

SUPREME COURT COPY

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No. S053228

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANDRE STEPHEN ALEXANDER,

Defendant and Appellant.

(Los Angeles County
Sup. Ct. No.
BA065313)

SUPREME COURT
FILED

SEP 16 2008

Frederick K. O'Riordan Clerk

Deputy

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

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DEATH PENALTY

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) ANDRE STEPHEN ALEXANDER,)
)
) Defendant and Appellant.)
)

APPELLANT’S SUPPLEMENTAL REPLY BRIEF

INTRODUCTION

In his supplemental opening brief, appellant augmented the federal constitutional bases of arguments I through III, V through XX and XXIII, previously presented to this Court in the opening brief. The supplemental brief also augmented argument IV and included eight additional arguments (XXV-XXXII) in support of appellant’s automatic appeal. Respondent has submitted a supplemental brief responding to each of the claims raised in by appellant in the supplemental opening brief.

In this reply to respondent’s supplemental brief, appellant limits his arguments to those issues on which additional briefing will be helpful to the court. Appellant’s omission of a discussion or refutation of any particular

argument, sub-argument or allegation made by respondent does not constitute a concession or waiver by appellant. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn.3, overruled on other grounds in *People v. Price* (2001) 25 Cal.4th 1046, 1049.) Appellant maintains that reversal of the conviction or alternative relief is required for the reasons explained in the briefing already filed in this case as well as the supplemental reply brief filed on his behalf, and he does not concede or waive any issue, or any ground, for the relief sought and raised therein.

Respondent has made numerous claims in the supplemental respondent's brief that appellant has waived or otherwise failed to preserve in the trial court issues which have been raised in the supplemental opening brief. Appellant contends that all of the claims are properly before this Court, and that any failure to cite federal constitutional grounds in the trial court in support of an argument or objection does not forfeit the right to do so on appeal because in those instances: (1) the appellate claim is of the kind that required no trial court action by appellant to preserve it; (2) the new constitutional arguments do not invoke facts or legal standards different from those the trial court was itself asked to apply but merely assert that the court's action or omission had the additional legal consequence of violating the state or federal constitution; and (3) the appellate claim involves the deprivation of fundamental constitutional rights. (See *People v. Boyer* (2006) 58 Cal.4th 412, 441, fn. 17, applying *People v. Partida* (2005) 37 Cal.4th 428, 433-439; *People v. Vera* (1997) 15 Cal.4th 269, 276.) Moreover, in the event that it is determined that any claim has been forfeited because of a failure to preserve it below, appellant maintains that the result was an unreliable and unconstitutional conviction and death sentence resulting from defense counsel's ineffectiveness.

Rather than addressing similar forfeiture claims in the context of his reply on individual issues, appellant relies on the general principles applicable to such claims which are set out in his initial reply brief, and which are incorporated by reference as if fully set forth herein. (ARB 2-13.)¹ To the extent that additional issue-specific arguments are necessary, appellant includes them in the body of each claim addressed in this supplemental reply brief.

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¹Throughout this brief, the following abbreviations are made: “AOB” refers to Appellant’s Opening Brief; “ARB” refers to Appellant’s Reply Brief; “ASOB” refers to Appellant’s Supplemental Opening Brief; “ASRB” refers to Appellant’s Supplemental Reply Brief; “RB” refers to Respondent’s Brief, and “RSB” refers to Respondent’s Supplemental Brief. Unless otherwise stated, all statutory references are to the Penal Code.

ARGUMENT

I

THE IDENTIFICATION OF PHOTOGRAPHS OF APPELLANT WAS THE RESULT OF AN IMPERMISSIBLY SUGGESTIVE SHOW UP PROCEDURE WHICH VIOLATED HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS

In his supplemental opening brief, appellant argued that the admission of Lloyd Bulman's eleventh-hour, suggestive, and highly unreliable identification of appellant's photographs violated his constitutional rights to a fair trial, confrontation and effective assistance of counsel as provided by the Sixth Amendment as well as reliable determinations of guilt, death-eligibility and penalty as provided by the Eighth Amendment. (ASOB 2-3.) These grounds for relief are in addition to the state and federal constitutional violations already raised in appellant's opening brief. Relying entirely on allegations presented in the initial respondent's brief filed in this case, respondent claims in the supplemental brief that any newly asserted constitutional errors resulting from Bulman's identification of photographs of appellant would be harmless. (RSB 2.)

Appellant has demonstrated that the identification of appellant's photographs by Bulman was the result of an impermissibly suggestive photo identification procedure which was tantamount to a show up, and that based on the totality of the circumstances, the identification was unreliable. Appellant has also shown that admission of the identification cannot be deemed harmless beyond a reasonable doubt such that reversal of the conviction and judgment is required. (AOB 182-209; ARB 14-32; see

United States v. Jernigan (9th Cir. 2007) 492 F.3d 1050, 1054.)²

The recent Report and Recommendations Regarding Eyewitness Identification Procedures (“Report and Recommendations”) issued by the California Commission on the Fair Administration of Justice (“Commission”) in April, 2006 (<http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf>) lends credence to appellant’s argument that the photo identification procedure in this case in fact lead to the very substantial likelihood of irreparable misidentification. The Commission determined that the risk of wrongful conviction in eyewitness identification exists in California and elsewhere in the country, and recommended that reforms to reduce the risk of misidentification should be

²In *Jernigan*, the Ninth Circuit Court of Appeals noted that:

“Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence.”

(*United States v. Jernigan* (9th Cir. 2007) 492 F.3d 1050, 1054, quoting *Jackson v. Fogg* (2d Cir. 1978) 589 F.2d 108, 112.) The court also recognized that cross racial identifications are “particularly suspect.” (*Ibid.*) See also articles on eyewitness identification cited by the court in *United States v. Jernigan, supra*, at p. 1054: Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 1, 3 (Oct.1999); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations For Lineups and Photospreads* (1998) 22 *Law & Hum. Behav.* 603, 619-627; Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification* (1979) 64 *J. Applied Psychol.* 440; Harvey Gee, *Eyewitness Testimony and Cross-Racial Identification* (2001) 35 *New Eng.L. Rev.* 835 [reviewing Elizabeth F. Loftus, *Eyewitness Testimony* (1996)]; John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications* (2001) 28 *Am. J. Crim. L.* 207.)

immediately implemented in California. (Report and Recommendations, p. 3.) The Commission recommended the implementation of certain guidelines and procedures with regard to eyewitness identification based upon its review and consideration of reports and studies; available research; the testimony of experts, representatives of police, prosecutor, criminal defense agencies and concerned citizens on eyewitness evidence; the experience of Santa Clara County; and the recommendations of other Commissions, Task Forces and other similar bodies.³ The recommended guidelines/procedures for photo arrays include: double-blind identification procedures, the sequential presentation of photos, video or audio preservation of the photo display, and the presentation of a minimum of six photos in the photo display consisting of the suspect and five fillers or foils fitting the description of the perpetrator. (Report and Recommendations, pp. 5-6.)

Not one of the photo identification procedures recommended by the Commission was utilized in appellant's case. Instead, as appellant has set forth in his opening and reply briefs, the photo identification procedure used amounted to an unduly suggestive single person show up, or at least one which would make appellant stand out. Of the five photos in the array that

³Among the studies and reports reviewed by the Commission was a comprehensive compilation of all exonerations in the United States from 1989 to 2003 published by University of Michigan researchers. Based on information in the compilation concerning the high number of mistaken identifications in rape and assault cases where exoneration had occurred, the Commission noted that the data suggested that "unexposed misidentification could be present in other convictions that heavily rely on eyewitness identification, such as robbery cases, where DNA evidence is not normally present" and that "the risk of error is greater in cross-racial identifications." (Report and Recommendations, p. 2.)

was presented to Bulman by prosecutors the night before he was to testify: (1) two were of appellant; (2) two were of Terry Brock, who Bulman had already identified as the perpetrator that first approached him and thus could easily be “eliminated” as the person who shot Cross; and (3) the remaining one was of Charles Brock, who Bulman had previously indicated was not one of the perpetrators and who had a tattoo or scar on his face -- unique characteristics which Bulman testified neither perpetrator possessed -- and likewise easily “eliminated.” Moreover, one of appellant’s photos was the only one of the five where a mustache was not discernable. Even though the array contained two photos of Terry Brock, Bulman had already seen one of the photos of Terry that was included and had identified him as the other perpetrator, thus leaving the multiple photos of appellant to additionally narrow Bulman’s choice. (ARB 18-20.)

Although Bulman had previously failed to make any identification of appellant, the circumstances of this particular photo array made it highly likely that appellant would be misidentified. (*Simmons v. United States* (1962) 390 U.S. 377, 383-384; *People v. Carlos* (2006) 138 Cal.App.4th 907, 912 [only defendant’s photo in six-pack photo array had number and name directly below it, causing it “stand out” from the others]; See *United States v. Wade* (1967) 388 U.S. 218, 229 [noting the inherent danger that any suggestion, even unintentional, by persons who conduct the procedure that they expect the witness to identify the accused can lead the witness to make a mistaken identification].)

Because respondent does not add any new substantive allegation on this issue in the supplemental brief, the issue is joined and no further reply to respondent’s contentions is necessary.

II

THE TRIAL COURT'S REFUSAL TO APPOINT MADELYN KOPPLE TO REPRESENT APPELLANT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

In his supplemental opening brief, appellant argued that reversal of the conviction and judgment is required because the trial court's refusal to appoint Madelyn Kopple, who had represented appellant throughout the municipal court proceedings, violated his right to due process (U.S. Const., 5th and 14th Amends.), a fair adversarial proceeding (U.S. Const., 6th Amend.), and reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (ASOB 4.) These grounds for relief are in addition to the deprivation of appellant's state and federal constitutional rights to counsel and to equal protection of the law addressed in appellant's opening brief.

Relying entirely on the arguments made previously in respondent's initial brief, respondent alleges first in the supplemental brief that, even assuming the doctrine of the law of the case does not bar consideration of the issue on appeal, the newly asserted constitutional claims lack merit. (RSB 3.) Appellant has previously demonstrated that the claim regarding the trial court's failure to appoint Ms. Kopple for the felony trial proceedings is not barred by the law of the case doctrine because it is merely a rule of procedure which does not go to the power of the court. To bar the claim would constitute a "manifest misapplication of existing principle resulting in substantial injustice." (*People v. Scott* (1976) 16 Cal.3d 242, 246-247; see *Castro v. United States* (2003) 540 U.S. 375, 384.) (AOB 223-227; ARB 38-39.) Appellant has also fully shown that his

state and federal constitutional rights to counsel of choice and to equal protection of the law, were violated by the trial court's failure to allow Ms. Kopple to represent appellant in the Superior Court proceedings and that reversal of the conviction and judgment without consideration to prejudice is required. (AOB 210-234; ARB 33-45; see *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 143-150; *People v. Ortiz* (1990) 51 Cal.3d 975, 988.) Respondent's additional contention in the supplemental brief, that there was no federal constitutional violation because there was no state law error, is similarly without merit. (RSB 3.) Even assuming, which appellant does not concede, that there was no violation of the California Constitution by the trial court's failure to appoint counsel of choice, the record shows that appellant's objection below was also predicated on independent federal constitutional grounds (VI CT 1611-1619; 15 RT 900).

Because respondent does not add any other new substantive allegation in the supplemental brief, the issue is joined, and no further reply to respondent's contentions on this claim is necessary.

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III

PREJUDICIAL REFERENCES DURING VOIR DIRE TO THE INVALID SPECIAL CIRCUMSTANCE ALLEGATION OF MURDER OF A PEACE OFFICER VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

In his supplemental opening brief, appellant argued that prejudicial effect of numerous and repeated references to the invalid special circumstance allegation of murder of a peace officer by the trial court during voir dire resulted in the deprivation of appellant's constitutional right to a fair trial by impartial jurors under the Sixth and Fourteenth Amendments. Appellant also argued that the references impermissibly lessened the prosecution's burden of proof, violated appellant's right to due process under the Fifth and Fourteenth Amendments, and deprived appellant of his right to reliable determinations of guilt, death-eligibility and penalty under the Eighth Amendment. (ASOB 5-6.) These grounds for relief are in addition to the constitutional violations delineated in appellant's opening brief.

