Hodges pressured him to rob and kill McDade. As argued by the prosecutor: ""How can he be the least culpable of the three? The other two are back in the car. They say it and he says it." (36RT 12611.)

Accordingly, the record does not support the prosecutor's argument that appellant acted alone in both robbing and shooting McDade and respondent has not demonstrated otherwise.

K. Argument Beyond the Evidence Vouching for Truthfulness of Testimony that Appellant Fired Gun During Kennedy High School Shooting

In the opening brief, appellant argued that the prosecutor went beyond the evidence to support his argument that it was appellant, not William Akens, who was the shooter during the drive-by shooting at Kennedy High School when he told the jurors that they should believe Akens' testimony that appellant fired a gun during that drive-by shooting, because "he's on the stand under penalty of perjury" and '[h]e's on probation, so he's worried about that type of thing. He's got to tell the

truth, even though he really doesn't want to. Kind of matter of fact about the thing, but he says that Carl shot at that group, at the bus stop." (35RT 12464; see AOB 556-559.) As established in the opening brief, this argument was improper because there was no evidence that Akens was on probation and, in fact, the prosecutor knew that Akens had been paroled. (See AOB 558; 33 RT 11733.)

Respondent does not contend that the argument was proper but merely responds that any error was harmless. (RB 253-254.) Respondent's contentions have been fully met at AOB 556-559 and 573-575.)

L. Attacks on Integrity of Defense Counsel

In the opening brief, appellant established that the prosecutor committed misconduct when he made repeated attacks on the integrity of defense counsel by (1) insinuating that defense counsel were attempting to mislead the jury with dishonest defense tactics; and (2) arguing that one of the main tenets of appellant's mitigation case (lingering doubt based on the actions of the Hodges's brothers in manipulating appellant to commit the robbery and shoot McDade) was nothing but a red herring -- a fabrication based on standard defense tactics. (AOB 560-564.)

The State makes the same response that it provided to Argument XX(B), arguing that the "prosecutor's remarks were merely comments on defense tactics or the defense view of the evidence." (RB 254.) Based on the same authorities cited in Argument XX(B), *People v. Seaton* (2001) 26 Cal.4th 598, 663, *People v. Medina*, *supra*, 11 Cal.4th 694, 759, and *People v. Gionis*, *supra*, 9 Cal.4th 1196, 1215-1217, respondent claims that the prosecutor's argument was proper. (RB 254-256.)

For the reasons expressed in Argument XX(B), *ante*, respondent is wrong. The argument in this case, where the prosecutor accused defense counsel of fabricating appellant's mitigation case based on dishonest defense tactics, is far different from that in *Medina*, where the prosecutor argued that defense counsel would "twist" or "poke" at the prosecution's case. (*Medina*, *supra*, at p. 759.) As explained in Argument XX(B), resorting to deception or fabrication is reprehensible conduct, whereas challenging the State's case is not. In the same vein, the argument here is different from that approved in *Gionis*, which this Court characterized as simply establishing that lawyers are "schooled in the art of persuasion," but very similar to the argument condemned in that case (""""You're an attorney. It's your duty to lie, conceal and distort everything and slander everybody."""). (*Gionis*, *supra*, at p. 1216.) In *Seaton*, this Court, after reviewing the prosecutor's remarks "in their proper context," found no impropriety because "[t]he remarks were comments on the evidence presented by the defense and did not impugn counsel's integrity." (*Seaton*, *supra*, at p. 663.) Here, however, there was no evidence to support the insinuation that counsel was making up the defense mitigation case.

For the reasons expressed above, in Argument XX(B), *ante*, and in the opening brief, the prosecutor's argument, attacking defense counsel's integrity and accusing them of using dishonest tactics to fabricate a defense, was improper and should be condemned.

M. Improper Attack on Defense Mental Health Expert

In the opening brief, appellant established that the prosecutor committed misconduct when he improperly attacked the testimony of the defense expert, based on psychological and intelligence testing, that

appellant suffered extreme intellectual deficits[66] which, in combination with other personality characteristics, rendered him susceptible to manipulation by older individuals such as the Hodges's brothers. (AOB 564-569.) Appellant argued that the prosecutor committed misconduct when he denigrated the doctor's testimony by misstating trial testimony, asserting false facts, and belittling his test results and opinions without evidentiary support. (*Ibid.*)

The State responds that the prosecutor could properly argue that Dr. Nicholas had a financial interest in testifying favorably for the defense, citing *People v. Clark* (2011) 52 Cal.4th 856, 962, which in turn cited *People v. Arias* (1996) 13 Cal.4th 92, 162 and *People v. Cook* (2006) 39 Cal.4th 566, 613. (RB 257-258.) These cases merely hold that prosecutors are allowed to remind jurors that a paid witness may be biased and are also allowed to argue, from the evidence, that a witness's testimony is unbelievable or unsound. (*Arias*, *supra*, at p. 162; *Cook*, *supra*, at p. 614; and *Clark*, *supra*, at p. 962.) The key, however, is that argument attacking an expert witness's testimony must be based on evidence. This Court has never approved attacks on expert witnesses based on misstatements of the record or outright assaults on the witness's character because the prosecutor does not like his opinion. What appellant has demonstrated, in his opening brief, is that the prosecutor did not merely suggest Dr. Nicholas was biased because he was a paid witness, but attacked his opinions by misstating trial testimony, asserting false facts and belittling his test results without

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[66] Dr. Nicholas testified that appellant had a full-scale I.Q. of 75, placing him in the mild mentally retarded range. (34RT 12002, 12006, 12032.)

evidentiary support. (AOB 564-567.) The argument was improper here, because it was not based on or tied to the evidence.

Respondent next argues that the "prosecutor was also entitled to argue that Nicholas's IQ tests did not reflect appellant's ability to function in the real world." (RB 258.) Of course, the prosecutor was entitled to make that argument *if* it was based on the evidence, but the case law is clear that he could not mount such an attack on the basis of false representations of the evidence. The State concedes that the prosecutor's attack on Dr. Nicholas's I.Q. testing was based on a misstatement but attempts to downplay the improper argument by characterizing it as a "minor overstatement." (RB 258.) The record belies this characterization. The prosecution falsely asserted that the results of the testing were not "confirmed" in the community because "everybody says that Carl Powell is of normal intelligence, except for Dr. Nicholas" (35RT 12490) and further falsely argued "[t]here's no evidence in the real world of him being dumb." (*Id.*, at p. 12470.) Regardless of the State's attempted spin, those arguments were absolutely false. Appellant's intellectual deficits were confirmed in the community by both Littlejohn's testimony describing appellant as stupid, "mental," and "kind of like a special kid" (by which she meant mentally slow) (31CCT 9263, 9269; 28RT 10412, 10431) and the evidence of appellant's dismal school performance.[67] Even appellant's

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[67] Appellant had to repeat both the second and the eighth grades and his grades at high school were very poor – mostly "D's" and "F's" except for a "B" in P.E. (34RT 12135-12136; 45CCT 13410-13413 [Def. Penalty Phase Ex. P-A (Kennedy High School transcripts)].)

mother, who tried to deny appellant's intellectual deficits, admitted that he was a "little slow." (35RT 12272.)

Respondent argues this "was such a minor overstatement that it was harmless" (RB 258), but as demonstrated above, it was not a minor overstatement. Furthermore, it was the prosecutor's main arsenal (other than attributing financial bias) for attacking Dr. Nicholas' opinion. Moreover, this attack went to the heart of appellant's mitigation case – that his intellectual deficits, in combination with other personality features, rendered him vulnerable to the manipulation and coercion applied by the Hodges's brothers to commit the capital crime.

Respondent also downplays the prosecutor's falsehood regarding Winston Churchill,[68] arguing that "there is no reasonable likelihood that the jury's penalty phase decision turned on this issue." (RB 259.) This argument misses the mark. The point is that the prosecutor attacked Dr. Nicholas's testing and opinions on the basis of falsehoods, rather than evidence presented at trial. Given that the doctor's testimony regarding appellant's intellectual deficits was such an essential part of the defense case in mitigation, the improper attack was not harmless. The attack based on the Churchill falsehood and misstatement of the evidence were glib and

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[68] To denigrate Dr. Nicholas's explanation that as I.Q, descends, the ability to lead becomes less and less, the prosecutor argued:

> Well, one of the greatest leaders in the world was Winston Churchill, and it was well known that he was a terrible, terrible student. And he probably wouldn't have done well in that I.Q. test because it measures those kinds of things."

(35RT 12491.)

could very well have persuaded at least one juror to reject Dr. Nicholas's testimony.

As established in the opening brief, rather than attacking Dr. Nicholas' testimony on the basis of properly introduced evidence, the prosecutor (1) belittled his psychological testimony and results without evidentiary support, (2) aired unsubstantiated opinions, and (3) attacked the doctor's opinions on the basis of false assertion of trial testimony and facts. (AOB 564-569.) Appellant relied on a decision by the Sixth Circuit in *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 314-316 (superseded on other grounds), where the Court strongly condemned the use of such improper tactics to attack a defense expert witness. Respondent argues that *Gall* is factually distinguishable and the misconduct there was more extreme. (RB 259.) Appellant disagrees. *Gall* found improper the very same tactics used by the prosecutor here. *Gall* condemned the belittling of medical and psychological tools used to support the defendant's insanity defense (*Gall, supra*, at p. 315); here, the prosecutor belittled and mocked the I.Q. testing when he argued that Dr. Nicholas made no effort to find out if his "studies in the laboratory, so to speak" would be confirmed in the community and argued that Winston Churchill "probably wouldn't have done well in that I.Q. test because it measures those kinds of things." (35RT 12490-12491.) *Gall* condemned the expression of personal belief as to the weakness and partiality of expert testimony (*Gall, supra*, at p. 315); here, the prosecutor expressed his personal belief that because Dr. Nicholas "was bought and paid for in this case," he had to reach conclusions that the defense wanted and intimated that was the basis for the doctor's disagreement with the prosecutor's opinion regarding future dangerousness. (35RT 12490, 12492.) *Gall* condemned the prosecutor's mischaracterization of crucial aspects of the witness's testimony (*Gall, supra*, at p. 315); here, as

discussed above, the prosecutor misstated the trial evidence in order to attack Dr. Nicholas's opinion.

Respondent argues that the misconduct in *Gall* was more egregious because there, the prosecutor attacked the use of the insanity defense. (RB 259.) However, here, the prosecutor attacked the use of psychological testing to establish appellant's intellectual deficits – which formed the central tenet of appellant's case in mitigation. Respondent also argues that the comments in *Gall* were not isolated and the evidence rebutting the insanity defense was weak, whereas in this case, the comments were isolated and the People's penalty phase evidence was strong. (RB 259.) The record, as quoted in the opening brief, belies the contention that the comments were isolated. (See AOB 565-567.) This was a full-on attack on Dr. Nicholas's testimony and to suggest it was minor or isolated is specious. Moreover, similar to *Gall*, the prosecution introduced no evidence rebutting Dr. Nicholas's test results. And, for the reasons expressed in Arguments XXIII, XXV, and XVIII, respondent's argument regarding the strength of the aggravating evidence misses the mark.

Accordingly, respondent has failed to persuade that the prosecutor's attacks on Dr. Nicholas's testimony constituted proper arguments.

N. Improper Invocation of Biblical Authority

In the opening brief, appellant argued that the prosecutor committed misconduct by invoking Biblical authority to justify and support imposition of the death penalty in this case when he told the jurors: "If you make certain choices in your life theology-wise you go to hell. If you make other certain choices in your life, you go to heaven. That's the way it is. That's the way – that is how life is made up." (35RT 12438; see AOB 570-571.)

Respondent acknowledges that the vice in invoking religious authority is that it undercuts the jury's own sense of responsibility for its sentencing decision. (RB 260.) As explained by the Ninth Circuit, religious arguments in capital sentencing trials have been condemned by virtually every federal and state court because they undermine the jury's role in the sentencing process and its own sense of responsibility, thus violating the Eighth Amendment. (*Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 775-780.)

Respondent contends, however, that the argument here was not an improper invocation of religion; the prosecutor was merely stating that people who make certain choices go to heaven and those who make other choices go to hell. (RB 260.) According to the State, the prosecutor's comments did not diminish the jury's sense of responsibility for its verdict, nor did they suggest that the jury should apply a higher law. (*Ibid.*) They were just part of a non-religious philosophical argument focusing on free will. (*Ibid.*)

Respondent is wrong. This was not a mere philosophical argument focusing on free will. Everyone on the jury would understand the prosecutor's reference to theology to invoke the principles of religion and particularly, Judeo-Christian values, for that is exactly what theology means.[69] Moreover, the prosecutor was essentially quoting the Bible, which

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69 Wikipedia defines theology as:

> Theology (from *Greek* *Θεός* meaning "god" and *λογία*, *-logy*, meaning "study of") is the systematic and rational study of concepts of deity and of the nature of religious truths, or the learned profession acquired by completing specialized training

provides that God will punish murderers by sending them to Hell, the everlasting lake of fire. (See Revelation 21:8 [“But the fearful, and unbelieving, and the abominable, and murderers, and whoremongers, and sorcerers, and idolaters, and all liars, shall have their part in the lake which burneth with fire and brimstone: which is the second death.” (*King James Bible "Authorized Version", Cambridge Edition;* http://www.kingjamesbibleonline.org/Revelation-21-8.) The lay juror would readily understand the prosecutor’s words as referring to scripture. The message was clear: God mandated death and hell for a murderer, such

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> in religious studies, usually at a university or school of divinity or seminary. (http://en.wikipedia.org/wiki/Theology.)

As defined by the Merriam-Webster dictionary, theology is:

> **1:** the study of religious faith, practice, and experience; *especially*: the study of God and of God's relation to the world
>
> 2 *a* : a theological theory or system <Thomist *theology*> <a *theology* of atonement>
>
> *b* : a distinctive body of theological opinion <Catholic *theology*>
>
> 3: a usually 4-year course of specialized religious training in a Roman Catholic major seminary. ("Theology." *Merriam-Webster.com*. http://www.merriam-webster.com/dictionary/theology; see also http://dictionary.reference.com/browse/theology [theology: “the field of study and analysis that treats of God and of God's attributes and relations to the universe; study of divine things or religious truth; divinity.”].)

as appellant. The prosecutor's argument was, indeed, invoking the higher law of God and telling the jurors that death was the proper penalty.

Respondent further argues that this case is distinguishable from those cited in the opening brief where the Bible was used as support for, or approval of, the death penalty, because the prosecutor was not invoking Biblical authority. (RB 260-261.) For the reasons expressed above, respondent is wrong. In *Fields v. Brown*, the Ninth Circuit admonished that it is improper and prejudicial for the prosecution to invoke God or to paraphrase a Biblical passage in closing argument in the penalty phase of a capital case. (*Fields v. Brown* (9th Cir. 2007) 503 F.3d 755, 780.) That is exactly what the prosecutor did here. For the reasons expressed here and in the opening brief, this argument was improper and deprived appellant of his Eighth Amendment right to a reliable penalty determination.

O. These Claims Have Not Been Waived Because the Record is Clear that Any Further Objections Would Have Been Futile.

Appellant demonstrated in his opening brief that his claims of prosecutorial misconduct were preserved for review even though defense counsel failed to object. (AOB 571-573.) The trial court's conduct during guilt phase argument made clear that any objections during argument would be futile and the only recourse to remedy improper argument was to respond to it during defense argument. (AOB 572.) Moreover, no admonition could have cured the harm of the prosecutor's repeated, intemperate behavior. (*Id.*, at pp. 572-573.) Accordingly, counsel's failure to object must be excused as futile.

Respondent contends that appellant's claims have not been preserved. (RB 230-232.) Appellant's opening brief thoroughly addresses

forfeiture. Hence, appellant respectfully directs this Court's attention to his opening brief. (AOB 571-573.)

P. The Misconduct Violated Appellant's Rights Under The Federal Constitution and Was Prejudicial, Requiring Reversal.

In the opening brief, appellant established that the prosecutor's misconduct violated his rights under the federal constitution and thus require reversal unless the State can demonstrate that the error was harmless beyond a reasonable doubt. (AOB 573-574.) The State provides no response to appellant's argument that the misconduct deprived him of due process under the Fourteenth Amendment and his right to a reliable, individualized penalty determination under the Eight Amendment. (RB 261-264.) It argues, without explanation, that this error should be assessed under the state "reasonable possibility" standard for assessing prejudice from penalty phase errors. (RB 261-262.) Nonetheless, this Court has held that "[o]ur state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard of *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Nelson* (2011) 51 Cal.4th 198, 219, fn. 15.)

Respondent has not even attempted to meet this burden. Its response is merely a contention that any possible error was "neutralized" by the standard penalty instructions provided in this case, which informed the jurors to determine the facts from the evidence, to accept the law as stated by the court, to reach a verdict based on the evidence and the law, to exercise its discretion conscientiously, that statements made by attorneys are not evidence, and not to be influenced by bias, prejudice, public opinion, or public feelings. (RB 262-263.) According to respondent, these instructions, in conjunction with the standard penalty instruction which told

the jurors which factors could be considered, were sufficient to dispel any and all possible prejudice. (RB 262-264.) However, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury [citation] all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. U.S.* (1949) 336 U.S. 440, 453 (conc. opn. of Jackson, J.).) This Court, too, has cautioned that even limiting instructions appear to call for "'discrimination so subtle [as to be] a feat beyond the compass of ordinary minds.'" (*People v. Antick* (1975) 15 Cal.3d 79, 98; see also *People v. Laursen* (1968) 264 Cal.App.2d 932, 939, disapproved on another ground by *Mozzetti v. Superior Court* (1971) 4 Cal.3d 699, 703 [limiting instruction insufficient to cure prejudice from prosecutorial misconduct in closing argument].) Respondent's reliance on the court's instructions to cure any error is misplaced.