In the supplemental brief, respondent erroneously alleges that appellant's newly asserted constitutional claims fail. Again resting on arguments set forth in the initial respondent's brief, respondent's contention is that, even assuming waiver and invited error do not preclude review of the issue, the references to the peace officer special circumstance were "proper and non-prejudicial since the victim's status as a federal peace officer would have been presented to the jury regardless of the peace officer special-circumstance allegation." (RSB 4.)

Appellant has demonstrated previously that there was no forfeiture or invited error to bar consideration of this claim. (ARB 46-49.) Appellant has also fully shown that the trial court's prejudicial references during voir dire to the invalid peace officer special circumstance allegation deprived appellant of his constitutional rights and cannot be deemed harmless beyond a reasonable doubt. (AOB 234-237; ARB 46-52.)

Respondent's misapprehension of the impact of the references to the invalid special-circumstance is clear, and the repeated assertion in the supplemental brief that the references at issue were "proper and non-prejudicial" (RSB 4) must be rejected. Appellant's argument is not that the jury would have inevitably *learned* that Julie Cross was a federal agent, but instead that the trial court's repeated references during voir dire to the invalid peace officer special-circumstance impermissibly and incorrectly drove home the message that the intent to kill a person with *any* law enforcement status elevated the murder charge thus making the perpetrator death-eligible. Standing alone, the fact that the court later correctly determined that Cross' status as a federal agent was insufficient to sustain the peace officer special circumstance allegation as true renders the voir dire references to the contrary prejudicial. However, when combined with the insufficient evidence of the robbery charge to support the additional felony-murder special circumstance allegation (see Arg. XVII), the prejudice resulting from references to the invalid peace office special circumstance was even greater and would have negatively impacted the jury's determination of guilt, death-eligibility and penalty. (ARB 49-52.)

Respondent's contentions in the supplemental brief rest on assertions previously made in the initial brief, and no new substantive

allegation is made. As such, the issue is joined, and no further reply to respondent's contentions is necessary.

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**APPELLANT'S CONSTITUTIONAL RIGHTS WERE
VIOLATED BY THE TWELVE YEAR DELAY
BETWEEN THE CRIME AND HIS ARREST**

In his supplemental opening brief, appellant argued that the prosecution's twelve-year delay in filing charges against him violated his constitutional rights to a fair trial, present a defense, effective assistance of counsel and reliable determinations of guilt, death-eligibility and penalty as provided by the Fifth, Sixth, Eighth and Fourteenth Amendments. (ASOB 43.) These constitutional violations in support of appellant's claim for relief are in addition to those that were articulated in his opening brief. Relying entirely on the contentions previously set forth in the initial respondent's brief, respondent incorrectly alleges that the newly asserted constitutional claims fail on their merits because there has been no showing that appellant was prejudiced by the delay. (RSB 41.)

Appellant has fully demonstrated in his opening and reply briefs that the lengthy pre-indictment delay by the prosecution resulted in actual and substantial prejudice, including the unavailability of material witnesses, the loss of fading memories and the destruction of critical evidence that was potentially exculpatory. (AOB 243-253; ARB 84-98.) Because respondent makes no new substantive allegation on this claim in the supplemental brief, the issue is joined and no further reply to respondent's contentions is necessary.

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VI

THE GOVERNMENT'S FAILURE TO PRESERVE EVIDENCE IN THIS CASE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

In his supplemental opening brief, appellant argued that the government's failure to preserve and/or the destruction of important evidence of apparent exculpatory value, violated his constitutional rights to due process and a fundamentally fair trial. (U.S. Const., 14th Amend.) Appellant argued further that the government's actions violated his right to present a defense (U.S. Const., 6th, 14th Amends.) as well as his right to reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (ASOB 44.) These constitutional violations in support of appellant's claim for relief are in addition to those which were set forth in appellant's opening brief.

Relying entirely on the initial respondent's brief filed in this case, respondent contends in the supplemental brief that there was no violation of due process where substantial evidence supports the trial court's determination that the evidence had no apparent exculpatory value and comparable evidence was available to appellant. (RSB 42.) Appellant has fully demonstrated in his opening and reply briefs that each item that was destroyed by the state was material, had apparent exculpatory value, could not be replaced by comparable evidence, and that the destruction of the evidence at issue was done in bad faith thus depriving appellant of his due process and other related constitutional rights. (AOB 254-257; ARB 99-113; *Arizona v. Youngblood* (1988) 488 U.S. 51; *California v. Trombetta* (1984) 467 U.S. 479.)

In *Cooper v. Brown* (9th Cir. 2007) 510 F.3d 870, Justice McKeown wrote separately “to draw attention to the illustrative troubling circumstances involving the alleged state mishandling of evidence.” (*Id.* at p. 1005.) In the concurring opinion, Justice McKeown underscored the critical link between confidence in the justice system and integrity of evidence, and placed considerable responsibility on the government for making resolution of the question of petitioner’s culpability unavailable due to the serious questions of the investigation and evidence supporting the conviction. In so doing, he stated:

Significant evidence bearing on [petitioner's] culpability has been lost, destroyed or left unpursued, including, for example, blood-covered coveralls belonging to a potential suspect who was a convicted murderer, and a bloody t-shirt, discovered alongside the road near the crime scene. The managing criminologist in charge of the evidence used to establish [petitioner’s] guilt at trial was, as it turns out, a heroin addict, and was fired for stealing drugs seized by the police. Countless other alleged problems with the handling and disclosure of evidence and the integrity of the forensic testing and investigation undermine confidence in the evidence. As the Supreme Court observed in *Kyles v. Whitley*, “[w]hen, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it.” 514 U.S. 419, 446 n. 15 [parallel citations omitted] (1995).

The legitimacy of our criminal justice system depends on the “special role played by the American prosecutor in the search for truth in criminal trials.” *Banks v. Dretke*, 540 U.S. 668, 696 [parallel citations omitted](2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 [parallel citations omitted] (1999)). The same principle extends to the police and their investigatory work in supporting the prosecution. Of course

we don't demand or expect perfection. But we expect full disclosure, competency in the investigation, and confidence in the evidence. . . .

The forensic evidence in this case is critical and yet it was compromised. [footnote omitted] These facts are all the more troubling because [petitioner's] life is at stake.

(*Cooper v. Brown, supra*, 510 F.3d at pp. 1004-1005 (conc. opn. of McKeown, J.).)

Because respondent adds no new substantive allegation to this claim in the supplemental brief, the issues are joined, and no further reply to respondent's contentions is necessary.

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VII

THE FAILURE TO APPLY EVIDENCE CODE SECTION 795 TO THIS CASE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant has argued in his supplemental opening brief that the trial court's failure to apply Evidence Code section 795 procedures to the 1980 hypnosis sessions of Lloyd Bulman violated his constitutional rights to due process (U.S. Const. 5th and 14th Amends.), confrontation and a fair trial based on reliable evidence (U.S. Const. 6th and 14th Amends.), his state-created liberty interest (U.S. Const., 5th and 14th Amends.), and reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (ASOB 45-46.) These deprivations of appellant's fundamental constitutional rights in support of his claim for relief are in addition to those under state and federal law delineated in his opening brief.

Relying entirely on previous arguments made, respondent alleges in the supplemental brief that, even assuming a federal constitutional claim was preserved below, the newly asserted constitutional violations fail on their merits. Respondent further contends that even if section 795 should have applied to the 1980 hypnosis sessions, any such error would be harmless under *Chapman v. California* (1980) 386 U.S. 18. (RSB 43.) Appellant has fully demonstrated that any procedural bar of forfeiture should not preclude consideration by this Court on the merits of the asserted violation of his fundamental constitutional rights arising from the trial court's actions. (ARB 112-113.) Appellant has also shown that failure to apply section 795 to the 1980 hypnosis sessions, resulted in the admission of Bulman's unreliable and prejudicial testimony and post-hypnosis identification of appellant (*People v. Shirley* (1982) 31 Cal.3d 18, 40; *State*

v. *Moore* (N.J. 2006) 902 A.2d 1212, 1227-1229 [hypnotically refreshed testimony of the victim identifying defendant is inadmissible]), and that, accordingly, reversal of the conviction and judgment is required. (AOB 258-263.)

Because respondent does not add any substantively new allegation in the supplemental brief, the issue is joined, and no further reply to respondent's contentions is necessary.

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VIII

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED BY THE FAILURE TO EXCLUDE BULMAN'S TESTIMONY UNDER EVIDENCE CODE SECTION 795

Appellant argued in his supplemental opening brief that the trial court's failure to exclude Lloyd Bulman's testimony under Evidence Code section 795 seriously undermined his constitutional rights to confrontation and the reliability of the guilt, death-eligibility and penalty determinations in this case under the Sixth and Eighth Amendments. (ASOB 47-48.) These constitutional violations in support of his claim for relief are in addition to the state and federal constitutional violations appellant articulated in his opening brief.

Respondent contends in the supplemental brief that the newly asserted constitutional claims fail on their merits. In so doing, respondent relies entirely on the arguments made in the initial respondent's brief to allege that section 795 was inapplicable to Bulman's testimony because there was substantial evidence to support the trial court's finding that Bulman was not hypnotized during the 1987 session. Respondent further contends that there was no federal law violation because of the absence of state law error. (RSB 44-45.) These contentions lack merit.

Appellant has fully demonstrated that the trial court applied the incorrect standard that "successful" hypnosis was a prerequisite to determine that section 795 did not apply to the 1987 hypnosis session. Appellant has also shown that the court's refusal to exclude Bulman's testimony based on law enforcement's failure to follow the procedures required by section 795 violated both California and federal law, was prejudicial, and reversal of the judgment and conviction is required. (AOB

264-268; ARB 114-124.)

Contrary to respondent's allegation, the federal constitutional basis of appellant's claim has not been waived. The record shows that the trial court understood appellant's motion to exclude Bulman's testimony to be based on independent federal constitutional grounds, including the right to due process, a fair trial, a conviction based on reliable evidence, meaningful cross-examination, and reliable determinations of guilt, death-eligibility and penalty. (U.S. Const., 5th, 6th, 8th and 14th Amends.) During the hearing on appellant's motion, the trial court stated its belief that the creators of section 795 were concerned with the protection of a defendant's constitutional right to fair trial. The court also recognized that additional constitutional concerns are raised by the testimony of a witness who has been hypnotized such as evidence which is unreliable because it has no value and a witness who is impervious to searching and meaningful cross-examination. (33-4 RT 2977-2978.) Where, as here, the trial court understood the federal constitutional bases of appellant's motion to exclude, there has been no forfeiture of those grounds. (*People v. Partida* (2005) 37 Cal.4th 428, 433-435; *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection deemed preserved if record shows trial court understood the issue presented]; *Melendez v. Pliler* (9th Cir. 2002) 288 F.3d 1120, 1125 [California courts construe broadly sufficiency of objections focusing on whether that court had reasonable opportunity to rule on merits of objection].)

There are no new substantive allegations on this claim in the supplemental respondent's brief. Accordingly, the issues are joined, and no further reply to the respondent's contentions in the supplemental brief is necessary.

IX

ADMISSION OF EXPERT TESTIMONY REGARDING PRESUMPTIVE BLOOD TESTS ON APPELLANT'S JACKET VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

In the supplemental opening brief, appellant argued that the erroneous admission of irrelevant and prejudicial expert witness testimony regarding presumptive blood tests on appellant's jacket violated his fundamental constitutional rights to due process and a fair trial (U.S. Const., 5th and 14th Amends.), as well as the right to reliable determinations of death-eligibility and penalty (U.S. Const., 8th Amend.). Appellant also argued that admission of the highly prejudicial testimony resulted in an arbitrary deprivation of a state law entitlement and his due process rights (U.S. Const., 5th and 14th Amends.). (ASOB 49.) These violations are in addition to those under state and federal law which were delineated in his opening brief.

Relying entirely on arguments made in the initial respondent's brief, respondent erroneously alleges in the supplemental brief that, assuming appellant preserved a federal constitutional claim below, the federal law violations appellant asserts fail on their merits because the record supports the trial court's determination that evidence on the presumptive blood tests was admissible. (RSB 46.) Appellant has fully demonstrated that the trial court committed reversible error when it admitted irrelevant and scientifically unreliable and highly prejudicial testimony on the presumptive blood tests performed on appellant's jackets which was prejudicial thus requiring reversal of the judgment and conviction (*People v. Sloan* (1978) 76 Cal.App.3d 611, 631; *State v. Daniels* (Mo. Ct. App. 2005) 179 S.W.

3d 273, 284-285; see *Daubert v. Merrill Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 590). (AOB 268-273; ARB 125-134.) Appellant has also demonstrated that the federal constitutional basis of his claim has not been forfeited. (ARB 131-132.)

The supplemental respondent's brief adds no new substantive allegation beyond that which respondent has set forth in the initial brief filed. Accordingly, the issue is joined, and no further response to the allegations made in the supplemental brief is necessary.

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ADMISSION OF IRRELEVANT TESTIMONY BY APRIL WATSON AND OF IMPROPER HEARSAY TESTIMONY BY DETECTIVE HENRY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant argued in his supplemental opening brief that the erroneous admission of irrelevant and prejudicial testimony of April Watson, as well as the improper hearsay testimony of Detective Henry, violated his constitutional rights to due process and a fair trial under the Fifth Amendment, as well as reliable determinations of guilt, death-eligibility and penalty under the Eighth Amendment. Appellant further argued that the admission of Watson's testimony and the hearsay testimony of Henry violated state evidentiary rules resulting in the deprivation of appellant's state law entitlements under the Due Process Clause of the Fifth and Fourteenth Amendments. (ASOB 50-51.) These deprivations of appellant's constitutional rights in support of his claim for relief are in addition to the violations of state and federal law set forth in the opening brief.

Respondent incorrectly asserts that the newly asserted federal constitutional claims fail on their merits. Relying entirely on the assertions made in the initial respondent's brief, respondent claims that Watson's testimony was properly admitted under Evidence Code section 210 and that, even assuming a specific and timely objection to Henry's testimony was made, it was properly admitted pursuant to Evidence Code sections 1235 and 1237, both exceptions to the hearsay rule. Respondent also erroneously alleges that because admission of the evidence at issue did not violate state

law, no federal violation occurred, including the arbitrary deprivation of appellant's state law entitlements under the Due Process Clause. (RSB 47.)

Appellant has fully discussed in his opening and reply briefs that the admission of the irrelevant testimony of Watson was improper, was highly prejudicial and cannot be deemed harmless beyond a reasonable doubt. Appellant has also established that he did not forfeit a hearsay objection to Henry's testimony on what Watson had told him about her conversation with appellant, and that admission of his testimony in this regard was improper and prejudicial hearsay evidence, and not harmless beyond a reasonable doubt. (AOB 273-278; ARB 135-149.)

Because no new substantive allegation is made in respondent's supplemental brief beyond that which was asserted in the initial brief, the issue is joined, and no further discussion of respondent's contentions is necessary.

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XI

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED THE PROSECUTOR TO INTRODUCE EVIDENCE THAT APPELLANT REFUSED TO STAND IN A LINEUP EVEN THOUGH THE EVIDENCE DID NOT PROPERLY SUPPORT A CONSCIOUSNESS OF GUILT

Appellant argued in his supplemental opening brief, that admission of evidence of his refusal to stand in a line up violated his rights to due process and fair trial (U.S. Const., 5th and 14th Amends.), to not incriminate himself (U.S. Const., 5th Amend.) and to reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (ASOB 52-53.) These constitutional violations, in support of appellant's claim for relief, are in addition to the violations under state and federal law which were asserted in the opening brief.

Respondent alleges in the supplemental respondent's brief that all federal constitutional claims asserted by appellant on this issue are without merit. Relying entirely on the allegations made in the initial respondent's brief, respondent contends that the trial court did not abuse its discretion when it admitted the evidence because the circumstances of appellant's refusal to stand in the lineup supported an inference of a consciousness of guilt. Respondent also alleges that, even assuming that appellant did not waive an objection to the evidence under Evidence Code section 352, the evidence was properly admitted, and there was therefore no federal law violation due to the absence of state law error. (RSB 48-49.) Respondent's claims are without merit and must be rejected.

Appellant has fully demonstrated in his opening and reply briefs that the totality of the circumstances surrounding his refusal to stand in the

lineup did not properly infer a consciousness-of-guilt, and that admission of the evidence resulted in the prejudicial deprivation of his state and federal constitutional rights which cannot be deemed harmless beyond a reasonable doubt. Appellant has also demonstrated that his objection to the lineup on the basis of Evidence Code section 352 was not forfeited and is properly before this Court. (AOB 279-281; ARB 150-153.)

Because respondent does not add any substantively new allegation to that which was articulated the initial respondent's brief, the issues are joined. As such, no further discussion of respondent's contentions set forth in the supplemental brief is necessary.

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XII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DENIED APPELLANT HIS RIGHT TO PRESENT A DEFENSE BY EXCLUDING TESTIMONY BY JACQUELINE SHEROW WHICH INCULPATED CHARLES BROCK AS TO THE MURDER OF JULIE CROSS

In his supplemental opening brief, appellant argued that the erroneous exclusion of Jacqueline Sherow's testimony as to the inculpatory statements Charles Brock had made to her regarding his involvement in the Julie Cross homicide deprived appellant of his constitutional rights to due process, a fair trial and present witnesses in his defense under the Fifth and Sixth Amendments. Appellant also argued that the exclusion of Sherow's testimony deprived him of his right to reliable determinations of guilt, death-eligibility and penalty under the Eighth Amendment. (ASOB 54-55.) Those violations, in addition to the deprivation of his constitutional rights to due process and to present witnesses and a defense, which were delineated in his opening brief, require reversal of the judgment and conviction.

Respondent alleges that, even assuming appellant preserved a federal constitutional claim below, each of the federal claims asserted by appellant fail on their merits. Relying entirely on the assertions made in the initial respondent's brief, respondent also contends that the record supports the trial court's ruling that Brock's statements were not admissible under Evidence Code section 1230. (RSB 50-51.) Each of respondent's claims lack merit.

Appellant has fully demonstrated that reversal of the conviction and judgment is required because the trial court committed prejudicial error when it excluded Sherow's testimony, which went to the heart of

appellant's defense that he was not the perpetrator, regarding Charles Brock's involvement in the Cross homicide. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324, 331; *Chambers v. Mississippi* (1973) 410 U.S. 284, 300-302.) (AOB 282-286; ARB 154-170.) Moreover, appellant has shown that there was no forfeiture below with regard to the federal constitutional bases of his claim. (ARB 161-163.) Respondent's additional assertion that no federal violation occurred due to no state law error lacks merit as well. The record shows that appellant made known to the trial court the substance, purpose and relevance of evidence of what Charles Brock had told Jacqueline Sherow. However, because the court ruled to exclude her testimony because it was not admissible pursuant to Evidence Code sections 1230 and 352, a renewed motion to include the evidence on the grounds of due process and the right to present a defense would have been futile. (*Ibid.*; see *People v. Hill* (1998) 17 Cal.4th 800, 820 [general exception to rule on forfeiture is where objection would have been futile].)

Respondent's supplemental brief adds no substantive allegations beyond those made in the initial brief. Accordingly, the issues are joined and no further discussion of respondent's contentions set forth in the supplemental brief is necessary.

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XIII

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY WITH CALJIC NOS. 2.04 AND 2.05

In his supplemental opening brief appellant argued that instructing the jury with consciousness-of-guilt instructions, CALJIC Nos. 2.04 and 2.05, deprived him of his constitutional right to a fair trial as well as his due process right to have a properly instructed jury find that all elements of the charged crimes had to be proven beyond a reasonable doubt. (U.S. Const., 5th, 6th and 14th Amends.) Appellant also argued that the consciousness-of-guilt instructions deprived him of his rights to a reliable determination of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (ASOB 56-57.) These constitutional violations in support of his claim are in addition to the ones set forth in the opening brief.

Respondent erroneously contends that, assuming appellant preserved a federal claim below, the newly asserted claims fail on their merits because the instructions were amply supported by the evidence and there was no lessening of the prosecution's burden of proof because of them. (RSB 52.) Appellant has shown that the federal constitutional claims resulting from the improper instructions are not barred from consideration by this Court because they are the type for which no court action was required to preserve them and they affected appellant's substantial legal rights. (*People v. Boyer, supra*, 38 Cal.4th at p. 441, fn. 17.) (ARB 176-177.) Appellant has also fully demonstrated that instructing the jury with the consciousness-of-guilt instructions was prejudicial because they improperly lessened the prosecution's burden of proof, thus affecting the reliability of the determinations the jury was required to make, and were not harmless

beyond a reasonable doubt. (AOB 286-289; ARB 171-182.)

Because respondent's supplemental brief relies entirely on the initial brief that respondent has filed in this case, and no new substantive argument is made, the issues are joined and no further response to respondent's contentions is required.

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XIV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BY GIVING PREJUDICIAL AIDING AND ABETTING INSTRUCTIONS WHICH WERE NOT SUPPORTED BY THE EVIDENCE

In the supplemental opening brief, appellant argued that the jury was improperly provided aiding and abetting instructions which were not supported by the evidence, the result of which deprived appellant of his constitutional rights to due process, a fair trial, an adequate defense and counsel (U.S. Const., 5th and 6th Amends.) as well as his rights to a reliable determination of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (ASOB 58-59.) These constitutional claims are in addition to those set forth in appellant's opening brief. Respondent contends, erroneously, that even assuming appellant preserved the federal claims below, the federal claims are without merit. Respondent also alleges, incorrectly, that there was substantial evidence to support each of the challenged instructions. (RSB 53.)

Appellant has demonstrated that consideration of the federal constitutional claims by this court is not barred by a failure to preserve them below. (ARB 186-187.) Where, as here, the appellate claim is "of a kind (for example, failure to declare a doubt concerning defendant's competence, failure to instruct sua sponte, or erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it," this Court has repeatedly determined that new constitutional arguments regarding the claim are not waived on appeal. (*People v. Rogers* (2006) 39 Cal.4th 826, 849, fn. 7.) Appellant has also fully demonstrated

that aiding and abetting instructions were not justified by the evidence in this case because: (1) there was insufficient evidence to warrant giving them, and (2) neither the prosecution nor the defense advanced a theory that appellant was liable as an aider or abettor. The fact that instructions on that theory were given confused the issues and improperly provided the jury with a means to convict appellant of murder, as well as find the robbery murder special circumstance true, even if they did not believe appellant was the actual shooter. (AOB 289-300; ARB 183-189.)

In the supplemental brief, the government relies entirely on the initial respondent's brief filed in this case and no new substantive allegation is added. The issues are thus joined, and no further response to contentions made by respondent in the supplemental brief is necessary.

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XV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT PERMITTED THE PROSECUTOR TO ELICIT HIGHLY PREJUDICIAL EVIDENCE THAT APPELLANT HAD COMMITTED A PRIOR SERIOUS CRIMINAL OFFENSE WITH TERRY BROCK

Appellant argued in his supplemental opening brief that the trial court deprived him of his constitutional rights to due process, a fair trial, a trial that does not lessen the prosecution's burden of proof and reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 5th, 6th and 14th Amends.) when it permitted the prosecution to elicit from Jessica Brock inflammatory evidence that appellant had committed a prior serious offense with Terry Brock. (ASOB 60-61.) These constitutional violations in support of appellant's claim are in addition to those which were set forth in his opening brief.

In the supplemental respondent's brief, respondent contends that, assuming a claim of the federal constitutional error was preserved below, the claims at issue fail on their merits. Relying entirely on the initial respondent's brief, respondent alleges that the trial court properly found the other-crimes evidence relevant under Evidence Code section 210, admissible under Evidence Code section 1101, and not unduly prejudicial under Evidence Code section 352. (RSB 54.) Respondent's allegations lack merit. Appellant has shown that the federal constitutional bases for his claim were not forfeited (ARB 195.) Appellant has also fully demonstrated that the trial court erred when it admitted the inflammatory other-crimes evidence, which was also evidence that linked appellant to Terry Brock, who had previously been identified by Bulman as being the perpetrator who

first approached his side of the car. Apart from having the impact of informing the jury that appellant was a “bad actor” based on a prior serious criminal activity, this evidence inferred guilt-by-association as to the instant offense. Any doubt that the jury may have had with regard to the seriousness of appellant’s prior criminal activity with Terry Brock was resolved when the Jessica Brock subsequently testified that appellant and Terry had committed a triple homicide (Arg. XVI, *infra*), thus compounding the prejudice resulting from allowing the prosecution elicit the evidence at issue. Because the improper other-crimes evidence was highly prejudicial, admission of it cannot be deemed harmless beyond a reasonable doubt and reversal of the conviction and judgment is required. (AOB 300-307; ARB 190-198.)