For the detailed reasons expressed in the opening brief, which respondent does not refute, the prosecutor's misconduct, which was pervasive and egregious, was also prejudicial. (AOB 573-575.) Reversal of the judgment of death is required.

XXV.

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE A PHOTOGRAPH OF APPELLANT AND WILLIAM AKENS HOLDING GUNS AND EXHIBITING GANG SIGNS AND TESTIMONY BY DETECTIVE AURICH THAT APPELLANT WAS A "MAIN PLAYER" IN THE CRIP GANG.

Over defense objection, the trial court permitted the prosecution to introduce prejudicial gang evidence: (1) a previously excluded photograph (People's Exhibit P-3) of appellant and William Akens laughing and throwing gang signs while pointing guns at each other (35RT 12299-12302); and (2) a gang detective's testimony that he had received information that appellant was a "main player" in the Crip gang, which he described as a sophisticated criminal and hardcore gang leader who promotes his gang and is involved in gang-related crimes. (33RT 11809-11810.) In the opening brief, appellant argued that the photo did not constitute proper rebuttal evidence, was based on impermissible propensity reasoning and should have been excluded under Evidence Code section 352. (AOB 584-590.) He argued that the detective's opinion testimony should have been excluded under 352 due to the lack of a reliable foundation. (AOB 590-593.)

Respondent contends that this evidence was properly admitted "to rebut defense evidence that appellant was naïve and criminally unsophisticated and any error was harmless." (RB 264-265.) Respondent also contends that appellant has not properly preserved his 352 argument regarding the erroneous admission of the officer's gang opinion testimony and that the detective's testimony was admissible as reputation evidence. (RB 273-275.) Appellant disagrees with all of respondent's contentions.

A. The Photo Was Inadmissible Because It Did Not fall Within Any Statutory Aggravating Factor, Was Not Relevant to Any Disputed Issue and Did Not Constitute Proper Rebuttal Evidence, Any Relevance Was Outweighed By Its Potential For Prejudice, and Its Admission Violated Appellant's Right to Due Process.

The prosecution was very eager to introduce at the penalty phase the photograph of appellant and Williams, but the court rejected the State's attempt to admit that photograph during the prosecution's case-in-chief. The prosecution itself agreed that this evidence, which it attempted to introduce as a "gang involvement" aggravator, was not admissible as a circumstance in aggravation under Penal Code section 190.2 (13RT 4521-4522), and the Court denied the prosecution's request to admit the photograph under section 190.3(b) as evidence of a threat of violence. (*Id.*, at pp. 4520-4521.) The court found that the photograph depicted gang membership but did not portray any specific threat or force or any other specific criminal purpose. (*Id.*, at p. 4532.) Consequently, the photograph was admissible, if at all, only in rebuttal.

During the defense case, the defense mental health expert, Dr. Nicholas, presented extensive testimony recounting appellant's gang membership, which began at age 10 or 12. (34RT 12088-12089, 12099, 12099-12100, 12110.) The prosecution, however, upon cross-examination of appellant's mother and two brothers, during the defense case in mitigation, elicited their denials that appellant was a gang member. (34RT 11957, 11963-11965, 12247, 12249-12250; 35RT 12292.) Thereafter, the prosecution sought admission of the photo to rebut this testimony. (35RT 12299-12300.) The court overruled defense relevancy and 352 objections and admitted the photograph for two purposes: (1) to establish and clarify appellant's gang status (35RT 12302); and (2) to rebut the defense

argument that the Hodges's brothers manipulated and coerced appellant to kill McDade. (*Id.*, at p. 12302.)

In the opening brief, appellant argued that the court erred in admitting the photograph as rebuttal evidence because (1) the photograph was not necessary to establish or clarify appellant's gang status and should have been excluded as both cumulative and prejudicial; (2) the photograph had no relevance under the court's second theory of relevancy to rebut the defense argument that appellant was manipulated and coerced by the Hodges; (3) this second theory of relevancy was based on impermissible propensity reasoning; and (4) the evidence should have been excluded under Evidence Code section 352. (See AOB 584-590.)

Respondent contends that the photograph had significant probative value and was admissible because (1) It was relevant to establish and clarify appellant's gang membership and show the extent of his involvement in the Crip gang in Sacramento; (2) It was relevant to prove appellant's desire to prove himself as a criminal and had some tendency to suggest that appellant was a violent, callous person; and (3) It was admitted in rebuttal after appellant had introduced evidence minimizing his gang involvement. (RB 268-269.)

Respondent is wrong on all counts. These issues which respondent claims had been put in issue by the defense case were either (1) not disputed; (2) not, in fact, issues at all; or (3) raised by the prosecution's questioning of defense witnesses. Accordingly, the photograph did not constitute proper rebuttal evidence. Moreover, it was not relevant under any of the theories put forth by the court or the State on appeal and constituted impermissible propensity evidence. Therefore, the court had no discretion to admit it and its admission violated appellant's due process rights under

the California and United States Constitutions. And even if the photograph had any relevance, its probative value was so slight and its potential for prejudice so great, that the court abused its 352 discretion by admitting the photograph.

1. The Photograph Should Have Been Excluded Because It Was Not Relevant to Any Disputed Issues, Did Not Constitute Proper Rebuttal, and Constituted Impermissible Propensity Evidence.

The supposed purpose for which the photograph was being offered, to prove that appellant was a gang member, was not disputed. As argued in the opening brief, after presentation of both the prosecution's and the defense cases at penalty phase, there was no dispute as to appellant's gang status and no need for clarification. (See AOB 584-585.) Notably, the defense mental health expert testified, on the basis of conversations with appellant, that appellant had been a gang member since the age of 10 or 12; when in Los Angeles, appellant was 100% committed to the Crips; upon moving to Sacramento, he continued his affiliation with the Crip gang and chose to exaggerate his Los Angeles Crip notoriety while participating in gang activities in Sacramento; and appellant was street-wise. (34RT 12088-12089, 12099-12110.) Moreover, during the prosecution's penalty case, William Akens admitted that he was a Freeport Crip and appellant was his running buddy. (33RT 11747-11749.) Akens also testified, as acknowledged in respondent's argument, "that appellant had been a Los Angeles Crip and testified about appellant's involvement in the gang crimes targeting Moten [a rival gang member]." (RB 265.)

Respondent contends, however, that testimony by appellant's mother and two brothers denying that appellant had been in a gang "gave the photo relevance and probative value as rebuttal evidence." (RB 269.) Respondent

is mistaken for two reasons: (1) despite their testimony, the issue was not genuinely disputed; and (2) it was the prosecution, not the defense, who elicited their denials.

This Court has held that once the defendant has presented evidence of circumstances in mitigation, the prosecution may present rebuttal evidence "tending to 'disprove any disputed fact that is of consequence to the determination of the action.'" (*People v. Boyd* (1985) 38 Cal.3d 762, 776; quoting Evid. Code, § 210.) But "[i]f a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively." (*People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on another ground by *People v. Newman* (1999) 21 Cal.4th 413, 419-420; see also *Jefferson*, Cal. Evidence Benchbook (2nd ed. 1982) § 21.2, p. 493.) Any ultimate fact the prosecution seeks to establish with bad-character evidence, such as gang-related evidence, must be both "material" and "'actually in dispute.'" (*People v. Thompson* (1980) 27 Cal.3d 303, 315; *People v. Williams* (1988) 44 Cal.3d 883, 905.)

Appellant did not dispute his gang membership. His own expert testified, on the basis of his conversations with appellant and review of his records, that appellant had been a committed gang member since a very young age. Moreover, appellant offered to stipulate that he was a gang member and that he and Akens recognized each other as gang members. (35RT 12301.) Accepting this proposed stipulation would have cost the prosecutor nothing legitimate. It would only have cost him the improper windfall benefit of introducing extremely prejudicial and, at most, minimally probative evidence.

Under these circumstances, the prosecution was obliged to accept the stipulation and abandon its efforts to introduce the gang photograph. "[I]f a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer, and refrain from introducing evidence of other crimes to prove that element." (*People v. Hall*, *supra,* 28 Cal.3d at p. 152; *accord*, *People v. Bonin* (1989) 47 Cal.3d 808, 848-849 [Court erred by admitting parents' testimony to establish the identity of the victims and as foundation for their photographs; because the defense offered to stipulate to the identifications and admissibility of photographs, "the court should have compelled the prosecution to accept the defense's offer and barred it from eliciting testimony on the facts covered by the proposed stipulation"]; *People v. Gonzales* (1968) 262 Cal.App.2d 286, 288-291 [In a prosecution for possession of marijuana, the trial court erred in admitting evidence of defendant's commission of narcotics offenses not charged in the information for the avowed purpose of proving his knowledge of the narcotic nature of marijuana, where defendant offered to stipulate to such knowledge, and where in view of such offer and the deputy district attorney's refusal thereof, it appeared that the purpose of the evidence was solely to inflame and prejudice the jury].) Accordingly, it was unnecessary and error to admit the photograph to establish appellant's gang membership.

It is also well established that the prosecutor cannot manufacture a basis for admitting rebuttal evidence by first eliciting testimony on cross-examination of a defense witness, and then seeking to admit contrary evidence in rebuttal. (*People v. Lavergne* (1971) 4 Cal.3d 735, 744 ["A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted."].) In *People v. Daniels*, this Court explained that "proper rebuttal evidence [] is *restricted to*

evidence made necessary by the defendant's case in the sense that [the defendant] has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*People v. Daniels* (1991) 52 Cal.3d 815, 859, italics added). Testimony elicited by the prosecutor on cross-examination of a defense witness is not evidence "introduced" by the defense, and rebuttal evidence cannot be made "necessary" when the prosecutor elicited the new evidence or assertions himself. (6 Wigmore, Evidence (Chadbourne ed. 1976), § 1873; *People v. Thompson*, *supra*, 27 Cal.3d at p. 330; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1302.)

Respondent argues that admission of the photograph was made necessary by the introduction of evidence by appellant minimizing his gang involvement (RB 268), but it was the prosecutor, not appellant, who elicited the testimony by appellant's family members denying appellant's gang membership.[70] Here, after the defense expert established conclusively that

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[70] On cross of appellant's mother, the prosecutor asked if she knew whether appellant was in a gang in Los Angeles, and she replied that he was not. (35RT 12292.) Brother Lawrence, when asked by the prosecutor whether appellant was ever involved in the Crip gang in Los Angeles, replied "never." (34RT 12247.) The prosecutor then asked if appellant was involved with the Crips in Sacramento and Lawrence answered "[n]ot that [he] knew of." (*Ibid.*) Lawrence agreed with the prosecutor that appellant was fairly street-wise and that his family "had to get him out of L.A. to get him away from gang involvement" (*id.*, at p. 12249), but he did not feel that appellant was in gangs in Los Angeles. (*Id.*, at p. 12250.) Brother Calvin, on direct, stated of appellant: "This guy calling him a gang member. Nobody down there in L.A. know him for his gang membership. Nobody down there – he's not a well-known guy." (34RT 11957.) Thereafter, when the prosecutor asked Calvin on cross if he knew whether or not appellant was in a gang, Calvin answered that to his knowledge, appellant had never been in a gang. (*Id.*, at p. 11963.) In response to further questions from the prosecutor whether Calvin saw any signs that appellant might be

appellant had been a committed gang member for many years, the prosecutor sought to admit the photograph for the ostensible purpose of rebutting testimony that he himself elicited while cross-examining appellant's mother and two brothers. That rebuttal testimony was thus improper because it was not "made necessary" by appellant's case.

In sum, given the testimony by the defense mental health expert based on appellant's admissions to him, the prosecution's penalty phase evidence by William Akens, and the defense offer to stipulate to appellant's gang membership, it is clear that admission of the inflammatory photograph of appellant and Akens cannot be predicated on the court's ruling that it was necessary to establish and clarify appellant's gang membership. Nonetheless, the State argues that "the photo was relevant to show the extent of appellant's involvement in the Crip gang in Sacramento" and "appellant's desire to prove himself as a criminal." (RB 268.) As stated by the court in ruling the photograph admissible:

> It's relevant to the whole issue that now has been developed in the penalty phase as to what level the defendant was involved in gangs or wanted to be a gang member, wanted to prove himself or already was before he came to Sacramento or only after he came to Sacramento. There have been many different scenarios in which gang membership has relevance, and this is relevant to that."

(35RT 12302.)

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in a gang, Calvin acknowledged that appellant wore the blue clothing associated with the Crip gang, but said that they all wore blue clothing and appellant did not come home "with the gang activity" – the slang, the posture. (*Id.*, at pp. 11963-11965.)

Neither the State nor the court has explained, however, why the extent of appellant's involvement in the Crip gang or his desire to prove himself as a criminal was relevant at the penalty phase. It was not. Evidence regarding the extent of appellant's gang involvement or his desire to prove himself as a criminal did not constitute permissible aggravating circumstances under Penal Code section 190.3 and did not rebut any mitigation offered by the defense.

First, evidence regarding the extent of appellant's gang involvement and his desire to prove himself as a criminal did not come within any of the statutory aggravating factors under 190.3 and therefore the photograph was not admissible under this theory as proper aggravating evidence. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 775-776.) The capital crime was not gang-related. (5RT 2117.) Indeed, during the guilt phase, the trial court broadly ruled that all gang evidence was irrelevant and inadmissible because there was no gang angle to the case. (5RT 2116-2118; 16RT 6791-6792.) The court admitted gang evidence at the penalty phase only because two of the three instances of prior criminal activity admitted under 190.3(b) were gang-motivated. (13RT 4523; 32RT 11437-11440.) The court ruled that evidence of appellant's gang affiliation could be admitted to show the motivation for these two aggravators. (32RT 11437-11439.)

In the Rigsby incident, Harold Rigsby, who identified himself as a member of the Broderick Boys street gang, testified that he was assaulted by six juveniles, including appellant, who identified themselves as Crips and asked him what he was doing in their hood. (33RT 11689, 11691, 11709-11711, 11714, 11728.) In the Moten incident, William Akens testified that he and appellant were running buddies in the "Freeport Crips" and they threatened and shot at Zeke Moten because he was a "gang banger

– an individual who left the Crips to join another gang, the Bloods. (33RT 11748-11755, 11758, 11788)

Once appellant's gang membership was established and the gang-motivation for the two aggravators was established by Rigsby's and Akens's testimonies, the extent of appellant's involvement in the Crip gang and his desire to prove himself as a criminal were irrelevant. His gang involvement and criminal desires were not at issue and demonstration of either was not necessary to prove the gang motivation for the Rigsby and Moten aggravators.

The trial court's ruling that the photograph was "relevant to the whole issue that now has been developed in the penalty phase as to what level the defendant was involved in gangs or wanted to be a gang member, wanted to prove himself or already was before he came to Sacramento or only after he came to Sacramento" (35RT 12302) ignores the fact that appellant's gang's status was admissible only to prove the motivating basis for the two prior acts introduced under 190.3(b). It also ignores the fact that, as discussed above and below, appellant, himself, did not dispute his gang membership and readily acknowledged his desire to prove himself as gang member. It was the prosecution who elicited testimony from appellant's family members denying appellant's gang membership. As demonstrated above, however, the State cannot manufacture a basis for admitting rebuttal evidence by this means.

Second, the photograph was not relevant under this theory to rebut any mitigation offered by the defense. To be admissible, rebuttal evidence must be specific and responsive to evidence presented by the defense. (3 Witkin, Cal. Crim. Law (4th ed. 2012) Punishment, § 551, p. 891.) In particular, "the scope of [penalty phase] rebuttal must be specific, and

evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24; *accord*, *People v. Jones* (1998) 17 Cal.4th 279, 307.) A defendant who places his character in issue by presenting mitigating evidence opens the door only to "prosecution evidence tending to rebut that 'specific asserted aspect' of [his] character." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1072; see also *In re Jackson* (1992) 3 Cal.4th 578, 613, disapproved on another point by *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6 [penalty phase rebuttal cannot "go beyond the aspects of the defendant's background on which the defendant has introduced evidence"]; *United States v. Winston* (D.C. 1971) 447 F.2d 1236, 1240 [the "opening the door" doctrine "is designed to prevent prejudice and is not to be subverted into a rule for injection of prejudice"].)

Here, appellant made no effort to show that the Rigsby and Moten aggravating circumstances were not gang-related or motivated. In fact, during defense counsel's cross-examination of Akens, he asked several questions regarding Akens's dress and manner of walking to establish that Akens was a gang member, asked whether Moten's problem was that he was a gang buster – a traitor who busts out of one gang and joins another --, and elicited details demonstrating the gang motivation for the assault on Moten.[71] (33RT 11755-11758, 11787-11788.) Appellant offered no

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[71] Defense counsel questioned Akens about sticking his feet out the car window to show Moten the blue color (the color worn by Crips) of his tennis shoes to inform Moten that they were coming back to get him and yelling "What's up cuz?" because "cuz" refers to a Crip gang member. (33RT 11787-11788.) Appellant's counsel then asked: "So you guys were yelling out gang stuff here in front of the bus stop, broad daylight, and

evidence at the penalty phase to rebut these two incidents.[72] Nor did *he* present any evidence to deny or minimize his involvement in the Crip gang. To the contrary – as noted above, his own defense expert testified that appellant was 100% committed to the gang, he was trying to prove himself as a gang member to older gang members, and he participated in gang activities in Los Angeles and Sacramento. (33RT 12040, 12086, 12088-12089, 12096, 12099-12100, 12106, 12110, 12115, 12129.) During his cross-examination of Akens, defense counsel attempted to establish that a youngster (John Hodges's nickname for appellant) is a "wannabe" who is trying to make a name for himself, to prove himself, and get into the gang ranks. (33RT 11762.)