Respondent’s supplemental brief relies entirely on the initial brief filed, and no new substantive claims are made. As such, the issues are joined, and no further reply to the contentions made in respondent’s supplemental brief is necessary.

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XVI

DENIAL OF APPELLANT'S MOTION FOR MISTRIAL BASED ON EVIDENCE THAT HE HAD PREVIOUSLY COMMITTED A TRIPLE MURDER WITH TERRY BROCK VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

In his supplemental opening brief, appellant argued that his constitutional rights to due process, a fair trial, an impartial jury, a trial which does not impermissibly lighten the prosecution's burden of proof and reliable determinations of death-eligibility and penalty (U.S. Const., 5th, 6th, 8th and 14th Amends.) were violated by the trial court's failure to grant his mistrial motion based on the improper and inflammatory admission of evidence that appellant had committed a prior triple murder in 1978 with Terry Brock. (ASOB 62-63.) These constitutional violations are in addition to the state and federal law claims set forth in appellant's opening brief.

Relying entirely on the initial respondent's brief, respondent erroneously alleges now that, assuming appellant preserved a federal constitutional question below, the claims fail because the record supports the trial court's exercise of discretion under state law in denying the mistrial motion. Additionally, respondent contends that the federal law claims fail because they depend on the existence of state law error. This argument is also without merit. (RSB 55.)

Appellant has previously shown that the constitutional bases for his claims were not forfeited below, and this Court is not barred from considering them. (ARB 204.) Moreover, appellant has fully demonstrated that the denial of the mistrial motion violated his state and federal

constitutional rights such that reversal of the conviction and judgment is required. As set forth in Argument XV, *supra*, the trial court erroneously admitted other-crimes evidence informing the jury that appellant had previously committed a serious offense with Terry Brock. To the extent that the jury required confirmation of the belief that appellant was a “bad actor” who committed prior serious crimes with Terry Brock, and therefore must have committed the instant offense, any such confirmation resulted from Jessica Brock’s testimony that Terry Brock and appellant had committed a triple murder in 1978. The trial court was cognizant of how prejudicial this evidence was, as it had previously ruled that evidence of appellant’s prior murder conviction was not admissible during the guilt phase and Jessica Brock was instructed not to make reference to it. Standing alone, the inflammatory evidence of appellant and Terry Brock committing a triple homicide in 1978 justified granting the mistrial motion. However, the cumulative effect of this evidence and the trial court’s error in allowing the prosecution in the first place to elicit evidence that appellant and Terry Brock had engaged in other criminal activity together (Arg. XV, *supra*) virtually insured that no admonition or instruction by the court would have cured the harm. Accordingly, the failure to grant the mistrial motion cannot be deemed harmless beyond a reasonable doubt and reversal of the conviction and judgment is required (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Parle v. Reynolds* (9th Cir. 2007) 505 F.3d 922, 929-930). (AOB 307-311; ARB 199-204.)

In the supplemental respondent’s brief, respondent does not add any substantively new argument beyond those which were articulated in the initial brief. The issue is therefore joined, and no further response to respondent’s contentions made in the supplemental brief is necessary.

XVII

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

Appellant has argued in his supplemental opening brief that the insufficiency of evidence to support the robbery-murder special circumstance determination violated his constitutional rights to due process and reliable determinations of death-eligibility and penalty under the Fifth and Eighth Amendments. (ASOB 64-65.) These constitutional violations are in addition to the those made in support of appellant's claim set forth in his opening brief.

Respondent contends in the supplemental brief that the newly asserted constitutional claims fail on their merits because substantial evidence was presented to support the robbery-murder special circumstance. In so doing, respondent relies entirely on the initial respondent's brief filed in this case, and adds no new substantive argument. (RSB 56.) Appellant has fully demonstrated in his opening and reply briefs that the evidence was insufficient to sustain the robbery-murder special circumstance, and that, as such, this special circumstance must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Ledesma* (2006) 39 Cal.4th 641, 714.) (AOB 311-315; ARB 205-212.)

Thus, the issues are joined, and no further reply to respondent's supplemental brief is required.

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XVIII

APPELLANT’S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS WERE VIOLATED BECAUSE THE TRIAL COURT DENIED DEFENSE COUNSEL’S REQUEST FOR A CONTINUANCE TO PREPARE A MOTION FOR NEW TRIAL AND BECAUSE THE COURT LACKED THE AUTHORITY TO MAKE THE NEW TRIAL MOTION ON APPELLANT’S BEHALF

In his supplemental opening brief, appellant argued that the improper actions by the trial court in denying appellant’s motion for a continuance to prepare a new trial motion, as well as taking it upon itself to make the new trial motion in defense counsel’s stead, violated appellant’s fundamental constitutional rights to present a defense, due process and reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 5th, 6th and 8th Amends.). (ASOB 66-67.) These violations in support of appellant’s claim are in addition to those raised in the opening brief.

In the supplemental brief, respondent relies entirely on the arguments made in the initial respondent’s brief and contends that the newly asserted constitutional claims fail on their merits because the record supports the trial court’s exercise of discretion in denying the request for a continuance. Respondent alleges that, to the extent that the issue was preserved below, the trial court did not file a new trial motion on appellant’s behalf under section 1181 but instead made a record of how it “*would have* ruled had appellant filed a motion for new trial” and that the denial of appellant’s request for a continuance was therefore proper under applicable state law. Respondent further alleges that there is no merit to appellant’s claim of federal constitutional error because such error is predicated on state law error of which there was none. (RSB 57-58.) Each of the contentions

respondent makes is without merit.

Appellant has shown that his objection to the trial court making the new trial motion on his behalf was not forfeited and, even assuming that any forfeiture occurred, consideration of the claim by this Court is not barred. (ARB 224-226.) Appellant has also fully demonstrated in his opening and reply briefs that there was good cause to grant defense counsel's request for a continuance in order to prepare appellant's new trial motion, and that the court's denial of it, as well as its subsequent action in making the motion on appellant's behalf, violated appellant's constitutional rights under state and federal law which cannot be deemed harmless beyond a reasonable doubt. (AOB 316-330; ARB 213-224, 226-228.)

The allegations respondent makes in the supplemental brief rely entirely on the assertions that made in the initial respondent's brief and there is no new substantive argument is added. Accordingly, the issues are joined, and no further reply to respondent's supplemental brief is necessary.

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XIX

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY FAILING TO GIVE HIS REQUESTED INSTRUCTION THAT THE MITIGATING CIRCUMSTANCES NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT AND THAT MITIGATION MAY BE FOUND NO MATTER HOW WEAK THE EVIDENCE

Appellant has argued in his supplemental opening brief that the trial court's refusal to give appellant's instruction on the scope and proof of mitigating evidence violated his constitutional rights to due process and a fundamentally fair trial, present a defense, instructions which are not confusing or misleading, adequate instructions on the theory of the defense and a determination based on consideration of all relevant aspects of appellant's character and record. (U.S. Const., 5th, 6th, and 14th Amends.) These grounds for relief are in addition to those which were delineated in the opening brief. (ASOB 68-69.)

Respondent alleges that, assuming that appellant preserved a federal constitutional claim below, the newly asserted constitutional claims fail on their merits because the penalty jury was properly instructed and the trial court properly refused to give the requested instruction. Respondent further alleges that any instructional error in this regard was harmless under the "reasonable possibility" test of prejudice." (RSB 59.) The contentions respondent makes lack merit.

Appellant has shown that he did not forfeit the claim below. (ARB 233-234.) This instructional claim, which affects appellant's substantial rights, is of the type where no objection is needed. (*People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7; §1259.) Accordingly, consideration of the claim

by this Court is not barred. Appellant has also fully demonstrated that the denial of the requested instruction on mitigating circumstances denied him a fair, individualized and reliable penalty determination which was prejudicial and requires reversal. (AOB 330-332; ARB 230-234.)

Because respondent relies entirely on the allegations made in the initial respondent's brief, and no new substantive argument is made in the supplemental brief, any further response by appellant is unnecessary.

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THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY FAILING TO INSTRUCT THE JURY THAT A SINGLE MITIGATING FACTOR, INCLUDING ONE NOT LISTED BY THE COURT, COULD SUPPORT A PENALTY LESS THAN DEATH

Appellant has argued in his supplemental opening brief that the trial court's refusal to give the jury his special instruction that a single mitigating circumstance, even one not enumerated by the court, deprived him of his constitutional rights to due process and fair trial, present a defense, instructions which are not confusing or misleading, adequate instructions on the theory of the defense and a determination based on consideration of all relevant aspects of appellant's character and record. (U.S. Const., 5th, 6th, 8th and 14th Amends.) (ASOB 70-71.) These constitutional rights are in addition to the state and federal law violations articulated in support of the claim in appellant's opening brief.

Relying on the allegations asserted in the initial respondent's brief, respondent alleges in the supplemental brief that, assuming appellant preserved a federal constitutional claim below, the newly asserted claims fail on their merits because the penalty jury was properly instructed and the trial court properly refused to give the special instruction. Respondent further alleges that any instructional error was harmless under the "reasonable possibility" test of prejudice." (RSB 60.) Respondent's allegations regarding this claim must be rejected.

Appellant has shown that the federal constitutional bases for his claim were not forfeited below. (ARB 233-234; 242.) Appellant has also fully demonstrated that the trial court's failure to give the

instruction: (1) left the jury without the guidance necessary for it to make its penalty assessment; (2) prevented the jury from considering and giving the full and proper effect to the mitigating evidence offered by appellant regarding his character as it related to family relationships; and (3) resulted in the deprivation of appellant's constitutional rights which cannot be deemed harmless beyond a reasonable doubt. (AOB 332-334; ARB 235-242, *Brewer v. Quarterman* (2007) ___ U.S. ___ [127 S.Ct. 1706, 1710].)

Respondent does not add any new substantive argument in the supplemental brief; accordingly, the issues are joined, and no further response to respondent's contentions is necessary.

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XXIII

THE TRIAL COURT IMPROPERLY READ AND CONSIDERED APPELLANT'S PROBATION REPORT PRIOR TO DENYING THE MOTION TO REDUCE THE SENTENCE

In his supplemental opening brief, appellant argued that the trial court's review and consideration of the probation report prior to denying the defense motion to reduce the sentence deprived him of his constitutional rights to due process and confrontation under the Fifth, Sixth, Eighth and Fourteenth Amendments because the court: (1) failed to perform its statutory charge under section 190, subdivision (e), which specifically precluded such action; and (2) considered and relied upon prejudicial matters not presented to the jury at the penalty trial which were contained in the probation report, including hearsay evidence that appellant had no opportunity to rebut. (ASOB 72.) These grounds for relief are in addition to the state and federal law grounds for relief set forth by appellant in the opening brief.

Respondent acknowledges that the trial court read appellant's probation report prior to ruling on the defense motion to reduce the sentence. Relying entirely on the initial respondent's brief, respondent nonetheless contends the record demonstrates that the court's ruling was not based on materials contained in the probation report, and that the court properly considered only the aggravating and mitigating evidence presented to the jury. Respondent further alleges that appellant's federal constitutional claims are without merit because they were based on state law error of which there was none. (RSB 61.) Each of respondent's contentions are meritless, and must be rejected by this Court.

Appellant has fully demonstrated that the trial court not only read but

also considered his probation report before making its determination on the motion to modify the sentence, and that this impropriety resulted in a violation of not only state law, but also of appellant's federal constitutional rights. (AOB 341-343; ARB 253-257.) Because respondent makes no new substantive argument in the supplemental brief, no further reply by appellant is necessary.

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XXV

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE 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

In his supplemental opening brief, appellant argued that the trial court erroneously and unconstitutionally instructed the jury on first degree murder because the information charged appellant only with second degree malice-murder. (ASOB 73-80.) Respondent disagrees, alleging the trial court properly instructed the jury that appellant could be convicted of first degree murder and cites contrary holdings of this Court. (RSB 62-65.)