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you're trying to let Zeek know, hey, you don't appreciate this guy cutting around and going out with Bloods, right?" . . . "And you were going to take him out." (*Id.*, at p. 11788.)

[72] Defense counsel asked no questions of Harold Rigsby (33RT 11704) and merely questioned an officer regarding the accuracy of Rigsby's identification of appellant's photograph and the extent of Rigsby's injuries. (*Id.*, at pp. 11715-11727.) Counsel's cross-examination of Akens established that Akens was a member of the Crip gang and the threat to and attack on Moten was gang-related; Akens did not actually see appellant shoot at Moten but merely assumed he did so; and Akens committed other assaults. (*Id.*, at pp. 11755-11761, 11789-11791.) Counsel also attempted to establish through his questioning of Akens that the Hodges brothers were older, established members of the Bloods (another gang); it would not be unusual for established members of one gang to use a younger member of another gang, such as appellant, to commit a crime; a younger gang member attempting to rise in the ranks of the gang would commit a crime for more sophisticated members of another gang to gain more status; and an older, more established gang member could control whether a younger gang member testified in court. (*Id.*, at pp. 11761-11778.)

Because the evidence concerning the extent of appellant's involvement in the Crip gang and his desire to prove himself as a criminal did not constitute permissible aggravating circumstances under section 190.3, was not relevant to prove the motivation for the aggravating aggravators --the only purpose for which gang evidence was admitted --, and did not rebut any mitigation, the admission of the photograph cannot be justified under this theory.

Notably, the State makes no attempt to justify admission of the photograph on the basis of the trial court's second reason for its ruling – that the photograph was relevant to rebutting the defense argument that appellant was manipulated and coerced by the Hodges to shoot McDade.[73] Respondent does not even address appellant's argument that the photograph of appellant and Akens joking around and pointing guns at each other had no relevance to establishing that appellant had previously considered robbing and killing McDade or was receptive to doing so. (See AOB 586-587.) The lack of any response to this argument effectively concedes the issue. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession]; *California School Employees Assn. v. Santee School Dist.* (1982) 129 Cal.App.3d 785, 787

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[73] As stated by the court:

> This photograph lends itself to the argument that [appellant] was receptive to do such things on other occasions. Whether he's joking or what the whole purpose of the photograph is it shows him holding a gun to somebody's head and laughing. And it can lend itself to the argument that the defendant had considered doing such a thing previously.

(35RT 12305.)

["[T]he district apparently concedes by its failure to address this issue in its appellate brief . . ."].)

Respondent does argue that the photograph was admissible to prove appellant was violent and callous. (RB 268.) According to respondent, the photograph "has some tendency to suggest that appellant was a violent and callous person" because it "showed appellant putting a gun to someone's head." (*Id.*, at p. 271) However, this argument fails for the same reason that doomed the court's theory. The photograph of appellant and Akens laughing and holding guns to each other's heads simply has no relevance to establishing that appellant was violent and callous. The relevancy test for determining whether the proffered evidence has "any tendency in reason" to prove or disprove a disputed fact is "one of logic, reason, experience, reasonable inference, and common sense." (*Jefferson*, Cal. Evidence Benchbook, *supra*, § 21.3, p. 501.) "If the *inference* of the existence or nonexistence of a disputed fact which is to be drawn from proffered evidence is based on speculation, conjecture, or surmise, the proffered evidence cannot be considered relevant evidence." (*Id.*, at p. 502, emphasis in original.) It is speculative and conjectural to draw an inference, from this facetious, adolescent, non-threatening display, that appellant was violent or callous. The trial court rejected the prosecution's argument that this photograph displayed a threat of violence, because appellant and Akens were laughing and goofing around in the photograph. (13RT 4520-4521.) As explained in *People v. Henderson* (1976) 58 Cal.App.3d 349, 360, an individual's possession of loaded guns does not support a reasonable inference of intent to commit assault with a deadly weapon.

Respondent disputes the application of *Henderson* here, contending that the photo "depicted much more than possession of a gun. . . "[It]

showed the extent of appellant's involvement in the Crips, was relevant to his desire to prove himself as a criminal, and had some tendency to suggest that he was a violent and callous person." (RB 270-271.) Appellant has already explained that the extent of appellant's involvement in the gang or his desire to prove himself as a criminal was not relevant, since neither constituted permissible aggravating circumstances, nor rebutted any mitigation offered by the defense. *Henderson* refutes respondent's third reason – that the photo had some tendency to suggest that appellant was violent and callous. The point of *Henderson* is that intent cannot be inferred merely from an individual's possession of loaded guns. (*People v. Henderson*, *supra*, 58 Cal.App.3d at p. 360 ["Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one's home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of an assault with a deadly weapon.'] As stated by *Henderson*, any inference of intent to use the guns to assault another is "purely one of *sheer speculation* - the antithesis of relevancy." (*Ibid.*, emphasis in original.) Because the photograph was irrelevant to establish that appellant was violent and callous, the trial court had no discretion to admit it. (*Jefferson*, Cal. Evidence Benchbook, *supra*, § 21.4, at p. 548 ["Any evidence which leads to speculative and conjectural inferences in irrelevant and inadmissible."]; *People v. Turner* (1984) 37 Cal.3d 302, 321,overruled on another ground by *People v. Anderson* (1987) 43 Cal.3d 1104, 1115 ["there is no discretion vested in a court to admit irrelevant evidence."].)

Accordingly, none of the theories advanced by either the court or the State support the court's admission of the photograph. Moreover, as argued in the opening brief, the court's second theory of relevance is unacceptable because it requires resort to impressible propensity reasoning. (See AOB

588; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381; *People v. Riser* (1956) 47 Cal.2d 566, 577, disapproved on another ground by *People v. Morse* (1964) 60 Cal.2d 631, 648-49.) The State responds that the photograph was evidence of more than just propensity: "it was admissible as penalty phase evidence tending to show appellant's involvement in the Crips, his desire to prove himself as a criminal, and had some tendency to suggest that appellant was a violent, callous person." (RB 271-272.) But as demonstrated above, the extent of appellant's involvement in the Crips was not at issue and was not a statutory aggravator nor proper rebuttal to any mitigation presented at the penalty phase, and the second two reasons are nothing more than propensity inferences based on appellant's and Akens's mocking display of weapons.

Respondent next argues that the general rule against propensity evidence does not apply here because it was designed to protect defendants against unfair determinations of guilt and this propensity evidence was introduced during the penalty phase. (RB 271.) Respondent provides no analysis or supporting authority for this contention; it only observes that the two propensity cases discussed in appellant's opening brief (*McKinney v. Rees*, *supra*, and *People v. Riser*, *supra*) concerned guilt-phase issues. (*Ibid.*) Respondent's failure to provide any analysis or supporting authority waives this argument on appeal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37 ["As this contention is perfunctorily asserted without any analysis or argument in support, we reject it as not properly raised"]; *accord*, *People v. Bonin*, *supra,* 47 Cal.3d at p. 857, fn. 6; see also *Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n.* (1999) 21 Cal.4th 352, 366, fn. 2 ["[Appellant] fails to provide any analysis or argument in support of the assertion, which, for this additional reason, is not properly raised."]; 9 Witkin, Cal. Proc. 5th (2008)

Appeal, § 701, p. 769 ["[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration."].)

In any event, respondent overlooks that although the photograph was admitted during penalty phase, its admission was tied to guilt-phase issues. The theory for the photograph's admission was that it proved statutory aggravating factors under 190.3(a) and (b), not that it rebutted good character evidence. The photograph was offered and admitted to prove the gang motivation for the Rigsby and Moten assaults introduced as uncharged prior acts of violence under 190.3(b) and to rebut appellant's defense to the capital murder that he was coerced to commit it by the Hodges's brothers. The issue upon which this evidence was admitted was appellant's guilt of these two uncharged prior acts and the capital crime, not appellant's good or bad character. Thus, even if respondent s unsupported assertion that the rule against propensity evidence applies only to guilt-innocence evidence is correct, it does not negate appellant's argument that admission of this erroneous propensity evidence violated the Due Process Clause.

Here, as in the cases cited in appellant's opening brief, *McKinney* and *Riser*, in order to prove that appellant committed the assaults on Rigsby and Moten and committed the capital offense on his own accord, the State used the photograph as character evidence to show behavior in conformance therewith, or propensity. Respondent attempts to distinguish *McKinney* and *Riser* on the basis that the evidence at issue in those two cases was merely bad-character or propensity evidence, whereas the demonstration of "appellant's involvement in the Crips, his desire to prove

himself as a criminal," and his "violent, callous" nature, was more than just propensity evidence. (RB 271-272.) Respondent is wrong.

In *McKinney*, where the victim's injuries were inflicted with a knife, the trial court admitted evidence of the defendant's possession of a knife which could not have been used in the crime, that he was proud of his knife collection and on occasion strapped a knife to his body, and that he used a knife to scratch the words "Death is His" on his door. (*McKinney, v. Rees*, *supra*, 993 F.2d at pp. 1381-1382.) On review, the Ninth Circuit reasoned that the only inference that could be drawn from the defendant's possession and wearing of a knife was that because the defendant previously owned and wore a knife, he was the type of person who would own a knife, and hence he owned a knife at the time of the commission of the offense. (*Id.*, at pp. 1382-1383) The Court also reasoned that the only inference to be drawn from the defendant's message on his door was that he had a fascination with death and knives and therefore was more likely to have committed a murder with a knife. (*Id.*, at p. 1383.) The Court thus concluded that this evidence of "other acts" was not relevant to a fact of consequence to an element of the crime, such as opportunity, and was probative only of character. (*Id.*, at pp. 1382-1384.)The Court condemned this use of character evidence to show behavior in conformance therewith, finding it violative of the Due Process Clause. (*Id.*, at p. 1385.)

Similarly, in *Riser*, this Court held that admission of a defendant's possession of weapons that could not be the instrumentality of the crime is inadmissible, because "such evidence tends to show, not that he committed the crime, but that he is the sort of person who carries deadly weapons." (*People v. Riser*, *supra*, 47 Cal.2d at p. 577.)

The rationale of these two cases condemning the admission of bad character evidence, which is relevant only to show a defendant's propensity to commit the crime, is applicable here. The trial court admitted the photograph as relevant to prove appellant's commission of two uncharged prior criminal acts and his sole culpability for the capital murder. However, as demonstrated above, the photograph was not admissible to establish any genuinely disputed fact of consequence to either the two alleged assaults or the capital crime; its only relevance was to show that appellant was a bad person who belonged to a gang and possessed guns. Indeed, the State's alleged theories for the photo's relevance – to show how involved appellant was in the gang, his desire to prove himself as a criminal, and his callous and violent nature – are clearly theories based on the use of character evidence to show propensity to commit criminal acts. The only inference to be drawn from the photograph, as clearly acknowledged by the State, was that because appellant is a callous, violent gangster, who wanted to be a criminal, he was the type of person who would commit the Rigsby and Moten assaults and the capital murder. Hence, the propensity reasoning at issue in *McKinney* and *Riser* is directly applicable here and respondent's feeble attempt to distinguish *McKinney* and *Riser* must be rejected.

In conclusion, contrary to respondent's contentions, the trial court had no discretion to admit the photograph because it had no relevance to any disputed fact of consequence, did not constitute proper rebuttal, and constituted impermissible propensity evidence.

2. <u>Even If The Photograph Had Any Probative Value, Its Probative Value Was So Slight And Its Potential For Prejudice So Great, That The Court Abused Its 352 Discretion By Admitting The Photograph</u>.

Moreover, even if the photograph had some probative value to establish appellant's gang status, it should have been excluded under Evidence Code section 352, since its relevancy was outweighed by its prejudicial effect. The photo was both inflammatory and cumulative of the substantial testimony establishing appellant's gang involvement. In the opening brief, appellant cited several cases for the well-settled rule that admission of cumulative evidence of gang-affiliation constitutes an abuse of discretion. (*People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905; *People v. Bojorquez*, *supra*, 104 Cal.App.4th at p. 342; *People v. Albarran, supra,* 149 Cal.App.4th at pp. 225-232; see AOB 585-586.) Respondent attempts to factually distinguish these cases (RB 269-270); however, the principles they stand for are good law.

Moreover, respondent's attempted factual distinctions are without merit. Respondent argues that *Cardenas* is distinguishable because there, the facts for which the gang evidence was admitted had already been established by other testimony, whereas here "the photo had significant probative value to rebut evidence presented in the mitigation case that downplays appellant's gang involvement." (RB 269.) Not so. Appellant's mitigation case readily acknowledged his gang involvement; it was the prosecution who elicited the understandable denials by appellant's family members and, as established above, the prosecution cannot elicit such evidence and then use it as a basis to introduce prejudicial evidence to prove an issue which the defense does not dispute.

Respondent attempts to distinguish *Albarran* on the same basis, arguing that unlike there, where the prosecution introduced inflammatory gang evidence "which had little or no bearing on any issue relating to Albarran's guilt on the charged crimes and approached overkill," the photo

in this case "was relevant and probative." (RB 269-270.) But, as established in the opening brief and above, the photo was not relevant or probative, especially at the penalty phase of the trial.

Respondent also argues that this case is distinguishable from *Albarran* and *Bojorquez*, because in those cases, the issue was guilt, whereas in this case, the issue was penalty – appellant's guilt had already been established. (RB 270.) Again, respondent is wrong. The issue here was guilt – appellant's guilt or innocence of the prior criminal activity admitted under 190.3(b) and his sole culpability for the capital offense.

Respondent finally attempts to distinguish *Albarran* and *Borjorquez* on the basis that "the lone photo of appellant and Akens was not equivalent in type or quantity to the inflammatory evidence proffered in those cases. (RB 269-270.) *Albarran* involved the admission of evidence identifying the defendant as a gang member, descriptions of his gang involvement, moniker, and tattoos, including a reference to the Mexican Mafia, as well as descriptions of the criminal activities of other gang members and a reference to the gang's graffiti which included a threat to kill police officers. (*Albarran*, *supra*, 149 Cal.App.4th at pp. 220-221.) *Borjorquez* involved the admission of gang expert testimony identifying the defendant as a gang member and generally describing the gang's criminal activities. (*Bojorquez, supra*, 104 Cal.App.4th at pp. p. 342-344.)

Respondent argues that the photo in this case did not describe the gang's activities or ascribe that conduct to appellant. (RB 270.) The State ignores, however, the age-old adage that "one picture is worth a thousand words," as well as the image depicted in that "lone photo" of appellant and gang-banger Akens smirking, while holding guns to each other's heads and making gang signs. This image was likely burned into the memories of

each of the jurors during penalty deliberations. Moreover, unlike the testimony of live witnesses, this physical evidence was transportable into the jury room during deliberations, where the jurors could examine it at length.[74] This photograph was every bit as inflammatory, if not more so, than the gang evidence admitted in *Albarran* and *Bojorquez*, much of which concerned other gang members, not Albarran or Bojorquez. As argued in the opening brief, this visceral image no doubt triggered the jurors' fears, many of whom had expressed concern during voir dire about gangs and weapon use and expressed views of varying degrees that racial minorities, such as appellant and Akens, were more violent than people of the majority race. (See AOB 589.)

Respondent's only response is that the jurors had just convicted appellant of special circumstances murder and were instructed, pursuant to the standard instruction given at every penalty phase (CALJIC 8.84.1), that they must not be influenced by bias or prejudice against appellant, nor swayed by public opinion or public feelings. (RB 272, citing 3CT 695 and 36RT 12625.) Such contentions are absurd, for they amount to a contention that the erroneous admission of inflammatory evidence at penalty phase could never be harmful in a capital case. The Court, however, has recognized just the contrary – that the admission of inadmissible evidence, especially that which relates directly to the character of the defendant, is rarely harmless. (*People v. Hamilton* (1963) 60 Cal.2d 105, 137, disapproved on another ground by *People v. Daniels*, *supra*, 52 Cal.3d 815 [Penalty phase errors which relate directly to the character and background of the defendant reasonably have a tendency to mislead the jury and thus it

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[74] The photograph, along with the other penalty phase exhibits, was delivered to the jury during its penalty deliberations. (36RT 12647.)

is reasonably probably that had they not occurred, a different sentencing decision may have been reached.].) In *Hamilton*, where inadmissible evidence was admitted and the prosecutor committed misconduct but there was also ample evidence to justify the jury in imposing the death penalty (the evidence of guilt was overwhelming and the defendant had a bad character and long line of previous convictions), this Court stated:

> Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming, as here, or that the crime involved was, as here, particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial.

(People v. Hamilton, *supra*, 60 Cal.2d at pp. 136-37.)

As aptly stated by one California court, "Surely there is a line between admitting a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to

inflame the minds of the jurors." (*People v. Redston* (1956) 139 Cal.App.2d 485, 491.) That line was crossed here. The photograph was not relevant to any disputed issues, was cumulative of other evidence, and did not constitute proper rebuttal. Given the prosecutor's repeated attempts to introduce the photo (see AOB 595), his refusal to accept a defense stipulation regarding appellant's gang involvement, his circulation of the photo among the jurors as soon as it was admitted (35RT 12327, 12329-12330), and his use of the photograph during penalty argument to compare appellant to an animal (36RT 12609), it is apparent that the purpose of this evidence was to inflame and prejudice the jury.

B. Detective Aurich's Main Player Testimony

In the opening brief, appellant argued that the court erred in admitting Detective Aurich's opinion testimony that appellant was a sophisticated criminal and a gang leader who promoted his gang and was involved in gang crimes, because of lack of foundation. (AOB 590-593.) As discussed below, because Detective Aurich provided no information regarding the source of his information, his testimony was not admissible as opinion testimony and instead constituted inadmissible hearsay. And as also argued in the opening brief, his opinion testimony, given without adequate explanation or identification of its sources, had little, if any, evidentiary value and the trial court should have excluded it under Evidence Code section 352. (AOB 592-593.)

The State offers two responses: (1) appellant has forfeited this claim because he did not object on 352 grounds at trial; and (2) Detective Aurich's testimony was admissible as reputation evidence. Appellant disagrees.

1. Forfeiture

Although appellant objected to the admission of Detective Aurich's testimony that appellant was a main player, respondent argues that this claim is forfeited, because trial counsel did not make the same exact points as appellant makes on appeal. (RB 273-274.) Respondent argues that trial counsel did not specifically invoke Evidence Code section 352, nor object on grounds of hearsay or Detective Aurich's lack of personal knowledge. (*Ibid.*) As acknowledged by respondent, appellant objected as follows:

> Q. As – as a detective in gangs, did you – did you recognize the name Carl Powell when this – when this shooting came up?
>
> A. Yes, I did.
>
> Q. And how is it that you recognized Carl Powell's name?
>
> A. When that area –
>
> MR. HOLMES: Objection. [¶] Relevance. [¶] And your one of your prior rulings as well.
>
> THE COURT: I will overrule the objection. I'll sustain it as to the form of the question. [¶] Do you want to put a question to the witness concerning reputation? [¶] You may do so.
>
> MR. MAGUIRE: Okay, Your Honor.
>
> THE COURT: But I – otherwise I overrule the objection to that extent.

(33RT 11809.)

Respondent acknowledges that defense counsel was referring to the court's prior ruling on the admissibility of gang evidence but contends that this reference was not a sufficient invocation of Evidence Code section 352.

(RB 273) Respondent argues that defense counsel did not recall the court's ruling correctly, the court did not cite Evidence Code section 352, and thus counsel's reference to the prior ruling was not a sufficient invocation of 352. Respondent's argument is based on a myopic examination of the record. An examination of appellant's objections to admission of gang evidence, and the court's prior rulings, demonstrates that respondent is wrong.

During in limine motions, appellant moved to preclude admission of any gang evidence regarding him or the Hodges brothers. (5RT 2116.) The court denied the prosecution's request to impeach appellant with evidence of his gang involvement and excluded gang evidence during the guilt phase, because the capital crime was not gang-related. (*Id.*, at pp. 2116-2118.)

Also prior to the guilt phase, the parties litigated appellant's motion to strike two gang activity aggravators noticed by the prosecution. (2CT 401, 407-409; 13RT 4517-4523.) Appellant asked the court to deny the prosecution's request to introduce, as aggravating circumstances, evidence of appellant's "background and history of gang activities" and the photograph of appellant and Akens. (*Ibid.*) The prosecutor agreed that the "background and history of gang activity" aggravator was not admissible as a circumstance in aggravation and thus agreed to strike it. (13RT 4521-4522.) The State argued, however, for admission of the photograph under 190.3(b) as evidence of a threat of violence. (*Id.*, at pp. 4520-4521.) The trial court rejected that argument and preliminarily granted the defense motion to strike the photograph, stating:

> It apparently depicts membership, arguably, membership in a gang and arming by the gang in that membership. It doesn't otherwise focus on any specific incident of a threat or force or any specific victim or any other specific criminal purpose.

(13RT 4521.) In response to appellant's renewed objection to the admission of any gang references at trial, including the penalty phase, the court ruled that if any of the three instances of prior criminal activity was gang-related, gang-involved, and/or gang-motivated, evidence of such would be admissible. (*Id.*, at p. 4523.)

Subsequently, during the guilt phase, the trial court reiterated its ruling excluding gang evidence at that phase. (16RT 6791-6794, 6798; 17RT 6822-6823.) It agreed with counsel that there be "no mention of gangs" (16RT 6791-6792) and "no reference to gang[s]" (17RT 6822-6823) unless the matter was first litigated outside the jury's presence and the court found that the probative value of the evidence outweighed its potential for prejudice. (16RT 6799-6800; 17RT 6801, 6803, 6822-6823).

Before the start of the penalty phase, the parties again discussed the issue of the introduction of evidence concerning appellant's gang affiliation in regards to the Moten incident. (32RT 11436-11437.) Defense counsel asked the court to follow its previous ruling precluding admission of any gang-related evidence (*id.*, at p. 11437) and to exclude admission of the Moten incident, because admission of evidence concerning that incident might very well result in the endless admission of gang-related activity. (*Ibid.*) The Court responded that it remembered ruling that gang affiliation was not "per se included with the factors in aggravation," but then ruled that "if a defendant in a capital case is, arguably, gang-affiliated, and that gang affiliation results in a threat of violence and an act of violence, and the People are allowed to present that evidence properly under a factor in aggravation, . . . , the fact that it happened to be have been motivated by some gang affiliation is necessarily relevant and admissible, *and . . . the*

argued prejudice is outweighed by the probative value." (32RT 11438-39, emphasis added.)

Thereafter, during redirect of Robert Visnick, the high school teacher who testified regarding the threat to Zeek Moten, appellant objected on hearsay grounds when Mr. Visnick blurted out that he learned that the incident was gang-related. (33RT 11665.) The court sustained the hearsay objection and admonished the jury to disregard the answer. (*Ibid.*) When the prosecutor asked for an opportunity to establish Visnick's response on a nonhearsay basis, a discussion was held outside the jury's presence. (*Id.*, at pp. 11665-11666.) Defense counsel stated:

> Your Honor, as the Court well knows, since this trial has started, I have made every effort to try to keep out any reference to gang-related incidents or gang affiliations or anything like that, and counsel has pretty well complied with that through the first part of the trial. And everything has happened since we started the second phase; he's been trying to open this up. *And other than object -- And I don't want to make any speaking objections in front of the jury, so I just want the Court to know that I'm making an adamant objection to any attempt on counsel's part to get into the gang-related incidents.*

(33RT 11666, emphasis added.) The court responded that it had previously ruled that if a circumstance in aggravation happened to be gang-related, evidence establishing such would be admissible. (*Id.*, at pp. 11666-11667.) As stated by the Court: "If the foundation can be laid and this witness can testify, other than through hearsay, that this incident was gang-related, that would be relevant to the threat and admissible." (*Id.*, at p. 11667.)

After questioning Mr. Visnick outside the presence of the jury, the Court sustained the defense objection, because it was clear that his belief

that the incident was gang-related was based solely on hearsay. (33RT 11669.) The Court told the prosecutor that if he had other witnesses who could testify to that, other than through hearsay, he would agree that it was "admissible, relevant and admissible." (*Ibid.*) The prosecutor then inquired whether it could inquire through Visnick if he knew whether Zeek Moten was involved in gang activity based on reputation evidence. (33RT 11671.) Defense counsel responded: "Sounds like you're trying to get into it through reputation as a gang member or something. I would thoroughly object to that." (*Ibid.*) The court told the prosecutor that if Visnick could establish that Moten, Akens, or appellant had some gang affiliation on the basis of testimony that qualified as an exception to the hearsay rule, such as a declaration against interest, he could present such evidence, but testimony that Moten told Visnick that Akens and Powell were members of some other gang was just "rank hearsay." (33RT 11671-11672.)

As this record demonstrates, appellant made it quite clear that he adamantly objected to admission of any evidence of his gang membership, involvement, or activities during both phases of the trial. He objected on relevance and foundational (including hearsay) grounds. The record also demonstrates the trial court's understanding that appellant was objecting on 352 grounds to the introduction of any gang evidence, as evidenced by the Court's ruling that no mention of gang evidence would be permitted unless the matter was first litigated outside the jury's presence and the court found that the probative value of the evidence outweighed its potential for prejudice. This understanding was also illustrated by the Court's ruling permitting admission of evidence of the gang-motivation for the Rigsby and Moten aggravating circumstances, because "the argued prejudice [was] outweighed by the probative value." (32RT 11438-39.)

As noted in previous arguments, to preserve for review a claim that evidence was erroneously admitted, a party must make a timely and specific objection. (Evid. Code, § 353(a).) "While no particular form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility. [Citations.] [¶] .... The circumstances in which an objection is made should be considered in determining its sufficiency. [Citations.]" (*People v. Williams* (1988) 44 Cal.3d 883, 906-907 [where prosecutor's opening statement had already made clear the nature of the "other crimes" evidence, defense counsel's "relevance" objection was deemed sufficient to put court on notice to determine admissibility under Evid. Code § 1101 standards for other offenses].)

"An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. [Citations.] In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.) Moreover, even if a defendant does not mention a ground for objecting to evidence (here, hearsay), but the court rules the statements are not hearsay, the defendant has not forfeited the hearsay objection: "[t]he issue of whether the caller's statements were hearsay was raised and ruled upon by the trial court; a more specific objection would have been superfluous." (*People v. Morgan* (2005) 125 Cal.App.4th 935, 940; *People v. Dang* (2001) 93 Cal.App.4th 1293, 1299 [Counsel made no 352 objection when the testimony was presented, but court later stated that it understood that a 352 objection had been raised and that the objection had been overruled; in light of court's treatment of the issue, reviewing court deemed 352 issue preserved for appeal].)

Here, defense counsel's reference to the trial court's previous gang rulings was a sufficient invocation of 352. Just as the defendant's relevance objection in *Williams* was deemed sufficient to put the court on notice to determine admissibility under 1101 where prior statements by the prosecutor had made clear that the evidence in question was "other crimes" evidence, appellant's reference to the court's prior gang rulings was sufficient to put the court on notice to determine admissibility under Evidence Code section 352 where the court's prior rulings indicated that such an analysis was necessary before it could admit any gang evidence. (*People v. Williams*, *supra*, 44 Cal.3d at pp. 906-907.) It is also clear, from the court's prior rulings on gang evidence, that it understood appellant's objection to the admission of any gang evidence to encompass a 352 objection.

Respondent argues that this reference to the court's prior ruling was not a sufficient invocation of 352, because defense counsel did not recall the ruling correctly. (RB 273.) Respondent points out that the court did not exclude gang evidence at the penalty phase. (*Ibid.*) This argument is nothing more than a red herring. The court made several rulings regarding the admission of gang evidence: (1) it ruled it inadmissible during the guilt phase because the capital crime was not gang-related; (2) it ruled it inadmissible as a circumstance in aggravation; (3) it ruled that the gang motivation for the Rigsby and Moten aggravating circumstances could be introduced. Regardless of whether the court admitted or excluded the evidence, the common basis for all of these rulings was the court's determination that the probative value of the specific gang evidence at issue outweighed its potential for prejudice. As noted above, when appellant objected to the admission of any gang evidence during the trial, the trial court made it clear that it would not admit such evidence unless it first

determined that the probative value of the evidence outweighed its relevance.

Respondent also argues that appellant's reference to the court's prior ruling was not a sufficient invocation of Evidence Code section 352, because the court did not cite 352. (RB 273-274.) But this Court has never required an express recitation of 352 in order to satisfy the requirement that the record must affirmatively show that the trial court exercised its discretion under 352 by weighing the prejudicial effect of challenged evidence against its probative value. On numerous occasions, this Court has stated that the necessary showing can be inferred from the record despite the absence of an express statement by the trial court. (*People v. Prince* (2007) 40 Cal.4th 1179, 1237; *People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800; *People v. Montiel* (1985) 39 Cal.3d 910, 924.) Here, the court expressly stated that it would admit gang evidence only if the probative value of the evidence outweighed its potential for prejudice. Respondent's contention that this was not sufficient because the Court did not state "352" is specious and should be rejected.

Accordingly, defense counsel's objection referencing the court's prior ruling on the admissibility of gang evidence was sufficient to preserve a claim that the trial court abused its discretion in failing to exclude Detective Aurich's testimony under 352. Moreover, this Court has held that when a trial court exercises its discretion to admit bad character evidence, such as other crimes evidence, to prove some relevant fact such as motive, opportunity, intent, preparation, plan, knowledge, or identity under Evidence Code section 1101(b), due to the substantial prejudicial effect inherent in such evidence, "that discretion must in all cases be

exercised within the context of the fundamental rule that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted." (*People v. Haston* (1968) 69 Cal.2d 233, 246; see also *Jefferson*, Cal. Evidence Benchbook, supra, § 33.6, p. 1203.) In *People v. Harrison*, this Court stated:

> Evidence Code section 1101, subdivision (a), generally prohibits the admission of a criminal act against a criminal defendant "when offered to prove his or her conduct on a specified occasion." Subdivision (b), however, provides that such evidence is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity...)." To be admissible, such evidence "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

(*People v. Harrison* (2005) 35 Cal.4th 208, 229.)

Here, in admitting the bad character evidence of appellant's gang affiliations and activities as relevant to the motivation for the Rigbsy and Moten assaults, the trial court was obviously aware of its responsibility to perform a section 352 balancing of probative value against the danger of undue prejudice. Appellant's 352 claim has thus been preserved.

Respondent also argues that appellant's objection was insufficient to preserve claims of lack of foundation or hearsay. (RB 274.) Notably, shortly before the presentation of Detective Aurich's testimony, when defense counsel objected on hearsay grounds to Visnick's testimony that he learned the incident was gang-related, counsel made clear that since the

beginning of the trial, he had made every effort to exclude any reference to gang evidence but did not want to "make any speaking objections in front of the jury" other than to voice an objection. (33RT 11666.) The court responded that evidence establishing that one of the aggravating circumstances was gang-related would be admissible if a sufficient foundation could be laid and the witness's testimony was not based on inadmissible hearsay. (*Id.*, at p. 11666-11667, 11671-11672.) Accordingly, here, too, defense counsel's reference to the court's prior rulings on the admissibility of gang evidence was sufficient to alert the court to its responsibility to determine there was a sufficient foundation for Detective Aurich's testimony before admitting it. It was also clear, in light of the court's previous rulings, that it would not admit such gang evidence without first determining this foundational issue. Moreover, the court's response to counsel's objection, stating that it would sustain the objection to the form of the question, but overrule the objection if the prosecutor wanted to frame the question to elicit reputation evidence, evidences the court's understanding that counsel's objection included foundational and hearsay issues. (*In re Wing Y.* (1977) 67 Cal.App.3d 69, 78 [Reputation evidence is made admissible by the Evidence Code as an exception to the hearsay rule to prove limited issues, including evidence of bad character to prove motive under section 1101]; *accord*, *Jefferson*, Cal. Evidence Benchbook, *supra*, § 18.5, p. 433; see also Evid. Code, § 1100.)

Finally, even if this Court has some question whether counsel's objection was sufficiently specific to preserve the grounds raised here,[75] it

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[75] Should this Court determine that counsel's objection was not adequate to preserve appellant's claims on appeal, appellant contends, in his petition for writ of habeas corpus, that counsel rendered ineffective

should assume that the issue is preserved and address it on its merits.(*People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6, overruled on another point in *People v. Combs* (2004) 34 Cal.4th 821, 860 [When "the question whether defendants have preserved their right to raise this issue on appeal is close and difficult, [the reviewing court] assume[s] that defendants have preserved their right, and proceed to the merits."]; *accord*, *People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5; *People v. Wattier* (1996) 51 Cal.App.4th 948, 953.)

2. Detective Aurich's Testimony That Appellant Was A Main Player, a Gang Leader Who Promoted and Was Involved in Gang Crimes, Did Not Constitute, and Was Not Admissible as, Reputation Evidence; It was Inadmissible Hearsay Evidence Based on Information Solicited From Unidentified Sources.

In the opening brief, appellant established that Detective Aurich's opinion that appellant was a sophisticated criminal and a gang leader who promoted his gang and was involved in gang crimes was inadmissible, because of a lack of foundation. (AOB 590-593.) The case law discussed in the opening brief holds that when an opinion, such as Detective Aurich's, is not based on matter personally known to the expert, but depends on information furnished by others, such opinion has no value unless the source of the information is reliable. (See *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 618 ["Of course, any material that forms the basis of an expert's opinion testimony must be reliable."]; *accord*, 1 Witkin, Cal.

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assistance. (PetHC, Claim VII(K), 426 ["[t]o the extent trial counsel were required to object under Evidence Code section 352 as well, they rendered ineffective assistance of counsel by failing to do so."].)

Evidence (4th ed. 2000) Opinion Evidence, § 31, p. 561.) Because Detective Aurich provided no information regarding the source of his information, his testimony was not admissible as opinion testimony and instead constituted inadmissible hearsay.[76] (Evid. Code, § 801, subd. (b) [Expert testimony is admissible only if based on matter of a type that reasonably may be relied upon by an expert in forming his or her opinion]; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 [Expert opinion, which failed to disclose matter relied on in forming the opinion, was inadmissible; "The required foundational showing that the opinion rests on matters of a type experts reasonably rely on is not made where, as here, the expert does not disclose what he relied on in forming his opinion."]; Witkin, Cal. Evidence, *supra*, § 36, p. 567 ["Where the basis of the opinion is unreliable hearsay, the courts will reject it."]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1172 [Trial court properly excluded expert opinion testimony which would have been based on unreliable hearsay statements].)