Appellant has acknowledged that this Court's previous rejection of claims similar to appellant's, including one of the cases expressly relied upon by respondent, *People v. Hughes* (2002) 27 Cal.4th 287 (see ASOB 75-77), but has set out why this Court should reconsider its decisions in this area (see ASOB 74-79). Appellant would only reiterate, in reply to respondent's contention that appellant's reliance on *Apprendi v. New Jersey* (2004) 530 U.S. 466 is misplaced because it has been demonstrated that appellant was not convicted of an "uncharged crime" (RSB 64), that the federal constitution requires that the facts necessary to bring a homicide within the crime of first degree murder – premeditation, required facts to establish first degree felony-murder and specific intent to commit the crime – must be charged in the indictment. This was not done in this case; accordingly, the conviction and judgment must be reversed.

XXVI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR FELONY-MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

In his supplemental opening brief, appellant argued that the trial court committed reversible error by failing to instruct the jurors that they had to unanimously agree on whether appellant committed a premeditated or felony-murder before they could convict him of first degree murder. (ASOB 81-89.) Respondent relies upon decisions of this Court holding otherwise (RSB 66-67), which appellant has previously recognized but asked this Court to reconsider (see ASOB 81-83).

This Court has held that “[t]here is only a ‘single, statutory offense of first degree murder.’” (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, citing *People v. Pride* (1992) 3 Cal.4th 195, 249; but see *People v. Dillon* (1983) 34 Cal.3d 441, 471-472, 476, fn. 23 [felony murder is a separate and distinct crime from malice murder].) However, this Court has also acknowledged that premeditated murder and felony murder do not have the same elements. (See e.g., *People v. Carpenter, supra*, 15 Cal.4th at p. 394; *People v. Dillon, supra*, 34 Cal.3d at pp. 465, 475, 477, fn. 24.) Specifically, malice is an element of murder under section 187 (malice murder), but it is not an element of felony murder under section 189. Likewise, premeditation and deliberation are elements of first degree malice murder but not of first degree felony-murder. Accordingly, the basis of appellant’s argument is not that these crimes are simply separate theories of

murder, but that they have separate *elements*. Respondent ignores the fact that malice-murder and felony-murder have separate elements and simply relies on this Court's cases rejecting the issue without analysis.

More recent decisions of this Court offer support for appellant's argument. In *People v. Seel* (2004) 34 Cal.4th 535, the defendant was convicted of attempted premeditated murder (§664, subd. (a) and §187, subd. (a)). The appellate court below had reversed the finding of premeditation and deliberation due to insufficient evidence and remanded for retrial on that allegation. This Court granted review to decide whether the premeditation allegation should be retried. (*People v. Seel, supra*, 34 Cal.4th at p. 540.) In holding that the constitutional restraints against the double jeopardy barred retrial on the premeditation allegation under *Apprendi v. New Jersey, supra*, 530 U.S. 466, this Court endorsed the view that "[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal defense 'element.'" (*People v. Seel, supra*, 34 Cal.4th at p. 549, quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 493.) Intent is clearly an element which makes malice murder a different crime than felony murder.

In *Burris v. Superior Court* (2005) 34 Cal.4th 1012, this Court held that under section 1387, the dismissal of a misdemeanor prosecution does not bar a subsequent felony prosecution based on the same criminal act when new evidence comes to light that suggests a crime originally charged as a misdemeanor is, in fact, graver and should be charged as a felony. (*Id.*, at p. 1020.) In reaching this conclusion, the Court compared the elements of the offenses at issue, stating that "[w]hen two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387." (*Burris v. Superior Court, supra*, 34 Cal.4th at p. 1016, fn. 3, citing

Dunn v. Superior Court (1984) 159 Cal.App.3d 1110, 1118 [applying “same elements” test to determine whether new charge is same offense as that previously dismissed for purposes of section 1387].) The negative implication is obvious: when two crimes have different elements, they are *not* the same offense.⁴

This Court’s decisions in *Seel* and *Burris* reaffirm the principle that because premeditated murder and felony-murder have different elements in California, they are different crimes, not merely two theories of the same offense. The jury should not have been permitted to convict appellant of murder without being required to determine unanimously that the crime was either a premeditated (malice) murder under section 187 or felony-murder under section 189. Accordingly, appellant’s first degree murder conviction and the entire judgment must be reversed.⁵

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⁴Respondent’s contention that the United States Supreme Court decisions such as *Ring v. Arizona* (2002) 536 U.S. 584 and *Apprendi v. New Jersey, supra*, 530 U.S. 466, upon which appellant relies, “do not hold otherwise” (RSB 66-67), runs afoul of Justice Scalia’s pointed warning that “the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane* – must be found by the jury beyond a reasonable doubt.” (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); ASOB 88.)

⁵Appellant has argued (ASOB 89), and respondent has chosen to ignore, that the instant instructional error is structural in nature and therefore reversible per se.

XXVII

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

In his supplemental opening brief, appellant argued that the jury instructions regarding the statutory factors to be considered in determining penalty rendered appellant's death sentence unconstitutional for a number of reasons. (ASOB 90-106.) Respondent disagrees, relying solely on previous decisions of this Court where identical claims were rejected. (RSB 69-71.)

Respondent offers no basis, apart from stare decisis, for continuing to follow precedents that are fundamentally flawed. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 577 [doctrine of stare decisis is not an inexorable command]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [doctrine of stare decisis should not shield court-created error from correction].) For reasons delineated in appellant's supplemental opening brief, appellant respectfully asks this Court to reconsider its prior rulings in this area, hold that the instructions regarding the statutory factors to be considered in determining penalty violated appellant's fundamental constitutional rights, and reverse the death judgment.

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XXVIII

THE PROSECUTION'S INTERCEPTION OF A PRIVILEGED AND CONFIDENTIAL COMMUNICATION RELATING TO DEFENSE STRATEGY CONSTITUTED AN IMPERMISSIBLE INTRUSION INTO THE ATTORNEY-CLIENT RELATIONSHIP WHICH VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS; REVERSAL OF THE JUDGMENT AND SENTENCE AS WELL AS DISMISSAL OF THE CHARGES IS REQUIRED

In his supplemental opening brief, appellant argued that reversal of the judgment and sentence, and dismissal of the charges against him, are required because the prosecution purposefully and without legitimate justification gained access to defense strategy information from a privileged communication which constituted an impermissible intrusion into the attorney-client relationship. This intrusion violated appellant's federal and state constitutional rights, including his right to counsel and private communications with counsel inherent in that right under the California Constitution. (ASOB 107-123.) Respondent argues that the prosecution's interception of the communication between appellant, his mother and his investigator did not constitute egregious conduct or rise to the level of a constitutional violation. Respondent further alleges that even assuming there was an improper intrusion by the prosecution, appellant has not demonstrated any prejudice. (RSB 72-86.) Respondent's arguments are without merit.

A. The Intrusion That Occurred In This Case Violated Appellant's Constitutional Rights For Which Prejudice Must Be Presumed And Dismissal Is Required

Contrary to respondent's assertions (RSB 79), the intrusion into the defense camp by overzealous governmental officials that occurred in this

case was egregious, purposeful, without legitimate justification and, accordingly, prejudice must be presumed.⁶ (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 756; *Morrow v. Superior Court* (1995) 30 Cal.App.4th 1252, 1259.)

Respondent is correct that a wire communications interception authorization order relating to investigation in appellant's case had been issued by the Los Angeles Superior Court. (RSB 79.) This fact, however, does not undermine appellant's claim. Although the interception of communications that were relevant to the issue of appellant's involvement in the 1980 murder of Julie Cross was authorized (see XIV CT 3786-3787),⁷ the deliberate interception of the confidential and privileged attorney-client communications involving defense strategy, such as that which occurred in this case, was not. (*Barber v. Municipal Court, supra*, 24 Cal.3d at p. 752;

⁶Respondent asserts without argument that the communication at issue is a "questionably privileged conversation." (RSB 79.) Contrary to this assertion, the attorney-client privilege relating to the January 9, 1996, phone conversation between appellant with the defense investigator was not waived by the presence of appellant's mother who was a third party participant. Here, as the trial court correctly determined, appellant's mother's presence during the call was necessary to further the interest of appellant. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 753; *Insurance Co. of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 767; Evid. Code §952.) (ASOB 110-111.)

⁷Appellant's Motion to Suppress Electronic Surveillance Evidence describes the affidavit submitted by the prosecution to obtain the warrant authorizing the interception of wire communications. Although appellant's motion references the affidavit in support of the warrant as "Application, Attachment B," the affidavit is not included with the motion in the Clerk's Transcript on Appeal. (See XIV CT 3782-3792.) The application and corresponding orders from the Superior Court were entered into evidence at the February 8, 1995 hearing on the motion to suppress as People's Exhibit 1. (56 RT 5968-5969.)

Shillinger v. Haworth (10th Cir. 1995) 70 F.3d 1132, 1143; *United States v. Levy* (3d Cir. 1978) 577 F.2d 200, 208-210; see §629.80; 18 U.S.C. 2518(5).)⁸

At the time Detective Richard Henry directed recording of the January 9, 1996 conversation, he was well aware that it was a case-related call between appellant, defense investigator Ingwerson and appellant's

⁸Section 629.80 provides in relevant part that:

When a peace officer or federal law enforcement officer, while engaged in intercepting wire, electronic pager, or electronic cellular telephone communications in the manner authorized by this chapter, intercepts wire, electronic pager, or electronic cellular telephone communications that are of a privileged nature he or she shall immediately cease the interception for at least two minutes. After a period of at least two minutes, interception may be resumed for up to 30 seconds during which time the officer shall determine if the nature of the communication is still privileged. If still of a privileged nature, the officer shall again cease interception for at least two minutes, after which the officer may again resume interception for up to 30 seconds to redetermine the nature of the communication. The officer shall continue to go online and offline in this manner until the time that the communication is no longer privileged or the communication ends. The recording shall be metered as to authenticate upon review that interruptions occurred as set forth in this chapter.

18 U.S.C. 2518(5) provides in relevant part that:

No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization. . . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.

mother.⁹ There is no dispute he knew that any conversations between appellant, his attorney, and/or his investigators were privileged and confidential, and thus required that he not listen to them or otherwise be privy to the content of those communications. (78 RT 8488-8490.) Similarly, there is no dispute Detective Henry listened to portions of the conversation as it was being recorded and that not long thereafter he reviewed the monitor log revealing the substance of the entire conversation. (78 RT 8482-8484, 8491-8492.)¹⁰

Even assuming, which appellant does not concede, that Detective Henry's directive to District Attorney Investigator Gene Salvino to "stay up on" and record the communication (78 RT 8490) was made with an innocent belief that the attorney-client privilege had been waived because appellant's mother was a third-party participant, the same assumption

⁹Investigator Gene Salvino specifically notified Detective Henry of the conversation between appellant, his mother and defense investigator Ingwerson. (78 RT 8490, 8523.) The transcript of that conversation was submitted by appellant in support of his motion to dismiss. (XIV CT 3743-3769.) At the hearing on appellant's motion, the transcript of the conversation was designated Court's Exhibit A. (78 RT 8462, 8481.) In appellant's supplemental opening brief, the transcript was incorrectly referenced as "People's Exhibit A." (ASOB 122.)

¹⁰There was no testimony presented at the hearing on appellant's motion to dismiss as to which portions of the conversation Detective Henry heard while it was being monitored and recorded. Accordingly, respondent cannot claim that Detective Henry did not hear any portions where defense strategy was discussed.

The wire monitor log containing the details of the January 9, 1996, communication, also at issue in this claim, was admitted into evidence at the hearing on the motion to dismiss as People's Exhibit 1. (78 RT 8495-8496.)

cannot be applied to his later review of the wire monitor log detailing the substance of the communication. At the time Detective Henry read the log he had already received advice from prosecutors to be “careful” with any conversations between appellant and the defense investigator involving trial strategy. The record also indicates that by that time he had received confirmation from the judge who had authorized the wire interception that the communications between appellant and the investigator involving defense strategy were within the attorney-client privilege. (78 RT 8483-8484, 8490-8495.) Because of these circumstances, it is clear that Detective Henry’s review of the monitor log of the privileged communication was deliberate, without legitimate justification and conducted for the purpose of obtaining confidential defense evidence or trial strategy. (*Barber v. Municipal Court, supra*, 24 Cal.3d at p. 756; *Morrow v. Superior Court, supra*, 30 Cal.App.4th at p. 1261; *Shillinger v. Haworth, supra*, 70 F.3d at p. 1141; *Graddick v. State* (Ala. Cr. App. 1981) 408 So.2d 533, 544; compare *Weatherford v. Bursey* (1979) 429 U.S. 545, 557 [“this was not a situation where the State’s purpose was to learn what it could about the defendant’s defense plans . . . or where the informant has assumed for himself that task and acted accordingly”].) Respondent’s assertions to the contrary (RSB 79), therefore, must be rejected.