The State does not attempt to defend the admission of Detective's Aurich's testimony on the basis that it constituted admissible opinion evidence, thereby failing to overcome appellant's showing that the testimony could not be admitted on that basis. (RB 274-276; see AOB 590-593.) Respondent merely argues that Detective Aurich did not testify as a gang expert. (RB 274) According to respondent, Detective Aurich was not expressing his own expert opinion that appellant was a "main player";

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[76] In the opening brief, appellant argued that this testimony should have been excluded under Evidence Code section 352, since the extremely prejudicial opinion testimony, given without explanation or supporting evidence, had little, if any, probative value. (AOB 592-593.)

instead, he simply testified to appellant's reputation in the community. (*Ibid.*)

Reputation testimony, however, must be provided by witnesses who know the individual's reputation, not by outsiders conducting an inquiry. In *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 736-739, police officers testified that they investigated the plaintiff's reputation and their investigation disclosed that he was reputed to be a bookmaker and doing a bookmaking business, that he was known as a gambler at the present time, and his place of business was known as a congregating place for professional gamblers and bookmakers. This Court, in finding that alleged reputation testimony was incompetent as hearsay and should have been excluded, said:

> "The testimony was not given by persons who knew the defendant's reputation, but by witnesses who inquired of others as to the defendant's reputation. The rule is that evidence of reputation when relevant may not be shown by witnesses conducting an inquiry, but must be given by persons having knowledge thereof."

(*Orloff, supra*, at p. 739.) In *Tingley v. Times Mirror Co.* (1907) 151 Cal. 1, 27, this Court explained the rationale for the rule that reputation testimony must be provided by those with knowledge, rather than by outsiders conducting an inquiry:

> "As general reputation consists of the estimation in which one is held in the community in which he resides, it can only properly and safely be testified to by a member of the community; it is the opinion of a member of a community as to the estimation in which another, who moves in it, is held generally by that community. Such member has the means of knowing what that general reputation is, and can properly speak of it. It would be extremely dangerous to enlarge the

> rule, so as to permit a stranger to a community, entering into it with special bias against another (as this Boston witness showed he was against plaintiff), to testify as to his opinion of the reputation of that other, based upon an interview with a limited number of persons in the community, possibly equally as prejudiced with himself. Under such circumstances it could not be said that he was testifying from his knowledge of the general reputation of the party, or that he was expressing his own opinion on the subject. He would be but stating his conclusion from the statements of others, derived from specific inquiry—a conclusion which would amount to but hearsay evidence at most."

(Tingley, supra, at p. 27 [Holding that testimony of a community outsider who testified to the plaintiff's reputation after making inquiries of 20 persons constituted inadmissible hearsay].)

Here, Detective's Aurich's testimony that appellant was a main player was not based on his own knowledge of appellant's reputation in the community, but based on his investigations as a gang detective. Detective Aurich testified that he had been a gang detective for ten years and in that position, his job was to investigate and identify gang members, gang associates, people involved in gang activity, and gang sets. (33RT 11803-11804.) The detective further testified that he did not personally know appellant but when he began investigating the Zeek Moten incident, he learned that appellant was a Freeport Crip and was a main player. (*Id.*, at pp. 11809-11810, 11814-11815 ["The information I was receiving was that [appellant] was a Freeport Crip and was a main player."].) Detective Aurich, who was not, himself, a member of the gang community, obviously learned this information by questioning other individuals. As an outsider, the detective was not competent to offer reputation evidence and his testimony did not constitute admissible evidence. Instead, it was nothing

more than hearsay based on solicited information from unidentifiable sources.

Moreover, despite the court's directive that Detective's Aurich's testimony regarding appellant's gang involvement be limited to reputation evidence and the prosecutor's questioning on that basis ("what was Carl Powell's reputation in the community for gang activity as of 1991 – late 1991?") (33RT 11809), Detective Aurich did not limit his answer to reputation evidence and instead, on the basis of his expertise as a gang expert, explained what it meant for appellant to be a "main player":

> Q. Based on your ten years of work as a detective in gangs were you able to – were you able to determine what Carl Powell's reputation was in the community for gang activity?
>
> A. Yes, I was.
>
> Q. And what was Carl Powell's reputation in the community for gang activity as of 1991 – late 1991?
>
> A. The information I was receiving was that he was a Freeport Crip and was a main player.
>
> Q. What do you mean by a main player?
>
> A. Main player – usually categorize gang members into three different levels. Your wannabes are very – on the peripheral end of the pie.
>
> You're (sic) more associates – they would hang around gang – known gang members, might be involved in minimal, related hardcore gang activity.
>
> And then your main players are a little more hardcore, gang members who promote their gang, be involved in gang activity, be involved in gang related type crimes, be a little more blatant about who they are and what they do.

Q. And would this be more sophisticated criminals?

A. Yes.

Q. And would they be the kind of people that would be leaders rather than followers?

A. Yes.

(33RT 11809- 11810.)

Notably, when Detective Aurich was first called to the stand, the prosecution established his credentials as a gang detective. (33RT 11803.) In establishing his credentials, the detective testified regarding his duties in monitoring and investigating gang members and gang activity. (*Id.*, at pp. 11803-11803.) Detective Aurich was not asked as a citizen in the community to testify regarding appellant's reputation in the gang community. Rather, he was asked to provide that information on the basis of his "ten years of work as a detective in gangs." (*Id.*, at p. 11809.) In other words, he was asked to provide this information on the basis of his specialized knowledge and that is exactly what he did. In so doing, he testified to his opinions, based on conversations with unidentified sources, that appellant was a main player, meaning that he was a sophisticated criminal and a gang leader who promoted his gang and committed gang activities, as well as gang-related crimes. (See Evidence Code section 720(a) ["A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to quality himself as an expert on the subject to which his testimony relates."].)

Respondent argues that the detective was not expressing his own expert opinion that appellant was a main player, but was merely "reporting on appellant's reputation in the community." (RB 274.) But, in explaining to the jurors what or who a main player was, Detective Aurich was

certainly expressing his opinion based on his specialized knowledge, training, and experience as a gang expert. [See, e.g. *People v. Champion*, *supra*, 9 Cal.4th at p. 924 [police officers are commonly used as an expert witness to explain gang terminology]; *accord*, *People v. Fudge* (1994) 7 Cal.4th 1075, 1111; *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699.) Regardless of whether "main player" was a label attached to appellant by Detective Aurich on the basis of information he had received from unidentified sources or was, instead, a label used by such sources, it was Detective Aurich who, in his capacity as a gang expert, explained what it meant for appellant to be labeled as such. And that was expert opinion testimony, not reputation evidence. (See, e.g. *People v. Cole* (1956) 47 Cal.2d 99, 103 [decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact].)

Moreover, the prosecution treated Detective Aurich's testimony as expert testimony, rather than reputation evidence. As argued in the opening brief, the prosecution relied on Detective Aurich's credentials to afford this evidence of appellant's alleged gang involvement, criminal sophistication, and commission of unidentified gang activities and crimes, a sense of credibility it did not deserve. (See AOB 593; see 35RT 12474 [During closing argument, before quoting Detective Aurich's testimony that appellant was a main player, a hard-core gang member, a leader, and more sophisticated criminal, the prosecutor reminded the jurors that Detective Aurich was a gang detective from 1984 to 1994 "and part of his business was to know what was happening in the gang community, intelligence"].)

After reaping the benefit of the detective's expertise, the State should not be heard now to contend that he was merely testifying to appellant's reputation.

Accordingly, respondent's assertion that Detective Aurich's testimony was admissible as reputation evidence offered for impeachment purposes[77] must be rejected. His testimony was not limited to reputation evidence and did not qualify as competent reputation evidence. Instead, his testimony was nothing more than the recitation of hearsay from unidentified sources and as such, it should have been excluded.

C. Prejudice

1. Standard to Be Applied

In the opening brief, appellant argued that the erroneous admission of the photo and Detective Aurich's gang testimony violated appellant's Fourteenth Amendment right to due process. (AOB 594, citing *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1381, 1384-1385.) Appellant further argued that this error violated the Eighth Amendment. (AOB 594.) The admission of this emotionally charged evidence, which encouraged the jurors to impose a sentence of death on the basis of a visceral reaction to the photo's charged content, violated the Eighth Amendment's requirement of reasoned decision-making. (See, e.g. *Gardner v, Florida* (1977) 430 U.S. 349, 358

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[77] Respondent has devoted significant argument to explaining why Detective Aurich's testimony was admissible for impeachment purposes. (RB 274-276.) Given that Detective Aurich's testimony was not limited to reputation evidence, did not qualify as competent reputation evidence, and was not admissible as opinion testimony, respondent's argument concerning its relevance is immaterial.

["It is of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion."]; see also *Booth v. Maryland* (1987) 482 U.S. 496, 508-509, overruled by *Payne v. Tennessee* (1991) 501 U.S. 808 ["[E]motionally charged" evidence is "inconsistent with the reasoned decisionmaking we require in capital cases."].) Because the admission of this evidence violated both the Eighth and Fourteenth Amendments, appellant argued, prejudice must be assessed under *Chapman*'s[78] "reasonable doubt" standard. (AOB 594.)

The State responds that *McKinney v. Rees* is inapplicable and hence the *Chapman* standard does not govern assessment of prejudice here. (RB 276.) Rather, respondent argues, prejudice must be analyzed under the state "reasonable possibility" standard elucidated in *People v. Brown*, *supra*, 46 Cal.3d 432, for review of penalty phase errors. (*Ibid.*) Appellant has already demonstrated above that *McKinney* is applicable. Furthermore, because the error also violated the Eighth Amendment, *Chapman* must govern this analysis regardless of the applicability of *McKinney*.

However, this point of contention matters little, since this Court has "explained that '*Brown's* "reasonable possibility" standard and *Chapman's* "reasonable doubt" test ... are the same in substance and effect.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961, quoting from *People v. Ashmus*, *supra*, 54 Cal.3d at pp. 932, 990.) Because a death verdict must be unanimous, reversal is required under the state penalty phase prejudice standard if there is a reasonable possibility that even a single juror *might* have reached a different decision absent the error. (*People v. Ashmus*,

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[78] *Chapman v. California*, *supra*, 386 U.S. at p. 24.

supra, 54 Cal.3d at pp. 984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"].) Accordingly, under either the *Chapman* standard or the *Brown* standard, the State must demonstrate beyond a reasonable doubt that the erroneous admission of the evidence could not have affected at least one juror's penalty decision.

2. The State Has Not Demonstrated that This Error Was Harmless.

As argued in the opening brief, the State cannot prove that the admission of this inflammatory evidence did not contribute to the jury's decision to impose the penalty of death. (AOB 594-598.) Respondent's argument to the contrary is based on two contentions: (1) the standard penalty phase instructions were sufficient to dispel any possible prejudice; and (2) any error is harmless because the aggravating evidence was strong. (RB 277-278.) Neither contention satisfies the prosecution's burden.

Appellant has already addressed, in the opening brief and above, the damage done by the admission of the provocative image of appellant and Akens smirking, making gang signs, and pointing guns at each other and the prosecutor's use of the photograph during argument to evoke fear and anger. (See AOB 589-590, 595, 597.) It defies common sense to even suggest that this photo did not affect the jurors' determination of penalty in this case, especially given the prosecutor's incendiary use of it. Respondent merely responds that the jurors were instructed, pursuant to the standard penalty phase instructions, not to be influenced by bias or prejudice against the defendant. (RB 277.) Appellant has also addressed this contention, *ante*, and directs the Court to that portion of this brief. (Arg. XXV, §A(2), *ante*.)

Moreover, respondent readily acknowledges that the prosecutor used Detective Aurich's erroneously admitted hearsay testimony to rebut one of the mainstays of appellant's case in mitigation – that appellant was manipulated and coerced by the Hodges to shoot McDade. (RB 277.) Defense expert Dr. Nicholas testified, on the basis of testing, an interview of appellant, and review of police reports and various records, that due to appellant's minimal intellectual abilities and high need for approval, he would gravitate to a follower position, rather than leader, and would be susceptible to manipulation by older individuals (such as the Hodges's brothers) whose approval he sought. (34RT 12033, 12083, 12114.) Dr. Nicholas opined that the influence of older, more sophisticated gang members, such as John and Terry Hodges, could propel appellant to commit a very serious criminal act, one that he was not prepared to do and would not do on his own. (34RT 12041, 12046.) But, during his penalty argument, the prosecutor heavily relied on Detective Aurich's credentials and hearsay testimony to rebut Dr. Nicholas's testimony, arguing:

> . . . Detective Aurich testified that he was a gang detective for ten years, from 1984 to 1994.
>
> And, remember, he said there were three categories of gang members. And – And Detective Aurich also testified that part of his business was to know what was happening in the gang community in Sacramento. And he knew about Carl Powell.
>
> And what did he say about Carl Powell? He was a main player.

(35RT 12473.)

> Then I asked Detective Aurich about Carl Powell's reputation in the gang community.

He says, "the information that I was receiving was that he was a Freeport Crip and was a main player."

I said, "What do you mean by a main player?"

He says, "Main player – Usually categorized gang members into three different levels: Wannabes, associates and main players.

And then your main players, he said, are a little more hard-core gang members who promote their gangs, being involved in gang activity and gang-type crimes, and be a little more blatant about what they are and what they do.

I said, "Would this be a more sophisticated criminal?"

He said, "Yes."

And I said, "Would these be the kind of people who would be leaders rather than followers?"

And he says "yes".

But the defense will want to paint Carl Powell as an easily manipulated follower. But that's not what the evidence is in this case.

(*Id.*, at pp. 12474-12475.)

The prosecutor thus was able to effectively rebut mitigation evidence elicited from a respected mental health expert that appellant was quite vulnerable to manipulation and coercion by the Hodges's brothers on the basis of rank, unreliable hearsay which should never have been admitted.

Respondent next contends that "even if the photo and 'main player' testimony had been excluded, the People still had a strong penalty phase case," citing the circumstances of the crime and the Zeek Moten aggravating circumstance. (RB 277-278.) Accordingly, respondent argues, any error in admitting the photo or Detective Aurich's testimony was harmless. (*Id.*, at p. 278.) As explained, however, in Argument XXIII,

section C, *ante*, respondent's argument incorrectly asks this Court to focus on the strength of the evidence and make a comparison which, as a matter of federal constitutional law, can be made only by a jury which hears all the evidence, not by an appellate court. The decision whether to sentence a defendant to death or to life without the possibility of parole is a normative decision, which requires jurors to make individual determinations based on their own understanding of the penalty factors and their own moral assessment of the evidence. This Court cannot presume that the jury would have voted to impose the death sentence in this case even in the absence of this improperly-admitted evidence. (XXIII, § C, *ante*.) Moreover, as noted above, this Court has recognized that admission at the penalty phase of inadmissible evidence which relates directly to the defendant's character, as did the photo and Detective Aurich's gang testimony, is rarely harmless. (*People v. Hamilton*, *supra*, 60 Cal.2d at p. 137; see also *Brown v. Sanders* (2006) 546 U.S. 212, 220-221 [recognizing unfair prejudice resulting from admission of evidence that jury would not otherwise have heard in the penalty weighing process].)

Additionally, respondent's contention ignores far too much. In insisting that the erroneous admission of this evidence was harmless given the circumstances of the crimes and the Moten aggravating circumstance, respondent does not address the mitigating evidence in this case.[79] As discussed in the opening brief, the defense presented the following mitigation: (1) appellant suffers significant intellectual deficiencies and due

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[79] Respondent's only acknowledgment of the defense case in mitigation is its assertion that the prosecutor properly used the photo and Detective Aurich's testimony to attack appellant's mitigating evidence. (RB 277.)

to such deficiencies and personality traits was susceptible to manipulation at the time of the crime; (2) appellant suffered a deprived childhood, growing up in a dangerous, gang-infested area; (3) appellant has a family who loves and supports him; (4) appellant has the ability to function well in a structured environment; (5) appellant had no prior felony convictions; (6) appellant confessed to the crime; and (7) appellant did not act alone but was accompanied, influenced, and coerced to commit the crime by two much older and sophisticated accomplices. (See AOB 597-598.) And, perhaps, most importantly, the jurors were considering here the fate of a young man merely eighteen years old at the time of the crime. (3 CT 856; 1CCT 47-48; see *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [Although capital crime involving three murders was quite egregious, a death sentence was not inevitable, given that the defendant was quite young and had no criminal history]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 933 (conc. opn. of Gould, J.) [Despite strong aggravating evidence (killing of two persons, plus two prior incidents of violent behavior), there is a reasonable *probability* that the result would have been different, given that the defendant was a young man who did not have an extensive record].)

Respondent's contention of harmless error, which relies solely on its conclusory statements regarding the circumstances of the capital offense and the 190.3(b) offenses, are of little, if any assistance to the Court in assessing the impact of the error here. As the United States Supreme Court has recently recognized in this regard, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side . . . ." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 331.)