Appellant’s reliance on *United States v. Levy, supra*, 577 F. 2d 200 and *Barber v. Municipal Court, supra*, 24 Cal. 3d 742, is not misplaced. Contrary to respondent’s argument (RSB 79-80), these cases are analogous to the instant matter because they involved deliberate and unjustifiable intrusions into the defense camp by the prosecution which resulted in access to defense strategy information by government agents responsible for investigating and prosecuting the case.

In *United States v. Levy, supra*, Drug Enforcement Administration (DEA) agents handling the investigation of an alleged conspiracy involving multiple defendants sought and obtained information about defense strategy from a codefendant who was a government informant but also represented by the same attorney as the defendant. (*United States v. Levy, supra*, 577 F.2d at pp. 202-204.) In evaluating the knowing invasion of the attorney-client relationship and disclosure of confidential information that had occurred, the Court of Appeals determined that overwhelming considerations militated against a standard which tests the Sixth Amendment violation by weighing the degree to which such disclosure was prejudicial. The court explained that: (1) a determination of how confidential defense strategy information may have benefitted or aided the government in “its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in selecting witnesses and jurors, or in the dynamics of the trial itself,” requires excessive speculation about possible prejudice; (2) free two-way communication between a client and his/her attorney is essential if the right to counsel under the Sixth Amendment is to be meaningful; and (3) such communications must be insulated from the government. (*Id.*, at pp. 208-209.) In *Levy*, the confidential defense strategy information provided by the informant to DEA case agents was transmitted to the prosecutor. However, the Court of Appeals’ determination that a per se Sixth Amendment violation resulted from the disclosure of confidential information did not turn on the disclosure to the prosecuting attorney. Instead, the presumed constitutional violation was because the information from the informant was disclosed to “government enforcement agencies responsible for investigating and

prosecuting the case.”¹¹ In addition to recognizing that the extent to which a defendant has been actually prejudiced by the government intrusion can never be known with certainty, the Court of Appeals recognized “the substantial risk that case agents of law enforcement agencies, like the DEA, who actually work up the cases and assist government counsel at trial, might not even disclose to the government attorneys that certain information was obtained from the defense by an informer.” (*United States v. Levy, supra*, 577 F.2d at p. 208.) In so doing, the court stated that,

[i]n such cases the sixth amendment violations might be disclosed, if at all, late in the trial or after the trial has been completed. At that point a trial court applying an actual prejudice test would face the virtually impossible task of reexamining the entire proceeding to determine whether the disclosed information influenced the government’s investigation or presentation of its case or harmed the defense in any other way.

(*Ibid.*) In *Levy*, because the district court found no constitutional violation resulting from governmental invasion, the original prosecution team was permitted to proceed with the trial. The Court of Appeals determined that dismissal was the only appropriate remedy under the circumstances of the case because any future effort to cure the violation would result in the “same sort of speculative enterprise” that the court had rejected when it previously attempted to assess the prejudice resulting from the disclosure of confidential defense strategy. (*Id.*, at p. 210 [“Even if new case agents and

¹¹Indeed, in its discussion of the facts below, Court of Appeals in *Levy* described the conduct of the DEA agents as constituting Sixth Amendment violations when it said: “[i]n this case a government attorney, sensitive to her obligation to prevent sixth amendment violations by *agents of the United States*, called the matter to the district court’s attention.” (*United States v. Levy, supra*, 577 F.2d at p. 208, emphasis added.)

attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussion with key government witnesses. . . .”].) The court also recognized as important the fact that “public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain.” (*Ibid.*)

Similarly, in *Barber v. Municipal Court, supra*, 24 Cal.3d 742, this Court rejected the government's argument that an exclusionary remedy would suffice when government agents intentionally invade the defense camp and gain access to attorney-client privileged materials because of the “exceedingly difficult problems of proof” faced by defendants whose rights to confidential communications have been violated. (*Id.*, at p. 757.) In such circumstances, this Court stated that “[s]ubtle forms of prejudice are nearly impossible to isolate.” This Court also recognized that “[e]ven the blatant use of illegally obtained information will be difficult to prove” because such proof would require an informer or prosecutor to admit wrongdoing or because an informer's failure to make a report of the confidential communication could be a way to convey to the prosecution that nothing unexpected had been revealed. (*Ibid.*, citing *Weatherford v. Bursey* (1977) 429 U.S. 545, 565 (dis. opn. of Marshall, J.).)

In *Barber*, the defendants had participated in a sit-in at a nuclear power plant and were charged with trespass. The defendants met with attorneys to plan trial strategy, and a codefendant who participated in the meeting was later discovered to be an undercover police officer. Despite the fact that there was no showing that the undercover officer had actually passed confidential defense information to the prosecution but had instead reported that the “defense was to become more ‘political’” (*Barber v.*

Superior Court, supra, 24 Cal.3d at pp. 749-750), this Court held that the right to communicate privately with counsel was violated under California law because the undercover government agent was present at confidential attorney-client meetings. (*Id.*, at pp. 750-751; 755-756.)¹² This Court concluded that dismissal of the charges was the only effective remedy because an exclusionary remedy was inadequate. In so doing, this Court relied upon a number of reasons for that determination, including the fact that: (1) the prejudice from the invasion suffered by the defendants was both difficult to prove and incalculable; (2) defense counsel's inability to prepare adequately for trial due to the lack of cooperation by defendants resulting from their distrust of other defendants and those working on the case and to freely and with complete confidence discuss their case with counsel; (3) an exclusionary remedy was ineffective to assure that the prosecution does not benefit from the illegality and to deter the state from future unlawful intrusions; and (4) "[t]he intrusion, through trickery, of the law enforcement agent in the confidential-client conferences . . . cannot be

¹²Significantly, this Court noted that even if the determination in *Barber, supra*, was made under federal law, it would not sustain the conclusion asserted by Justice Clark in his dissenting opinion that there was no violation of the right to counsel under the Sixth Amendment. This observation was based on the legal distinctions between the conduct of the undercover agent in *Weatherford v. Bursey, supra*, 429 U.S. 545 [undercover agent who retains separate counsel, agent attended attorney-client conference at invitation of codefendant, agent sought separate trial from codefendant, and agent merely provided information and suggestions to defense counsel] and the conduct of the codefendant-informant in *Barber* [informant retains same attorney as defendants; informant attended the coincidental attorney-client conference at the direction of the government, informant sought a joint trial, and agent reported the nature of the defense to the government]. (*Barber v. Municipal Court, supra*, 24 Cal.3d at p. 756, fn. 14.)

condoned.” (*Id.*, at pp. 757-759.)

Contrary to respondent’s allegation (RSB 81), an independent reading of the transcript of the January 9, 1996, phone communication shows that confidential defense strategy information was disclosed to government agents. Besides identifying certain witnesses the defense sought to interview, or witnesses appellant wanted to be interviewed, the communication revealed information that should be obtained from certain witnesses, questions that should be presented to certain witnesses when interviewed, and information appellant wanted defense counsel to use in cross-examination of certain witnesses. (XIV CT 3743-3769; Court’s Exh. A.) Moreover, the important defense strategy information contained in the January 9th communication was not repeated “almost verbatim” by appellant’s mother in subsequent non-privileged conversations she had with others. (78 RT 8530-8531; People’s Exhibits 2-5.)¹³ Independent review of transcripts of later calls by defendant’s mother show that very little of the defense strategy information contained in the privileged January 9, 1996 phone communication was repeated to others. (People’s Exhs. 2-5.)

Even assuming, arguendo, that the privileged communication “largely consisted of discussions regarding potential witnesses never called by the defense, yet already known by the prosecution” (RSB 81), that fact is irrelevant to the question whether an intentional and unjustified invasion of

¹³People’s Exhibits 2 through 5, are transcripts of non-privileged phone conversations between appellant’s mother and others that were admitted into evidence at the hearing on appellant’s motion to dismiss. (78 RT 8505.)

the attorney-client relationship has occurred in this case. Under California law, appellant's right to communicate in absolute privacy with counsel was violated when Detective Henry reviewed the monitor log summarizing the entire substance of the phone conversation after he had been advised that the communication fell within the attorney-client privilege (*Barber v. Municipal Court, supra*, 24 Cal.3d at p. 756.) Moreover, where, as here, the right to counsel and an attorney-client relationship under the Sixth Amendment is also at stake, an analogy to Fourth Amendment law that there is no prejudice from an unlawful invasion unless it is shown that some of the government's evidence would have been unknown is inappropriate. (*United States v. Levy, supra*, 577 F.2d at p. 209 ["No severe definition of prejudice, such as the fruit-of-the-poisonous tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies."].) Finally, even assuming that the defense strategy which was revealed only constituted information about witnesses that Detective Henry already knew about and/or had interviewed, the prosecution here necessarily became privy to the fact that such information was the only defense strategy the prosecution had to anticipate. (*Id.*, at p. 208.) The knowledge of the planned defense strategy would permit the prosecution to shape its case, or witnesses, accordingly. "While the significance of such benefits is, of course, speculative, such speculation is the inevitable consequence of the legal standard the [trial] court adopted." (*Ibid.* 78 RT 8530-8531.)

There is no dispute that Detective Henry was the lead investigating officer on the case and a key member of the prosecution team long before and during the trial proceedings. He was actively involved with witnesses as well as the ongoing investigation of the case against appellant, including the gathering of evidence for the case against appellant through the wiretap

interception. (E.g., 78 RT 8478, 8484.) Detective Henry's invasion into the defense camp was egregious purposeful and without legitimate justification because he reviewed the communication after he had been advised that it was privileged. In light of the unlawful access to privileged defense strategy information that Detective Henry had gained, it must be presumed that appellant's constitutional rights were violated, including his right to counsel and to private attorney-client communications, and that such violations were per se prejudicial. (*Barber v. Municipal Court, supra*, 24 Cal.3d at pp. 755-756; *United States v. Levy, supra*, 577 F.2d at p. 209.)

Even assuming, *arguendo*, that knowledge of the substance of the privileged communication by the prosecuting attorneys is a necessary prerequisite to the constitutional violation that occurred here, the record does not substantiate respondent's additional assertion that the prosecutors "did not obtain *any* information regarding the defense case." (RSB 81, emphasis in original.) Although there was a stipulation that Deputy District Attorney Peterson had not read the wire monitor log detailing the substance of the privileged communication in the course of her duties or when preparing the 72 Hour reports required by the wire tap authorization (78 RT 8525), there was no similar stipulation as to Deputy District Attorney Kuriyama, the lead prosecuting attorney handling the case who also signed on the 72 Hour reports. (See, e.g., XIII CT 3515-3528.) It is reasonable to assume that if District Attorney Kuriyama had not read or viewed the log, a stipulation reflecting that fact would have been proffered. Additionally, there was no evidence as to how the log was maintained, where it was maintained, or who had access to it. Despite respondent's allegation otherwise (RSB 84), testimony by Detective Henry that he did not divulge information about the confidential communication to the prosecuting

attorneys in this case, does not demonstrate that District Attorney Kuriyama had not independently learned of the substance of the communication by his own review of the monitor log.

United States v. Morrison (1981) 449 U.S. 361 is distinguishable from this case because it did not involve a governmental intrusion in the attorney-client relationship involving defense strategy or preparations. Moreover, it did not address the serious implications for the adversary process posed by a purposeful government intrusion, such as the one that occurred here, which was without legitimate justification and from which defense strategy information was revealed. (Compare *Barber v. Municipal Court, supra*, 24 Cal.3d at pp. 756-760; *Shillinger v. Haworth, supra*, 70 F.3d at pp. 1141-1142; *United States v. Levy, supra*, 577 F.2d at pp. 208-209.) Finally, the United States Supreme Court only addressed the misconduct that occurred in the case as a Sixth Amendment violation rather than the other constitutional violations that are asserted here. (*People v. Morrow, supra*, 30 Cal.App.4th at p. 1260.)

In *Morrison*, two government DEA agents sought the defendant's cooperation in a related investigation and met with her without the knowledge or permission of her attorney. The defendant declined to cooperate and made no statement pertinent to her case. The agents also made disparaging remarks to the defendant regarding her attorney, but the defendant continued to rely upon retained counsel. Claiming there was no Sixth Amendment violation, the prosecution argued that proof of prejudice from the intrusion was required. (*United States v. Morrison, supra*, 449 U.S. at pp. 362-363.) Although the Supreme Court found the intrusion into the attorney-client relationship deliberate, it declined to reach the issue of whether the Sixth Amendment was violated, holding only that dismissal of

the indictment was inappropriate in that case because there was no “demonstrable prejudice, or substantial threat thereof.” This determination was based on the fact that the DEA agents received no information from the defendant and they otherwise failed to affect her relationship with her attorney. (*United States v. Morrison, supra*, 449 U.S. at pp. 365-367.)¹⁴

In contrast to *Morrison*, appellant has demonstrated that the prosecution both improperly obtained information relating to confidential defense strategy and without legitimate justification knowingly intruded into the attorney-client relationship. These actions by the prosecution constituted violations of appellant’s constitutional rights which were per se prejudicial and which require dismissal of the charges. (*Barber v. Municipal Court, supra*, 24 Cal.3d at pp. 757-758; *Morrow v. Superior Court, supra*, 30 Cal.App.4th at pp. 1260-1263; *United States v. Constanzo* (3rd Cir. 1984) 740 F.2d 251, 254; *Briggs v. Goodwin, supra*, 698 F.2d at pp. 494-495; *United States v. Levy, supra*, 577 F.2d at pp. 208-209.)

B. If The Intrusion By The Prosecution Resulting In The Interception of Confidential Defense Trial Strategy Information Is Not Per Se Prejudicial, The Prosecution Still Did Not Meet Its Burden of Proof

Even assuming that the purposeful intrusion resulting in the government’s access to confidential information about defense trial strategy in this case does not raise an irrebuttable presumption of prejudice, the prosecution did not meet its heavy burden of showing that appellant was not

¹⁴In denying the remedy of dismissal, the United States Supreme Court in *Morrison, supra*, nonetheless condemned the “egregious behavior of the Government agents” in the case and stated that “in cases such as this, a Sixth Amendment violation may . . . be remedied in other proceedings.” (*United States v. Morrison, supra*, 449 U.S. at p. 367.)

prejudiced by it. (*People v. Zapien* (1993) 4 Cal.4th 929, 867 [state misconduct places burden on prosecution to prove by preponderance of evidence there was no prejudice to defendant]; *Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1258 [“the People . . . have the burden to show there was no substantial threat of demonstrable prejudice]; *United States v. Danielson* (9th Cir. 2003) 325 F.3d 1054, 1072 [prosecution has heavy burden of showing non-use of privileged trial strategy information].) Contrary to respondent’s allegation (RSB 83), the problem in this case is not that the government obtained incriminating statements or other specific evidence, but rather that it obtained information about appellant’s trial strategy by means that were “neither accidental nor avoidable.” (*United States v. Danielson*, *supra*, 325 F.3d at pp. 1059, 1067.) Because appellant had shown there was a purposeful intrusion resulting in the disclosure of defense strategy to the government, the burden shifted to the prosecution to prove by a preponderance of evidence that appellant was not prejudiced by the governmental invasion. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 867; *United States v. Danielson*, *supra*, 325 F.3d at p. 1071.)

In support of the claim that appellant was not prejudiced by the governmental intrusion, respondent relies on the fact that neither Detective Henry nor Gene Salvino testified before the jury as to what they heard. Respondent also alleges that findings made by the trial court with regard to the knowledge of the communication by prosecuting attorneys or the use of the confidential defense strategy information by the prosecution were supported by substantial evidence. (RSB 82-83.) By relying on these “facts” to establish appellant has suffered no prejudice, respondent ignores the heavy burden of proof that had been placed on the prosecution due to the purposeful governmental intrusion that occurred and which resulted in

the disclosure of privileged defense strategy. To meet its burden, “the government must present evidence, and must show by a preponderance of the evidence, that ‘all of the evidence it proposes to use,’ and all of its trial strategy, were ‘derived from legitimate independent sources.’” (*United States v. Danielson, supra*, 325 F. 3d at p. 1071, quoting *Kastigar v. United States* (1972) 406 U.S. 441, 460.)

Contrary to respondent’s assertion (RSB 86), governmental agents in this case purposefully and without justification violated the attorney-client privilege as well as appellant’s right to counsel and other constitutional rights by their substantive review of the January 9, 1996 communication between appellant, his investigator and his mother. Despite being advised that the communication fell within the attorney-client privilege, Detective Henry deliberately and without legitimate justification read the monitor log of the January 9th conversation setting forth the substance of the communication, thus becoming privy to the confidential defense strategy contained therein. (*United States v. Danielson, supra*, 325 F.3d at pp. 1068-1069 [inherent unfairness of a police investigator gaining access to defense strategy even where prosecuting attorney never had direct access].) As set forth above, very little of the confidential defense strategy information contained in the confidential communication was repeated in the subsequent non-privileged conversations by appellant’s mother. (See p. 60, *supra*.)

Even assuming that it must be demonstrated that prosecuting attorneys had learned of the contents of the communication (RSB 84), the prosecution here did not meet their evidentiary burden by sufficiently demonstrating otherwise. (See *Briggs v. Goodwin, supra*, 698 F.2d at p. 495 [“once the investigatory arm of the government has obtained

information, that information may reasonably be assumed to have passed on to other governmental organs responsible for prosecution”].) The fact that Detective Henry testified he had not divulged privileged information to an “any member” of the prosecution team does not prove that lead prosecutor Kuriyama did not independently learn of the contents of the communication through review of the monitor log relating to the communication or when preparing the 72 Hour reports. More importantly, the prosecution did not meet their evidentiary burden by sufficiently demonstrating there was no “use” of the defense strategy by any government agent involved with the prosecution against appellant. Respondent’s assertions to the contrary are not supported by the record. (RSB 84.) At the hearing on appellant’s motion to dismiss, the evidence that the defense strategy information was not “used” by Detective Henry was presented when the trial court questioned him whether he attempted to exploit or benefit from the information in the communication. Detective Henry’s response was that he had interviewed “most” of the people discussed but not on anything related to the communication. (78 RT 8518.) The colloquy on this point between the court and Detective Henry is as follows:

The Court: And in terms of the information contained in Exhibit A, did you make any attempt to exploit or profit from that information and investigate the people mentioned in A or Exhibit A?

The Witness [Detective Henry]: I had interviewed most of the people I had heard on these conversations [sic] prior to this conversation, but nothing related to this conversation.

(*Id.*) Contrary to respondent’s allegation (RSB 84), Detective Henry’s response does not show that he did not “use” any information “gleaned from the conversation.” His response, as well as the evidence that the

prosecutors or their law clerks did not read the transcript or listen to the recording of the communication, was insufficient to support the heavy burden placed upon the prosecution here to show by the preponderance of evidence that all of its evidence and trial strategy were derived from legitimate independent sources. (*Kastigar v. United States* (1972) 406 U.S. at p. 460.) “In the absence of such an evidentiary showing by the government, [appellant] has suffered prejudice.” (*United States v. Danielson, supra*, 325 F. 3d at p. 1071; *People v. Morrow, supra*, 30 Cal.App.4th at p. 1261 [even narrowed to Sixth Amendment violation, the purposeful and unjustified intrusion by the prosecution amounted to a substantial threat of demonstrable prejudice as a matter of law].)

Respondent’s assertion that appellant has failed to show he suffered “actual” prejudice (RSB 84) disregards this Court’s recognition that “[s]ubtle forms of prejudice are nearly impossible to isolate.” (*Barber v. Municipal Court, supra*, 24 Cal. 3d at p. 757.) Moreover,

In cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle. In such cases, it will often be unclear whether, and how, the prosecution's improperly obtained information about the defendant's trial strategy may have been used, and whether there was prejudice. More important, in such cases the government and the defendant will have unequal access to knowledge. *The prosecution team knows what it did and why. The defendant can only guess.*

(*United States v. Danielson, supra*, 325 F.3d at p. 1070, emphasis added.)

Because it is impossible to determine how any piece of confidential defense strategy information in the possession of the prosecution was used by the prosecution, such information must be deemed “inherently detrimental;” it also unfairly advantages the prosecution, and “threatens to

subvert the adversary system of criminal justice.” (*People v. Zapien, supra*, 4 Cal.4th at p. 1014, quoting *Briggs v. Goodwin, supra*, 698 F.2d at p. 495 (dis. opn. of Kennard, J.).)

Here, the prosecution purposefully and without legitimate justification invaded the defense camp and gained access to attorney-client privileged materials involving defense strategy. Because of the prosecutor’s egregious conduct, a “substantial threat of prejudice” occurred in this case which was within the meaning of *United States v. Morrison, supra*, 449 U.S. at pp. 365-366. (*People v. Zapien, supra*, 4 Cal.4th at pp. 1014-1015 (dis. opn. of Kennard, J.); *People v. Morrow, supra*, 30 Cal.App.4th at p. 1261; *Graddick v. State, supra*, 408 So.2d at pp. 547-548.) Moreover, the unlawful invasion by the prosecution here constituted a “structural defect affecting the framework within which the trial proceeds’ within the meaning of *Arizona v. Fulminante, supra*, 499 U.S. [279, 310] [parallel citation omitted].” (*People v. Zapien, supra*, 4 Cal.4th at p. 1015 (dis. opn. of Kennard, J.).) The prosecution did not meet its burden of showing there was no prejudice or substantial threat of prejudice resulting from the constitutional violations that resulted from the government’s unlawful intrusion. Accordingly, dismissal is the only appropriate remedy. (*Ibid.*, *People v. Morrow, supra*, 30 Cal.App.4th at p.1258-1259.)

C. Conclusion

The right to assistance of counsel, including the right to confer with counsel in absolute privacy, is guaranteed to a defendant in a criminal case by United States and California Constitutions. Where, as here, government enforcement officials responsible for investigating and prosecuting the case intentionally invade attorney-client communications for the purpose of

obtaining an adversarial advantage and become privy to confidential information, its action is in bad faith, without legitimate justification and “the prejudicial effect on the reliability of the trial process must be presumed.” (*Shillinger v. Haworth, supra*, 70 F.3d at p. 1142.) As this Court has recognized, an “exclusionary remedy is not only ineffective as a deterrent, but the problems of proof inherent in the remedy when applied to violations of the right to counsel would be inadequate to assure that the prosecution does not benefit from the illegality.” (*Barber v. Municipal Court, supra*, 24 Cal.3d at p. 759; see *Briggs v. Goodwin, supra*, 698 F.2d at pp. 494-495.) Reversal of the judgment and sentence, as well as dismissal of the charges in this case is necessary not only because of the direct interference with appellant’s right to counsel and to private attorney-client communications, but also because such misconduct resulted in a deprivation of due process of law and basic fairness. (*Barber v. Municipal Court, supra*, 24 Cal.3d at pp. 756, 759; *Morrow v. Superior Court, supra*, 30 Cal.App.4th at pp. 1260-1263; *United States v. Levy, supra*, 577 F.2d at pp. 208-210.)

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XXIX

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY INTRUDING INTO THE JURY'S DELIBERATIVE PROCESS AND BY EFFECTIVELY COERCING THE GUILT VERDICT

In his supplemental opening brief, appellant argued that reversal of the judgment and sentence is required because the conduct by the court in responding to a note submitted by the foreperson during the guilt deliberations – first by engaging in an overly invasive inquiry of the foreperson and then by delivering supplemental instructions based on that inquiry – impermissibly intruded into the sanctity of the jury's deliberative process, impaired the free and private exchange of views within the jury, and effectively coerced the unanimous guilt verdict. (ASOB 124-152.) Respondent contends that the trial court neither intruded into the jury's deliberative process nor coerced the verdict. Respondent also claims that any alleged error resulting from the provision of supplemental instructions by the court was invited by appellant. (RSB 87-111.) These arguments are without merit.