Respondent not only ignores the mitigation presented during the penalty phase; it also fails to acknowledge the effect of this error on the defense case in mitigation, as discussed above. This error is not simply one of admission of prejudicial evidence, but also the use of that improperly admitted evidence to distort the jury's consideration of one of the most important pieces of the defense case in mitigation. This error thus skewed the jury's penalty evaluation in two respects: (1) it introduced inflammatory aggravating evidence; and (2) it fatally distorted the jury's consideration of significant mitigation. Under these circumstances, it cannot be possible to conclude that the error could not have affected the jury's decision to impose death.

Respondent's assertion that the circumstances of the crimes – the capital crime and the Moten threat and assault – were alone so aggravating that they made the death verdict a foregone conclusion and rendered harmless any error in admitting additional aggravating evidence, is a gross overstatement of the evidence, an equally gross oversimplification of the penalty decision the jurors were called upon to make, and unsupported by the case law of either this Court or the federal courts. (See *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [Death verdict not foregone conclusion despite aggravating evidence regarding defendant's series of prior robberies and arson, which were "unusually – and unnecessarily – brutal and cruel," "scant evidence" in mitigation, and defendant's capital conviction of murdering a peace officer in the performance of his duties]; *People v. Sturm*, *supra*, 37 Cal.4th at pp. 1218, 1224, 1244, 1247 [Penalty phase errors required reversal despite fact that defendant murdered three friends, shooting them execution-style from close range after binding them and even as they "cried or begged for mercy," in order to rob store in which they worked; "although the crime committed was undeniably heinous, a

death sentence in this case was by no means a foregone conclusion."]; *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 962 [Penalty phase error required reversal; despite "egregious" nature of capital double murder and admission of "serious" aggravating other crimes evidence (possession of an assault weapon, two assaults on inmates, and possession of a shank in jail), "a death verdict was not a foregone conclusion"]; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081 [Aggravating evidence was "scant" where based on circumstances of underlying crimes – two first degree murders and assault with deadly weapon on third person in two separate incidents – along with prior felony burglary conviction and prior violent assault in which defendant fired gun]; *People v. Hernandez* (2003) 30 Cal.4th 835, 851-853, 877, disapproved of on another ground by *People v. Riccardi* (2012) 54 Cal.4th 758 [Penalty phase errors going to "most important aggravating evidence" under factor (b) required reversal where aggravation was based on circumstances of underlying murder for financial gain, along with prior conviction for robbery in which defendant used and fired a weapon at one of the victims and another prior burglary conviction, and mitigation included evidence of positive childhood and drug addiction].)

Respondent argues that the following aggravation -- that the jury found appellant guilty of shooting his former employer at close range during the commission of a robbery and appellant was a shooter during a gang-related assault – was so strong that any error here was harmless. (RB 277-278.) But far more egregious aggravation has been found *insufficient* to render penalty phase errors harmless, as evidenced by the case law cited above, and even under the *Strickland* standard for prejudice, a more

stringent standard than either the *Brown* or *Chapman* standards.[80] (See, e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 418 (dis. opn. of Rehnquist, J.) [Emphasizing that majority reversed for penalty phase errors under *Strickland* standard despite aggravating evidence that appellant had "savagely beat[en] an elderly woman, stole[n] two cars, set fire to a home, stabbed a man during a robbery, and confessed to having strong urges to choke other inmates and break a prisoner's jaw"]; *In re Lucas* (2004) 33 Cal.4th 682, 732, 735 [Penalty phase error required reversal under *Strickland* standard despite "the aggravated nature of the crimes," a "brutal and calculating attack," in which the defendant killed "two frail, helpless elderly neighbors," and additional aggravating evidence based on a prior violent assault]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 918, 920, 929-932 [Same – reversal required despite "strong" aggravating evidence based on capital crimes in which the defendant, through careful planning and execution, killed one individual to exact revenge and killed a second individual to eliminate the only eyewitness to the murder, and on

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80 Under the *Strickland* standard, trial counsel's penalty phase error that falls below an objective standard of reasonableness requires reversal if it undermines confidence in the outcome of the case. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) This standard has been equated with the *Watson* standard of prejudice. (See, e.g., *People v. Bell* (1989) 49 Cal.3d 502, 558-559 (dis. opn. of Mosk, J.); see also *People v. Espinoza* (1992) 3 Cal.4th 806, 821; *People v. Rich* (1988) 45 Cal.3d 1036, 1096.) The *Brown* prejudice standard for assessment of penalty phase violations of state law is "more exacting" than the *Watson* standard and, hence, "more exacting" than the *Watson* or *Strickland* standard. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) Therefore, decisions assessing the closeness of a penalty phase case for prejudice purposes under the *Strickland* standard are instructive in assessing the closeness of a penalty phase case for prejudice purposes under the more exacting *Brown* standard.

defendant's violent behavior in two prior incidents, including one in which the defendant fired a gun into an inhabited residence]; *Mak v.Blodgett* (9th Cir. 1992) 970 F.2d 614, 616, 619-622 [Same – despite defendant having been convicted of the massacre of thirteen people, an incident in which the defendant and two others, with defendant as the leader, hog-tied and shot fourteen people].)

Notably, the State's attempt to minimize the importance of this erroneously admitted evidence is a stark about-face from its position at trial, where the importance of the photograph and the gang evidence was evidenced by the prosecutor's repeated attempts to introduce the evidence and by his provocative use of the evidence once it was admitted. (See AOB 595-596.) The prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be." (*Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [Prosecutor's reliance in summation on erroneously admitted aggravating evidence was critical factor in finding error prejudicial]; *People v. Hernandez*, *supra*, 30 Cal.4th at p. 877 [Same]; *People v. Quartermain* (1997) 16 Cal.4th 600, 622 [Error in admitting evidence was prejudicial due in large part to prosecutor's reliance upon it in summation]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [Same]; *People v. Powell* (1967) 67 Cal.2d 32, 56-57 [Same: "[W]e have seen how important these statements were to the People's case, and 'There is no reason why we should treat this evidence as any less "crucial" than the prosecutor - and so presumably the jury - treated it.'"]; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments . . ."].)

In sum, respondent has failed to demonstrate that this evidence and the prosecutor's use of it to appeal to the juror's fears of and biases against minorities, gangs, and weapons, could not have affected at least one juror's decision to sentence appellant to death. Because admission of this improper, inflammatory evidence at the penalty phase was not harmless either under the *Chapman* "reasonable doubt" standard or the state "reasonable possibility" standard, reversal of the death judgment is required.

XXVI.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE.

In the opening brief, appellant established that Pama's testimony regarding the effect of McDade's death on his mother and brother, as well as on Colleen McDade and her children, was not admissible as lay opinion evidence, because it was based on Pama's own emotional reactions and conjecture, rather than observations of their behavior. (AOB 599-609.) Appellant argued that this was irrelevant, emotional evidence which invited an irrational, subjective response and diverted the jury from its proper role. (AOB 609-610.)

Respondent argues that the bulk of Pama's testimony was proper and any improper testimony was non-prejudicial. (RB 279.) Respondent also contends that a portion of this claim has been forfeited. (RB 280.) Appellant disagrees.

A. No Portion of This Claim Has Been Forfeited.

Respondent claims that appellant has forfeited the portion of his argument concerning Pama's testimony about the effects of McDade's death on his wife and daughter by failing to object at trial. (RB 280.) Respondent argues that he only objected to the testimony pertaining to McDade's mother and brother. (*Ibid.*) Respondent's reading of the record is incorrect.

When the prosecutor began his examination of Ms. Pama, he asked questions regarding her relationship with Colleen McDade, Keith McDade and the McDade children. (32RT 11612-11613.) He also asked her to

describe the problems that she had seen Colleen and her children endure since McDade's death and the events on the night of McDade's death when Ms. Pama drove Colleen McDade to the KFC store. (*Id.*, at pp. 11613-11617.) Defense counsel did not object to those questions and Ms. Pama's answers to those questions are not at issue here.

However, counsel did object when the prosecutor asked Pama to describe the effect of McDade's murder on his mother. (*Id.*, at p. 11618.) Counsel stated: "if counsel wants to ask one witness about the effects on another, I suggest he bring the other witness in." (*Ibid.*) The court overruled that objection "to the extent that the witness may describe things she has perceived as opposed to opinions she has otherwise." (*Ibid.*) However, as evident from the portions of her answers quoted in the opening brief (see AOB 603-604, 607-608), Ms. Pama did not restrict her answers to her observations but testified instead to opinions based on conjecture. Defense counsel objected to her answers, but the court overruled the objections:

> Q: All right. And how has the murder of Keith McDade affects (sic) Keith's mother, Roberta?
>
> A: Very, very hard.
>
> I've been down with Colleen to take the kids to Bobby to take care of. And she – she never – at first it seemed like she didn't want to talk about Keith.
>
> To me it was like, you know, you don't want if – if I don't say anything about it, it will go away. It really wasn't there.
>
> MR. HOLMES: Your Honor, this is the type of thing I was objecting to.
>
> I ask that portion be struck.

I ask that counsel keep strictly to questions that she can say I observed or I heard –

THE COURT: Overruled.

MR. HOLMES: -- forming her own opinions

THE COURT: I overrule the objection as to that line of testimony as to what she actually perceived and what she believed concerning those perceptions.

As a lay opinion she may do so.

Q: Okay. Go ahead.

(32RT 11619.) Ms. Pama then continued with her answer, opining that McDade's death was so difficult for McDade's family because his son Buddy was the spitting image of his father and Pama imagined that must be difficult for them to see "day in and day out." (*Id.*, at p. 11620.)

When the prosecutor next asked Ms. Pama about the effect of McDade's death on his brothers, defense counsel objected again:

Q: Do you know how the murder of Keith has affected the brothers?

Let's start off with John McDade.

MR. HOLMES: Your Honor, I would make the same objection here.

In fact, I'll make it a continuing objection.

THE COURT: I'll sustain the objection to the form of the question.

You may restate the question so that she is testifying other than what she may know from any other hearsay source.

(32RT 11621.) Despite the prosecutor's rephrased question ("have you personally observed how the murder of Keith has affected John McDade, his brother?" [*id.*, at p. 11621]), Ms. Pama continued to answer based on conjecture, rather than personal observations:

> "It's – it's difficult for him. [¶] He accepts this I think. And he knows that this has happened. [¶] And like I said I think it's really hard for him just to see Buddy too. It's still the same thing. He's seeing his younger brother."

(*Ibid.*) After the overruling of his continuing objection, defense counsel made no further objections and Pama continued to offer her opinions based on assumptions regarding the effect of McDade's death on his brother John, Colleen, and McDade's daughter Monique. (32RT 11621-11624.)

As this record evidences, respondent is wrong. Appellant's counsel did not limit his objection to the elicitation of testimony regarding the effects of McDade's death on family members to just McDade's mother and brother. His objection was broadly stated: he objected to questions "ask[ing] one witness about the effects on another." (32RT 11618.) He broadly requested that "counsel keep strictly to questions that she can say I observed or I heard." (*Id.*, at p. 11619.) Moreover, after objecting three times during Ms. Pama's testimony, counsel made clear that his was a continuing objection to questions and answers based on Ms. Pama's opinions and speculations, rather than her observations. (32RT 11621.)

Counsel's objections were timely and specific, and the trial court's rulings made it unnecessary for counsel to continue making the same objection over and over – three times is more than enough. Once the defendant objects to a line of questions, he is not required to renew it at each recurrence. (*People v. Antick* (1975) 15 Cal.3d 79, 95 ["It has long

been the rule that '[w]here a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising at each examination of other witnesses; and his silence will not debar him from having the exception reviewed.'"]; *accord*, *People v. Zemavasky* (1942) 20 Cal.2d 56, 62 ["In view of the earlier rebuff, it was not thereafter incumbent upon appellant to object repeatedly to such evidence when later sought to be elicited by the prosecution.... [it] would have been useless and would have served only to emphasize the matter to the jurors."]; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 696 ["Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue."] *People v. Calio* (1986) 42 Cal.3d 639, 643 ["'An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' (Citation)"].) Any further objection, under the circumstances, would have been futile and would only have emphasized Pama's testimony and risked antagonizing the jurors. (*People v. Hill* (1998) 17 Cal.4th 800, 821 [claim is not waived for failure to object where an objection would be futile].)

Accordingly, respondent's forfeiture argument is specious and should be rejected.

B. Pama's Testimony Regarding the Impact of McDade's Death on Others Was Not Admissible as Lay Opinion Testimony and Constituted Irrelevant, Emotional Evidence Which Invited An Irrational, Arbitrary Response.

Both parties agree that lay opinion testimony must be rationally based on the perceptions or observations of the lay person. (RB 281; AOB 606-607.) Respondent correctly notes that this Court has held "'"there is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members."' (Citation.)" (RB 280-281.) Respondent does not address, however, appellant's argument that "[g]enerally a lay witness may not give an opinion about another's state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397; see AOB 608.) As pointed out in the opening brief, that is what Pama was doing during her testimony; she was merely offering conclusions and assumptions regarding other family members' states of mind, rather than testifying to objective behavior. (See AOB 607-609.)

Respondent acknowledges that not all of Pama's testimony fell within the bounds of permissible lay opinion, but argues that "most of [her] testimony fell within [such] bounds. . . ." (RB 281.) Respondent points to several places in Pama's testimony where she did testify on the basis of her observations. (RB 281-282 [Pama's testimony that Colleen screamed and yelled and stated she was overwhelmed; Pama's testimony that Monique argued with her mother and got very angry].) However, as demonstrated in the opening brief, other parts of Pama's testimony, where she projected her own feelings about Buddy onto McDade's mother and brother and speculated about the impact of McDade's death on his family, were not based on her observations. (See AOB 607-609.) For the reasons expressed in the opening brief, appellant disagrees with respondent's argument that this testimony fell within the bounds of permissible lay opinion. As demonstrated therein, this testimony did not constitute proper lay opinion testimony, because it was based on Pama's own emotional reactions and conjecture, rather than her observations. (AOB 607-609.)

Respondent also asks this Court to reject appellant's contention that Pama's testimony was irrelevant, emotional evidence that invited an irrational response on the basis that the testimony was rationally based on Pama's perceptions and was not surprising. (RB 282.) As established in the opening brief, however, her testimony was not based on her perceptions. (See AOB 607-610.) Moreover, whether the testimony was surprising or not, it was, indeed, heartbreaking testimony which was likely to provoke an irrational, purely subjective response. As argued in the opening brief, this testimony increased the emotional punch of the prosecution's victim impact evidence. (See AOB 610.)

C. Prejudice.

The State contends that there is no reasonable possibility that this error affected the penalty verdict, because appellant's claim involved a small portion of the admissible victim-impact evidence and there was strong aggravating evidence -- the capital crime and the Zeek Moten threat and assault. (RB 282.) As explained *ante*, in Argument XXV, respondent's prejudice analysis, which relies on its conclusory statement regarding the strength of the aggravating evidence, fails to acknowledge the mitigating evidence and asks this Court to make a comparison which, as a matter of federal constitutional law, can be made only by a jury.

Moreover, this Court cannot dismiss the prejudice flowing from a piece of aggravating evidence simply because the prosecution presented other aggravating evidence. Given the kind of normative decision which each juror must make for him or herself at the penalty phase, who can say that Pama's testimony regarding Buddy's likeness to his father, and her conjecture as to its effect on other family members, was not the piece of evidence that persuaded one juror to vote for death? For the reasons set

forth above in Argument XXV and in the opening brief (AOB 609-610), the State has not demonstrated that the admission of this emotionally-laden evidence could not have affected at least one juror's decision to impose a sentence of death.

XXVII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTION ON VICTIM IMPACT EVIDENCE AND IN FAILING TO OTHERWISE PROPERLY INSTRUCT THE JURY ON THE USE OF VICTIM IMPACT EVIDENCE.

In the opening brief, appellant argued that the court erred in refusing appellant's proposed instruction cautioning the jury regarding the use of emotional victim impact evidence. (AOB 611-614.) Appellant further argued that even if there was a valid basis for refusing the proposed instruction, the penalty phase instructions were deficient in failing to direct the jury as to the proper use of victim impact evidence. (AOB 615-618.)

The State responds that the Court rejected this claim, based on an identical instruction, in *People v. Russell* (2010) 50 Cal.4th 1228, 1265-1266. (RB 283-286.) Appellant submits the issue on the argument presented in his opening brief, which adequately presents the issue and fully joins respondent's position.

XXVIII.

THE TRIAL COURT IMPROPERLY REJECTED SEVERAL REQUESTED PENALTY PHASE INSTRUCTIONS NECESSARY TO GUIDE THE JURY'S CONSIDERATION OF MITIGATION EVIDENCE IN VIOLATION OF APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS.

In the opening brief, appellant argued that the court erred in refusing to give several requested penalty phase instructions that were necessary to guide the jury's consideration of mitigation evidence and to permit full consideration of the defense case in mitigation. (AOB 619-632.) As argued there, the trial court's failure to give these instructions denied appellant's rights to due process, a properly instructed jury, and a reliable penalty verdict under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution. (AOB 621-622, 631-632.)

A. The Trial Court Erroneously Rejected Appellant's Requested Instruction That Sympathy or Compassion Alone Could Justify a Life Sentence.

Respondent argues that appellant has forfeited his claim that the trial court erred in refusing his requested instruction that the jurors could reject death as a penalty based on sympathy or compassion alone. (RB 287.) Respondent also argues that the claim is meritless because the Court has rejected it in previous cases and the proposed instruction was duplicative of other instructions provided to the jurors. (RB 287-288.) Appellant disagrees.

1. This Claim Has Not Been Forfeited.

Although appellant requested the trial court to give his requested instruction that sympathy or compassion alone could justify a life sentence,

respondent argues that this claim is forfeited because of statements made by defense counsel after the court stated how it would instruct on this issue. (RB 287.) Respondent's contention that defense counsel's statements constituted a forfeiture is incorrect and based on a misreading of the record.

Appellant requested a group of six special penalty phase instructions, entitled (1) "Lingering Doubt as to Guilt," (2) "Scope and Proof of Mitigation: Sympathy Alone Is Sufficient to Reject Death," (3) "Scope and Proof of Mitigation: General," (4) "Age Includes Psychological Immaturity," (5) "Mental Impairment Not Limited to Excuse or Negation of an Element," and (6) "Cautionary & Limiting: Victim Impact." (3CT 779-781.) As is evident, two of these instructions concerned the scope and proof of mitigation: one was a general instruction on that subject and the other included the principle that sympathy alone could justify a sentence of life without possibility of parole.[81] The court refused the general instruction regarding the scope and proof of mitigation. (3CT 780; 35RT 12395-12396, 12426.) It is the second requested instruction, the "Scope-and-Proof-Sympathy" instruction, which is at issue in this claim. That instruction stated:

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty. A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating

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[81] For ease of discussion, appellant refers to the instruction entitled "Scope and Proof of Mitigation: Sympathy Alone Is Sufficient to Reject Death" as the "Scope-and-Proof-Sympathy" instruction and the "Scope and Proof of Mitigation: General" instruction as "Scope-and-Proof-Sympathy-General" instruction.

> circumstance exists if there is any evidence to support it no matter how weak the evidence is.

(3CT 780.) Although the court gave a modified instruction regarding the second and third sentences in this proposed instruction, it refused to instruct that the jury could, based on sympathy or compassion alone, reject death as a penalty. (35RT 12424-12426.)

On September 19 and September 27, 1994, the court and parties held their first discussions regarding these defense-requested instructions. (32RT 11500-11505; 35RT 12388-12399.) On September 27, the court told counsel that it was refusing to instruct that the jury could reject the penalty of death on the basis of sympathy or compassion alone. (35RT 12390.) As stated by the Court:

> All right. The next one, are you with me now on the scope and proof of mitigation?
>
> . . . . .
>
> I'm not going to give the first sentence. What I will give is as follows:
>
> "A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any" - - And I'm inserting the word "credible evidence" - - "to support it."
>
> And then after that, insert, "regardless of its strength or weakness."

(35RT 12390.)

Thereafter, on September 28, 1994, the court and counsel reviewed the final penalty phase instructions which the court had prepared. (35RT 12403, 12407-12427.) This final set of instructions included those portions of the defense-requested instructions that the Court had previously

decided to give and excluded those portions which the court had refused. (*Ibid.*) During this review, the following colloquy regarding the "Scope-and-Proof-Sympathy" instruction occurred:

> MR. HOLMES[82]: We submitted one of these instructions here entitled scope of proof of mitigation simply along with sympathy sufficient to reject death.
>
> Did that get incorporated in any place as a factor – sympathy as a factor?
>
> THE COURT: It's in one of your six in your long - -
>
> MR. HOLMES: Right.
>
> MR. CASTRO: Hm-hmm (affirmative).
>
> MR. HOLMES: It's one of six we submitted.
>
> THE COURT: What – what title?
>
> MR. HOLMES: Scope of proof of mitigation. Sympathy alone is sufficient to reject death.
>
> THE COURT: I have included part, but not all of that.
>
> MR. HOLMES: Okay.
>
> THE COURT: Since sympathy – they are being told in K essentially the same thing I am not restating that.
>
> Let me see again what K says.
>
> MR. HOLMES: Any other circumstance.
>
> That one.
>
> MR. CASTRO: Hm-hmm (affirmative).

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[82] Appellant was represented by both Mr. Holmes and Mr. Castro. Holmes was absent during the instruction conference on September 27, when the court stated it was refusing to instruct that sympathy alone could support a sentence of life without possibility of parole. (35RT 12377, 12390.)

THE COURT: Yes.

MR. HOLMES: Okay.

(35RT 12424-12425.)

At that point, the court and parties turned to discussing three of the other defense-requested instructions in that group of six -- instructions regarding lingering doubt, age includes psychological immaturity, and mental impairment not limited to excuse or negation of an element. (*Id.*, at p. 12425-12426.) Then Mr. Holmes again mentioned the "Scope-and-Proof-Sympathy" instruction and the following discussion ensued:

> MR. HOLMES: Then I will – we have one, scope and proof of mitigation. And that's one you incorporated into – mitigating circumstances do not need to be proved beyond a reasonable doubt where other crimes and – crimes involving force, violence do.
>
> THE COURT: Right. Okay.
>
> MR. HOLMES: You're going to give the language in the K subsection where it says and any sympathetic or other aspect of defendant's character or record.
>
> THE COURT: Yes.
>
> And that's – I'm not giving your other instruction - -
>
> MR. HOLMES: Right.
>
> THE COURT: - - that dealt with that issue.
>
> MR. HOLMES: You're right.
>
> That totally includes that. Okay.
>
> MR. CASTRO: That's adequate.
>
> Right.

(35RT 12426.)

Respondent contends that Holmes's statements, "You're right. That totally includes that. Okay," and Castro's statements, "That's adequate. Right," constituted a forfeiture, citing "*People v. Valdez* (2004) 32 Cal.4th 73, 113 [defendant did not request clarifying language; may not complain that an instruction correct in law and responsive to the evidence was too general or incomplete]." (RB 287.) Respondent's forfeiture argument is seriously off its mark for several reasons.

First, it is based on a misreading of the record. As is evident from a careful reading of the record, these remarks, which the State contends constitute forfeiture, were in reference to the "Scope and Proof of Mitigation: General" instruction, not the instruction at issue here. At the beginning of this discussion, Holmes is referring to the "Scope-and-Proof-Sympathy" instruction, because this is the instruction where the court refused to give the first sentence (the jury may, based on upon sympathy or compassion alone, reject death as a penalty), but stated it would incorporate the second two sentences (mitigating factor does not have to be proved beyond a reasonable doubt etc.) into a modified instruction. (3CT 780; 35RT 12390.) When the court responded that it was not giving the other instruction which dealt with that issue -- the scope and proof of mitigation, it was obviously referring to the "Scope and Proof of Mitigation: General" instruction, which the court had refused on the basis that it was duplicative of CALJIC No. 8.85's factor (k). (3CT 780; 35RT 12396.) Accordingly, Holmes and Castro were referring to that instruction, not the instruction at issue here.

Second, even had Castro and Holmes been referring to the "Scope-and-Proof-Sympathy" instruction, the court had already refused the portion of that instruction at issue in this claim. Respondent overlooks the court's

ruling during the prior instruction conference. "'An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' (Citation)" (*People v. Calio* (1986) 42 Cal.3d 639, 643; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 696 ["Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue."]; *Pastene v. Pardini* (1902) 135 Cal. 431, 433 ["He may not only submit to the ruling of the court without future offer of evidence upon the excluded defense, but it is his duty to accept such ruling."].)

Third, respondent's cited authority does not support a finding of forfeiture where, as here, counsel has requested an instruction, and the court has refused to give a vital portion of the requested instruction. *Valdez*, and the other cases upon which it relies, involved situations where the defendant either failed to object to an instruction or contended an instruction correct in law was too general or incomplete but failed to request clarifying language. (*Valdez*, *supra*, 32 Cal.4th at pp. 112-114 [failure to object to truncated version of CALJIC 8.81.17 and failure to request clarifying language]; *People v. Lang* (1989) 49 Cal.3d 991, 1024-1025 [contention on appeal that instruction, correct in law, was erroneous but defendant failed to request appropriate clarifying or amplifying language]; *People v. Hart* (1999) 20 Cal.4th 546, 621-23 [contention on appeal that instructions were ambiguous and court failed its sua sponte duty to offer clarifying instructions, but defendant failed to request such clarifying instruction at trial]; *People v. Andrews* (1989) 49 Cal.3d 200, 217-218 [contention on appeal that court should have modified CALJIC

3.18, but defendant did not request such a modification at trial].[83]) In these situations, these courts held that a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. (*Ibid.*) None of these cases suggested the possibility of forfeiture where a defendant has requested an instruction and simply acquiesced to the court's ruling.

For all of these reasons, respondent's forfeiture argument is specious and should be rejected.

2. The Requested Instruction Was a Correct Statement of Law and Its Important Principle that Sympathy Alone Could Justify a Sentence of Life Was Not Duplicated in Any Other Instruction Given to the Jurors.

In the opening brief, appellant argued that the court erred in refusing his requested instruction because it was a correct statement of law and necessary to inform the jurors that they could, on the basis of sympathy or compassion alone, reject a sentence of death. (AOB 622-625.) Respondent does not quarrel with the fact that the instruction was a correct statement of law. Its response is that the Court has rejected this argument in several prior cases and the instructions provided to the jurors sufficiently covered the role of sympathy in determining penalty. (RB 287-288.)

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[83] Notably, all of these cases, despite finding that the defendants forfeited their claims, decided the claims on their merits. (*Valdez*, *supra*, 32 Cal.4th at p. 113; *People v. Lang*, *supra*, 49 Cal.3d at pp. 1024-1025; *People v. Hart*, *supra*, 20 Cal.4th at pp. 622-23; *People v. Andrews*, *supra*, 49 Cal.3d at p. 218.)

In the opening brief, appellant acknowledged that the Court has rejected this argument in *People v. Davis (Richard Allen)* (2009) 46 Cal.4th 539, 397-398, and *People v. Loker* (2008) 44 Cal.4th 691, 744-45. (AOB 624.) Respondent notes that the argument was also rejected in *People v. Hinton* (2006) 37 Cal.4th 839, 911-912. (RB 287.) However, for the reasons submitted in the opening brief, the requested instruction that sympathy alone could merit a sentence of life without possibility of parole was not duplicative of CALJIC Nos. 8.85 or 8.88, as respondent argues. (AOB 623-624; RB 287-288.)

Respondent argues that these CALJIC instructions sufficiently covered the principle of the proposed instruction by informing the jurors that (1) they could consider any circumstance which extenuates the gravity of the crime and any sympathetic or other aspect of the defendant's character or record; (2) they could assign whatever moral or sympathetic value they deemed appropriate to each of the factors; and (3) the weighing of aggravating and mitigating factors was not a mechanical counting of factors. (RB 287-288; see 3CT 742, 772-773.) That may be true, but the instructions did not tell the jurors that they could reject death on the basis of the sympathy alone. Rather, the jurors were told to consider the totality of the aggravating circumstances with the totality of mitigating circumstances and after weighing both, determine the appropriate penalty. (3CT 772-773.) They were also told, in determining which penalty to impose, to consider all of the evidence receiving during any part of the trial and to consider, take into account and be guided by all the factors listed in CALJIC 8.85, including the circumstances of the crime and any prior criminal activity which involved force or violence. (3CT 742.) These instructions therefore not only failed to inform the jurors that one factor alone could support rejection of death but instead told them that they had to consider and weigh

all of the factors. A reasonable juror would not interpret these instructions to allow them to reject a sentence of death on the basis of one factor alone, especially the factor of sympathy or compassion.

Accordingly, for the reasons expressed here and in the opening brief, the trial court erred in refusing appellant's requested instruction that sympathy alone could justify a sentence of life without possibility of parole.

B. The Trial Court Erroneously Rejected Appellant's Requested Instruction That Mitigating Evidence of Mental Impairment Is Not Limited to Excuse or Negation of an Element.

Respondent's response is twofold: (1) appellant has forfeited his claim that the trial court erred in refusing his requested instruction that mitigating evidence of mental impairment is not limited to excuse or negation of an element (RB 289); and (2) the refusal was proper because other instructions, as well as counsel's arguments, adequately addressed the jury's consideration of evidence of mental impairment. (RB 289-290.) Respondent is wrong on both counts.

1. This Claim Has Not Been Forfeited.

Here again, respondent argues that the claim has been forfeited because trial counsel acquiesced to the court's ruling. (RB 288-289.) Respondent points out that after the trial court stated it would not give the requested instruction concerning mental impairment ("Mental Impairment Not Limited To Excuse or Negation of An Element" [3CT 781]), but would give another defense instruction ("Age Includes Psychological Maturity" [3CT 781]) by modifying CALJIC No. 8.85 to inform the jury that it could consider appellant's chronological and psychological age at the time of the

crime, defense counsel responded that was appropriate. (RB 289; 35RT 12396-112397.)

For the reasons expressed above in section (A)(1), this claim of forfeiture is specious. The Court refused the instruction, then stated it would instead modify 8.85 to include the factor of chronological and psychological age, and counsel acquiesced to the court's ruling. That is not forfeiture; that is accepting the court's ruling and making the best of a bad situation. As made clear by the authorities cited above, counsel's acquiescence to the court's ruling does not support a finding of forfeiture. Moreover, as before, respondent's cited authority, *People v. Valdez*, *supra*, 32 Cal.4th at p. 113, does not support a finding of forfeiture where, as here, counsel requested an instruction, the court refused to give it, and counsel acquiesced to the court's ruling. (See section (A)(1), *ante*.)

2. <u>The Requested Instruction Was a Correct Statement of Law, Was Not Repetitive of Other Instructions, and Was Crucial to Ensure the Jury's Consideration of Appellant's Mitigating Evidence</u>.

In the opening brief, appellant argued that the court erred in refusing his requested instruction that mental impairment is not limited to evidence which excuses the crime or reduces the defendant's culpability, but includes any degree of mental defect, disease or intoxication and the fact that the jury has rejected a defense of insanity, diminished capacity or diminished actuality at the guilt phase does not prohibit its consideration of evidence showing some impairment as a reason not to impose death. (AOB 625-628.) As demonstrated there, the requested instruction was a correct statement of law, it was not covered by other instructions, and it was crucial to ensure that the jurors considered a central feature of appellant's case in mitigation – that his mental impairment, although insufficient to negate any

element of the offense, was a valid mitigating factor which could justify sparing his life. (AOB 626-628.)

Respondent does not argue that this was an incorrect statement of law. Rather, its opposition is based on two contentions: (1) other instructions sufficiently informed the jury that it could consider appellant's mental impairment evidence; and (2) counsel's arguments addressed the evidence of appellant's mental impairment. (RB 289-290.)

Respondent argues that the court's modification to CALJIC 8.85, which told the jury that it could consider the defendant's chronological and psychological age at the time of the crime, covered the information presented in the requested instruction. (RB 289.) According to respondent, "[t]elling the jury that it could consider appellant's psychological age told the jury that it could consider the mental impairment evidence." (RB 289.) Not so. The mental impairment evidence in this case consisted of substantial testimony regarding (1) appellant's very low I.Q., which placed him in the borderline mentally retarded range; and (2) his limited intellectual functioning characterized by his inability to think abstractly or engage in advanced planning, which rendered him vulnerable to manipulation by others. (34RT 12022, 12006-12007, 12032, 12083, 12114.) As explained in the opening brief, psychological age is not the same as mental impairment and would not be reasonably interpreted to include the mental impairment evidence in this case, which concerned limited intellectual functioning, rather than mental illness. A reasonable juror would interpret "chronological or psychological age" to include a defendant's actual age as well as his maturity. A reasonable juror would not interpret such language to also include mental retardation or similarly reduced intellectual functioning. Accordingly, the modification of 8.85 to

include a factor of "chronological or psychological age" was not sufficient to ensure the jury's consideration of the evidence of appellant's intellectual disabilities.

Respondent argues that the jurors would interpret "psychological age" to include evidence concerning maturity. (RB 289.) But that interpretation would not allow for the jury's consideration of the bulk of appellant's mental impairment evidence. Although there was some testimony concerning appellant's immaturity, nearly all of the mental impairment evidence here concerned his intellectual disability, which is not the same as maturity. Moreover, as pointed out in the opening brief, the modified CALJIC No. 8.85 instruction did not inform the jurors that they could consider evidence of appellant's mental impairment even if they believed it insufficient to excuse the crime or reduce his culpability. Respondent does not address this point, apparently conceding its validity.

Respondent also argues that other given instructions told the jury that it could consider appellant's mental impairment evidence, pointing to (1) CALJIC No. 8.85, factor (h), which told the jury to consider whether appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect; (2) CALJIC No. 8.85, factor (k), which told the jury to consider any sympathetic or other aspect of appellant's character that he offered as a basis for a life sentence; and (3) CALJIC No. 8.88, which defined a mitigating circumstance as any fact or condition which might be considered an extenuating circumstance in determining the appropriateness of the death penalty. (RB 290.) None of these instructions, however, told the jurors that they could consider the evidence of appellant's mental impairment even if they believed it insufficient to excuse the crime

or reduce appellant's culpability. In fact, factor (h) suggested just the contrary – that this kind of evidence was pertinent only if it impaired appellant's capacity to understand the criminality of his conduct or to conform his conduct to the requirements of the law. Notably, the prosecutor's closing argument emphasized that evidence of mental impairment could not be considered under this factor unless it impaired appellant's capacity to appreciate the criminal of his conduct or to conform his conduct to the requirements of the law:

> "Next is mitigation factor H, whether as a result of mental disease or defect or intoxication Carl Powell did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. [¶] There is none of that in this case. There's just no evidence of that." (35RT 12442.)

Respondent's final argument is that counsel's arguments addressed the evidence of appellants' impairment. (RB 290.) As pointed out elsewhere in this brief, however, the arguments of the parties are no substitute for legal instructions from the Court. "[I]nstruction by the court would weigh more than a thousand words from the most eloquent defense counsel." (*People v. Matthews*, *supra*, 25 Cal.App.4th at p. 99.) Jurors cannot be expected to divine legal principles on which they are not instructed. (*People v. Eid* (2010) 187 Cal.App.4th at p. 88.)

Accordingly, for the reasons expressed here and in the opening brief, the trial court erred in refusing appellant's requested instruction that mitigating evidence of mental impairment is not limited to excuse or negation of an element.

C. The Trial Court Erroneously Rejected Appellant's Requested Instruction on the Scope, Consideration of, and Weighing of Mitigating Evidence.

In the opening brief, appellant argued that the trial court erred in giving his requested instruction on the scope, consideration of, and weighing of mitigating evidence, because it contained an important and correct statement of law which was necessary to guide the jury's sentencing decision: that one mitigating factor, alone, was sufficient to outweigh all aggravating factors and support a sentence of life without possibility of parole. (AOB 628-630.) Respondent contends that the court properly refused the requested instruction "because CALJIC No. 8.85, factor (k) and CALJIC No. 888 sufficiently instructed the jury on the weighing of mitigation evidence." (RB 292.) Respondent also argues on the basis of *People v. Valencia* (2008) 43 Cal.4th 268, that this Court has held that CALJIC Nos. 8.85 and 8.88 adequately instruct the jury on its sentencing discretion; no pinpoint instructions are required. (RB 291-292.)

Valencia did not consider the issue before the Court here – that the court erred in refusing to instruct that any mitigating circumstance, standing alone, may be sufficient to support a decision that death is not the appropriate sentence. *Valencia* merely stated:

> Similarly, defendant contends the court erred in refusing to modify CALJIC No. 8.85 in various respects. We have rejected similar arguments. CALJIC No. 8.85 is both correct and adequate. (Citations.) The court need not give pinpoint instructions regarding what mitigating evidence the jury may consider, or special instructions regarding mercy and compassion. (Citations.) Contrary to defendant's argument, CALJIC No. 8.88 properly instructs the jury on its sentencing discretion and the nature of its deliberative process. (Citation.)

(*People v. Valencia*, *supra*, 43 Cal.4th at pp. 309-310.)

Furthermore, respondent's contention that CALJIC Nos. 8.85, factor (k), and 888 sufficiently covered the principles in the requested instruction is incorrect. These instructions, as respondent states, told the jury (1) to consider the totality of aggravating and mitigating circumstances, including any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, (2) that the weighing of aggravating and mitigating circumstances was not a mechanical counting of factors, nor the arbitrary assignment of weights to them, and (3) it could assign whatever moral or sympathetic value it deemed appropriate to each of the factors. (RB 292; 3 CT 742-743, 772-773.) They did not inform the jurors that the presence of just one mitigating circumstance would be sufficient to reject a sentence of death. Given the instructional command to consider the totality of aggravating and mitigating circumstances and to determine the appropriate penalty by weighing the aggravating and mitigating circumstances (3CT 772-773), it was imperative that the jurors be informed that one mitigating factor, alone, was sufficient to outweigh all aggravating factors and support a sentence of life without possibility of parole.

Accordingly, for the reasons expressed here and in the opening brief, the trial court erred in refusing appellant's requested instruction that one mitigating factor, alone, was sufficient to outweigh all aggravating factors and support a sentence of life without possibility of parole.

D. Reversal is Required.

The requested instructions were correct statements of law that related to extremely important legal issues: the consideration of mitigating evidence and the role that sympathy could play in the ultimate penalty decision. The United States Supreme Court has consistently held that, under

the Fifth and the Eighth Amendments, "'the sentencer [in a capital case] may not refuse to consider or be precluded from considering "any relevant mitigating evidence...."' (citations.)" (*Mills v. Maryland* (1988) 486 U.S. 367, 374-375, emphasis in original.) That constitutional requirement is not satisfied by merely allowing the defendant to introduce mitigating evidence; the jury's proper consideration of that evidence must also be ensured by the giving of proper instructions. "In the absence of jury instructions ... that would clearly direct the jury to consider fully [the defendant's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence ...." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 323, overruled on another ground by *Atkins v. Virginia* (2002) 536. U.S. 304.)

In a case, where the heart of the defense mitigation case concerned appellant's intellectual deficits and the role they played in rendering him vulnerable to manipulation by others to commit the capital crime, it was essential that the jury be informed that they could consider his mental impairments even if they did not provide a legal defense to the crime.

Similarly, in a case where the facts of the offense might have weighed heavily against appellant - where the prosecutor told the jury that the crime was so horrendous that it, alone, outweighed any mitigating circumstance and justified a sentence of death (35RT 12459) - the jury's awareness of the role that sympathy, mercy, or compassion could play was vital. The jury should have been told that it was not simply that these qualities should be weighed against the facts of the crime, but that they could be exercised independently and that in these qualities alone provided a basis for a life verdict in their determination of the proper penalty. This was exceptionally important, given that the jurors had to determine the

appropriate penalty for a young man barely out of his teens who was used and manipulated by older and more sophisticated criminals to commit the capital crime.

In light of the broad discretion exercised by the jury at the penalty phase of a capital case, this Court cannot determine the specific point at which the jury decided that death was the appropriate penalty. (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) However, the instructions at issue went to the heart of appellant's case. Had the jury been instructed in how to consider the mitigating evidence before it and been provided with instructions which would have ensured its consideration of appellant's mitigating evidence, there is certainly a reasonable possibility of a different verdict. The prosecution cannot demonstrate that this error was harmless beyond a reasonable doubt.

For these reasons and for the reasons expressed in the opening brief, this instructional error was prejudicial and requires reversal of the death judgment. (AOB 631-32.) As explained there, because this error violated the federal constitution, reversal is required unless the prosecution can show that it was harmless beyond a reasonable doubt. (*Ibid.*) Respondent argues that this error should be assessed under the state "reasonable possibility" standard for assessing prejudice from penalty phase errors. (RB 292-293.) However, as stated in the authority cited by respondent, "[o]ur state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard of *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Nelson* (2011) 51 Cal.4th 198, 219, fn. 15.) Respondent has not even attempted to meet that burden. Its response is merely a conclusory argument that "any error was harmless under any standard." (RB 293.) Reversal of the sentence is required.

XXIX.

THE REPETITION OF SEVERAL ERRONEOUS GUILT PHASE INSTRUCTIONS AT PENALTY PHASE DEPRIVED APPELLANT OF A FAIR AND RELIABLE DETERMINATION OF PENALTY.

Appellant submits this issue on the basis of his briefing in Arguments VI, XV, and XVI, *ante*, and the briefing in the opening brief. (AOB 633-636.)

XXX.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S APPLICATION FOR MODIFICATION OF THE DEATH SENTENCE UNDER PENAL CODE SECTION 190.4(e), DEPRIVING APPELLANT OF A FAIR AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In the opening brief, appellant established that the court erred in denying his motion to modify the verdict of death by attaching aggravating weight to factors this Court has held may only be mitigating and by failing to consider mitigating evidence. (AOB 637-651.) Respondent claims that (1) appellant has forfeited this claim by failing to object to the trial court's reasons for denying the motion; and (2) the court properly fulfilled its obligations under Penal Code section 190.4, subdivision (e), and the federal Constitution. (RB 298-308.) Appellant disagrees with both points.

A. The Court Should Review this Claim on its Merits.

Respondent argues that appellant has forfeited this claim by failing to object to the trial court's statement of reasons for denying the motion. (RB 300.) In support, respondent cites *People v. Jackson* (2009) 45 Cal.4th 662, 697. (*Ibid.*) In *Jackson*, the Court considered, and rejected on its merits, the defendant's argument that the trial court failed to properly exercise its responsibilities under section 190.4, subdivision (e), in denying his automatic application to modify the verdict of death because the court treated the motion as a "mere formality" and had, in fact, prejudged the issue. (*Jackson*, *supra*, at pp. 695-696.) *Jackson* refused, however, to consider the defendant's additional argument that the trial court erred in failing to state sufficient reasons for denying the motion. (*Id.*, at p. 697.)

Jackson held that claim was forfeited because the defendant did not object in the trial court. (*Ibid.*)

Appellant's claim is not that the trial court erred in failing to state sufficient reasons but that, like the court in *Jackson*, it failed to properly exercise its responsibilities under section 190.4, subdivision (e), by attaching aggravating weight to factors which may only be mitigating and by failing to consider mitigating evidence. Thus, under *Jackson*, this claim should be reviewed.

Moreover, the notion that appellate review of errors in the ruling on an automatic motion to modify may be waived or forfeited by failure to object appears to derive from an unexplained reference in *People* v. *Hill*, where the defendant argued that the trial court erred when it stated at the beginning of the hearing on the automatic application under section 190.4, subdivision (e), that it had read and considered the probation officer's report. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1220; *People* v. *Hill* (1992) 3 Cal.4th 959, 1013, 1012, overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046.) This Court rejected Hill's claim on the merits but also stated: "As respondent points out, however, defendant's assertion of error fails at the threshold because he failed to object at the hearing except to challenge one specific portion of the report." (*Hill*, *supra*, at p. 1013.)

The Court appears never to have confronted the inconsistency between the automatic nature of the motion to modify and the application of waiver or forfeiture rules. Inconsistently with *Hill*, the Court held in *People* v. *Ochoa* (1998) 19 Cal.4th 353, 469-470, that it is improper for defense counsel to submit the automatic motion to modify without actively litigating it. *Ochoa* indicates that, upon a showing of prejudice, it would be

ineffective assistance of counsel to waive or forfeit arguments in support of the automatic motion to modify penalty.[84] (*Ibid.*)

Failure to address the merits of this claim is also inconsistent with another line of authority from this Court. In *People* v. *Stanworth* (1969) 71 Cal.2d 820, 833, this Court said that in every capital case "subdivision (b) of section 1239 imposes a duty upon this court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.'" Carrying out that duty, the Court in *People* v. *Easley* reversed a judgment of death upon grounds raised for the first time in an amicus curiae brief in support of a petition for rehearing following the filing of an opinion by this Court.[85] (*People* v. *Easley* (1983) 34 Cal.3d 858, 863-864 ["Recognizing that in death penalty cases the provisions of section 1239, subdivision (b) impose 'a duty *upon this court'* to make an examination of the complete record of the proceedings ... to the end that it be ascertained whether defendant was given a fair trial"].)

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[84] Should this Court determine that counsel's acquiescence has resulted in forfeiture of this claim, appellant contends, in his petition for writ of habeas corpus, that counsel rendered ineffective assistance of counsel. (PetHC, Claim VII(O), at p. 462 ["[t]o the extent trial counsel were required to object to the court's statement of reasons in order to preserve the claim for appeal, they failed to render effective assistance of counsel by failing to do so."].)

[85] In *Easley*, the Court also considered the merits of other claims not objected to at trial. (*People v. Easley*, *supra*, 34 Cal.3d at pp. 869-872.)

Similar reasoning indicates that errors in the consideration of the automatic motion to modify cannot be forfeited by failure to object in the trial court. The judge has an obligation to rule, and rule correctly, on the automatic motion to modify regardless of what arguments, if any, the defendant's counsel makes in connection with the motion. *Stanworth* is plainly based on the same concern about the public interest in the reliability of judgments of death which motivates the U.S. Supreme Court's Eighth Amendment jurisprudence.

In conclusion, this court has inherent authority to review this claim in order to prevent the injustice of a sentence imposed through an unconstitutional review. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) It should reject respondent's invitation to refuse consideration and instead review whether the death penalty was properly evaluated at trial to prevent the ultimate injustice of a flawed capital sentence.

B. The Judge Erred By Giving Aggravating Weight to Factors Which As a Matter of Law May Only Be Mitigating and In Failing to Consider Mitigating Evidence.

In his opening brief, appellant argued that the trial court committed *Davenport*[86] error in its consideration of 190.3's factors (e), (f), and (k). (See AOB 643.) Respondent concedes that the court erred in considering the absence of factors (e) and (f) as aggravation. (RB 301.) As explained in the opening brief, the court treated the absence of mitigating evidence that the victim was a participant in, or consented to, the homicidal act as aggravating under factor (e). (36RT 12689.) Similarly, the court treated

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86 *People v. Davenport* (1985) 41 Cal.3d 247.

factor (f) as aggravating due to the lack of evidence that the offense was committed under circumstances which appellant reasonably believed to be a moral justification or extenuation for his conduct. (*Ibid.*)

Respondent argues, however, that the errors were harmless, because there is no reasonable possibility that they affected the court's decision to deny the motion to modify the death verdict. (RB 302-303.) According to respondent, "[t]he court clearly believed that the factors in aggravation outweighed the factors in mitigation." (RB 303.) This is true, but the problem with respondent's analysis is that the trial court not only erred in giving aggravating weight to factors which may only be mitigating, but also failed to consider considerable mitigating evidence. (See AOB 643-647.) In fact, it committed *Boyd*[87] error in treating significant mitigating evidence as aggravating. (See AOB 643-644.) Thus, the court's improper consideration of mitigating evidence as aggravation and failure to consider the mitigating evidence presented by the defense tainted its conclusion that the aggravating factors outweighed the mitigation.

Respondent disagrees with appellant's argument that the trial court treated the evidence concerning his family background and support as aggravation. (RB 304.) Respondent argues that the court considered the evidence and did not suggest that it was aggravating evidence, but was merely stating that it was unpersuasive mitigating evidence. (*Ibid.*) Respondent is wrong. After noting that appellant came from a loving, caring and nurturing family and that his situation was opposite to an abusive, deprived background, the trial court stated that "[appellant] should have been the product of a loving and caring family." (36RT 12687-12688.)

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[87] *People v. Boyd* (1985) 38 Cal.3d 762.

Clearly, the judge was holding appellant's background against him in opining that due to his loving family, he should have turned out better.

Respondent also disagrees that the trial court, in its consideration of factor (k), ignored and failed to consider evidence of appellant's deprived childhood and his many positive personality traits. (RB 304-305.) Respondent argues there is nothing in the court's comments to indicate that it ignored the testimony regarding appellant's deprived childhood and his positive behavior and when the court said that appellant did not come from a deprived family, it clarified that it meant deprived of love and caring. (RB 304-305.) However, at the beginning of its recitation of the mitigating evidence it had considered, the court stated: "And, yes, I have considered the factors under factor (k) that can be argued as mitigating factors about the defendant's family atmosphere and support." (36RT 12687.) The court then recited the mitigating evidence it considered to be mitigating – evidence of appellant's intellectual deficits, an absence of prior felony convictions – as well as the possible mitigating factors or evidence which the court did not find to mitigate -- appellant's loving and caring family, the offense was not committed while appellant was under the influence of extreme mental or emotional disturbance, the victim was not a participant, defendant did not believe his behavior was justified, appellant did not act under extreme duress or under the domination of others, appellant was not impaired at the time of the offense, appellant's offense participation was not minor, and his age did not mitigate his behavior. (*Id.*, at pp. 12687-12690.) Nowhere did the court mention the extensive evidence of appellant's deprived childhood and his positive traits. Given the court's prefacing remarks and his inclusive list of what he considered, it appears that the court did ignore evidence of the deprivations appellant suffered as a child and his positive behaviors.

Respondent further disagrees that (1) the trial court erred in refusing to consider appellant's youth (18 years old at the time of the offense) as a mitigating circumstance; and (2) the trial court's improper consideration of mitigating evidence as aggravation and failure to consider the mitigating evidence violated the Eighth and Fourteenth Amendments. (RB 305-308.) Respondent also asserts that any error was harmless. (RB 308.) Appellant's opening brief addresses these remaining contentions. He thus submits this claim on the points made above and in his opening brief. (See AOB 637-651.)

XXXI.

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

These issues were fully briefed in appellant's opening brief, and appellant stands on the showing he made therein. (AOB 652-687.)

XXXII.

REVERSAL OF THE GUILT AND PENALTY VERDICTS IS NECESSARY DUE TO CUMULATIVE ERROR.

Appellant fully briefed the issue of cumulative error in his opening brief and stands on the showing he made therein. (AOB 688-690.)

CONCLUSION

For the foregoing reasons, respondent has failed to overcome appellant's showing that he is entitled to the relief requested.

DATED: November 8, 2013

Respectfully submitted,

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BY: NEOMA D. KENWOOD

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CERTIFICATION OF WORD COUNT

PURSUANT TO RULE 8.630(b)(2)

I hereby certify that the foregoing brief contains 107,824 words, based on the computer word count, and uses a 13-point Times New Roman font. An application for leave to file an over-length brief is being filed simultaneously with this brief pursuant to California Rules of Court, rule 8.630(b)(5). (The record in this case was filed before January 1, 2008.)

DATED: November 7, 2013

Respectfully submitted,

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PEOPLE V. CARL DEVON POWELL, California Supreme Ct. No. S043520

PROOF OF SERVICE

I, Neoma Kenwood, am over the age of eighteen years and not a party to the within above entitled action. My business address is P.M.B. #414, 1563 Solano Avenue, Berkeley, California 94707.

On November 8, 2013, I served the attached **APPELLANT POWELL'S REPLY BRIEF** on the interested parties in said action by placing a true and correct copy enclosed in a sealed envelope, with first-class postage fully prepaid, in a United States Post Office Box, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 8, 2013, at Berkeley, California.

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