A. The Trial Court's Invasive Inquiry Of The Foreperson During Deliberations And Its Supplemental Instructions To The Jury Combined To Violate Appellant's Constitutional Rights

In arguing that the trial court's conduct was not erroneous, respondent ignores the totality of the circumstances surrounding the foreperson's note and that the combined actions by the court in response to it were inextricably connected, thereby constituting an overarching invasion into the sanctity of the jury's deliberations which effectively coerced the guilt verdict. Respondent's attempt to compartmentalize, and thus minimize, the actions by the court demonstrate a clear misapprehension of

the breadth of the unconstitutional and prejudicial intrusion that occurred in this case.

Contrary to respondent's assertion, the trial court's examination of the foreperson with regard to his note was not "reasonable under the circumstances." (RSB 98.) Appellant recognizes that this Court "follows established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist." (*People v. Cleveland* (2001) 25 Cal.4th 466, 484, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 520.) However, while an inquiry was arguably required to determine whether there was a refusal to deliberate or misconduct by the minority juror, the court's inquiry went beyond the scope of what was "reasonably necessary" and appropriate to make that determination. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.)¹⁵

Based on the information set forth in the foreperson's note (XIV CT

¹⁵This Court has recognized that when a juror has accused another juror of misconduct during deliberations, the trial court may first attempt to resolve the problem by reinstructing the jury before making any inquiry which could intrude into the sanctity of deliberations. (*People v. Cleveland, supra*, 25 Cal.4th at p. 480.) It is when reinstruction is not effective, and problems continue, that a limited inquiry must occur. (*Id.*) Moreover, because the information referring to the minority juror on the foreperson's note was consistent with a determination that the juror's disagreement with the majority was based on the merits of the case rather than a refusal to deliberate, appellant does not concede that an inquiry by the court was appropriate. (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1087 [court's authority to inquire into whether juror is unable or unwilling to deliberate is restricted whenever there is reasonable possibility that impetus for dismissal is based on the juror's views on the merits of the case]; accord *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 622; *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596.)

3852),¹⁶ the question before the trial court was whether the minority juror was following his/her oath and performing the duties required of a juror. Accordingly, all the court needed to determine was whether the juror: (1) was willing to abide by the juror's oath to decide the case according only to the evidence presented and instructions from the court (Code Civ. Proc. §232, subd.(b));¹⁷ *People v. Williams* (2001) 25 Cal.4th 441, 464 (conc. opn. of Kennard, J.) and (2) had “engaged in the deliberative process by listening to other jurors . . . and by attempting to explain his views (*People v. Cleveland, supra*, 25 Cal. 4th at pp. 485-486). The substance of the minority juror's views, however, such as his/her assessment of the prosecution's case and the credibility of evidence presented, was irrelevant to the determination and, more importantly, fell within the prohibited territory of the juror's thought processes. (*People v. Cleveland, supra*, 25 Cal.4th at p. 481, quoting *United States v. Thomas, supra*, 116 F.3d at p. 618 [“no one – including the judge presiding at a trial – has a “right to know” how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror”]; accord *People v. Engleman* (2002) 28 Cal.4th 436, 443.)

Rather than limit the inquiry to whether the minority juror was able to follow his/her oath and the duties that were required of a juror, however,

¹⁶The foreperson's note is set out in full at ASOB, p. 126.

¹⁷Code of Civil Procedure Section 232, subdivision (b), sets forth the oath to which jurors sworn to try the case must agree:

Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render only to the evidence presented to you and to the instructions of the court.

the trial court here engaged in an unnecessarily broad series of probing questions involving the *content* and *substance* of the deliberations which “were likely to – and did – reveal” detailed reasons for the juror’s belief that appellant was not guilty. (*People v. Williams, supra*, 25 Cal.3d at pp. 464-465 (conc. opn. of Kennard, J.); 67 RT 7558-7568.) As such, the court failed in its obligation to focus on the conduct of the juror rather than the content of the deliberations and not to “intrude unnecessarily” upon the sanctity of jury’s deliberations. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.)

Contrary to respondent’s assertion (RSB 98), the trial court was not “required” to ask direct questions about statements the minority juror had made during deliberations. Indeed, no such questions should have been presented during the inquiry because the references to the alleged statements by the juror contained in the foreperson’s note, while ambiguous, constituted reasons for the juror’s vote. (*People v. Cleveland, supra*, 25 Cal.4th at pp. 484-485.) Thus, any inquiry by the court about the minority juror’s statements would have revealed, and in fact did reveal, prohibited information concerning the juror’s thought processes. (*Ibid.*) Moreover, the “very making” of the statements by the juror did not constitute misconduct (RSB 98), and the court’s inquiry did not reveal the “juror’s refusal to follow the law” (RSB 99). As the trial court determined, there was no demonstrable reality that the juror was not deliberating (67 RT 7565-7569; 7573-7574),¹⁸ and respondent has failed to explain why that

¹⁸ In so doing, the trial court noted with certainty that there was a dispute between the jurors “over the way the case out to turn out.” (67 RT 7473.) The court also agreed with defense counsel that the information it
(continued...)

determination was erroneous.¹⁹

Respondent's "preliminary" assertion regarding the supplemental instructions, that any alleged error resulting from them was invited by appellant, is also without merit. (RSB 101-102.) First, no objection was necessary to preserve a claim that the instructions at issue violated appellant's substantial rights. (§§1259, 1469;²⁰ *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Barraza* (1979) 23 Cal.3d 675, 683.) Second, the facts of this case establish that doctrine of invited error is inapplicable. Although the invited error doctrine bars a defendant from "challenging an instruction given by the trial court when the defendant has made a "conscious and deliberate tactical choice" to "request" the instruction"

¹⁸(...continued)

received from the foreperson was ambiguous and was consistent with a disagreement over the sufficiency of the prosecution's case. (67 RT 7474; see *People v. Cleveland, supra*, 25 Cal. 4th at pp. 485-486 [no demonstrable reality that juror was refusing to deliberate even though his method of analysis differed from other jurors, he halfheartedly participated in deliberations, he listened unsympathetically to colleagues and his explanation of his position was inarticulate].)

¹⁹ Respondent incorrectly and repeatedly maintains the view that "[a]ll that was actually confirmed by the foreman is that one of the jurors was refusing to discuss the issue of circumstantial evidence, and that this juror was, contrary to law, unwilling to convict appellant without an eyewitness." (RSB 103; accord 105.) This rendition of the facts is not supported by the record and is contrary to the trial court's factual determination on the issue.

²⁰Sections 1259 and 1469 both provide in relevant part that, "[t]he appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

(*People v. Prieto* (2003) 30 Cal.4th 226, 264-265, quoting *People v. Lucero* (2000) 23 Cal.4th 692, 723, italics omitted), no such “choice” to request the instructions at issue was made by appellant.

Here, after the court’s conclusion that there was no refusal to deliberate by the minority juror, the prosecution requested that the jury be given a “special” instruction advising that an eyewitness identification is not required to convict. (67 RT 7572-7573.) Defense counsel objected to any such instruction because the court would be “directing a comment towards a particular juror to tell him that he would have to view the evidence in a certain way” as well as “invad[ing] the mental process of the juror.” (67 RT 7573, 7577-7578.) Without withdrawing appellant’s objection to the instruction, defense counsel stated that *if* the court was inclined to give an eyewitness instruction, standard instructions on eyewitness identification, CALJIC Nos. 2.91 and 2.92, were more appropriate (67 RT 7579, 7581).²¹ Similarly, it was only after the trial court decided to give the special eyewitness identification instruction the prosecution had wanted that appellant requested the jury also be told that a confession or fingerprints are not required in order to convict. (67 RT 7585-7586.) Because defense counsel made no conscious and deliberate tactical choice to request the supplemental instructions, the doctrine of invited error does not bar his claim. (*People v. Prieto, supra*, 30 Cal.4th at pp. 264-265 [defendant’s objections to instructions and modifications overruled; no invited error even though defendant acknowledged

²¹Over defense counsel’s objection, however, the trial court only gave the jury CALJIC No. 2.92 in addition to the special instruction relating to eyewitness identification that had been requested by the prosecution. (67 RT 7586, 7593-7595; XV CT 3905-3906.)

modifications improved instruction because there was no conscious and deliberate choice to request the instruction]; accord *People v. Moon* (2005) 37 Cal.4th 1, 28; *People v. Barraza, supra*, 23 Cal.3d at p. 683.)

Respondent's arguments in support of supplemental instructions given by the court are likewise without merit. (RSB 99-101, 103-111.) Although respondent recognizes that the challenged instructions must be viewed in the totality of applicable circumstances (RSB 101), a considered assessment of the instructions within the entire context of this case, and under the totality of all relevant circumstances, is precisely what respondent has failed to do. The focus of respondent's argument is that the form of the instructions did not resemble an *Allen* charge²² and that none of the vices condemned by this Court in *People v. Gainer* (1977) 19 Cal.3d 835 are present in this case. (RSB 103-105.) This unduly narrow view ignores that the instructions here were not provided in a vacuum, but instead were inextricably linked to the court's intrusive inquiry of the foreperson which revealed not only that the jury was divided 11-1 for guilt but also the reasoning behind the vote of the single juror who was not in favor of conviction. Moreover, the instructions failed to include any cautionary instruction which made clear that jurors need not surrender their conscientiously-held beliefs and that they did not need to agree. Respondent also characterizes appellant's argument as an attempt to "parse together certain phrases" from the lengthy monologue by the court. (RSB 106.) This assertion, however, misses the point – which is that under the totality of the circumstances surrounding the foreperson's note the trial court's actions, including the supplemental instructions, impaired the free

²²*Allen v. United States* (1896) 164 U.S. 492, 501.

and private exchange of the jury's views during deliberations and in so doing effectively coerced the unanimous guilt verdict. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 237, quoting *Jenkins v. United States* (1965) 380 U.S. 445, 446 (per curiam) ["contention jury was improperly coerced requires that we consider the supplemental charge given by the trial court 'in its context and under all the circumstances'"].)

The trial court here did not stop with its over broad and impermissibly invasive inquiry of the foreperson. Nor did it "reasonably reinstruct[] the jury on their responsibility to deliberate and to base their deliberations on the evidence." (RSB 105.) Instead, the court committed the very mischief that comes from probing the motivations of a juror when it second-guessed the motivations of the holdout in this case and delivered instructions which presumed that the juror was not properly deliberating rather than merely disagreeing with the majority regarding the sufficiency of the prosecution's case against appellant. (*United States v. Thomas, supra*, 116 F.3d at p. 620 [to permit trial judges to conduct intrusive inquiries of a juror's thought processes regarding the case would "invite trial judges to second-guess and influence the work of the jury"].) Here, the instructions served to validate and reinforce the majority view that there was sufficient evidence of appellant's guilt. They also strongly suggested that the lone holdout juror was improperly deliberating or not fulfilling his duty by maintaining a contrary position. Additionally, they sent "a strong message to the remaining eleven jurors that the trial court endorsed their proclivity for conviction and implicitly encouraged them to 'hold their position' This kind of reverse coercion interfere[d] with the jury's independent deliberations and threaten[ed] . . . [appellant's] . . . right to a fair trial." (*Perez v. Marshall* (9th Cir. 1997) 119 F. 3d 1422, 1429 (dis.

opn. of Nelson, J.).) In short, the continued intrusion into the deliberations by the court in this regard made it an almost certain likelihood that the juror would abandon his or her views in favor of the majority. (See *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976, 980.)

While the record is not conclusive that there was an “actual” deadlock when the foreperson’s note was submitted to the court (RSB 103), such an actuality is not a prerequisite to the determination whether the court’s intrusive conduct in this case, which included the delivery of the supplemental instructions, was implicitly coercive. (*Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 365 [*Allen* charge analysis applied even when jury has not reached a deadlock].) Nonetheless, the foreperson’s note made it apparent the jury had reached some kind of impasse where a single juror disagreed with the others regarding the circumstantial evidence relating to the identification of the perpetrator and that the juror was holding up the guilt verdict. (XIV CT 3852; 67 RT 7558-7571.) Indeed, after its inquiry of the foreperson, the court commented that “even” based on information from the note it was apparent there was an 11-1 dispute over the outcome, and that it was “quite obvious . . . that is the way it was leaning.” (67 RT 7573-7574.)

Respondent’s argument that the instructions were proper because they did not “contain a discriminatory admonition directed to minority jurors to rethink their position in light of the majority” (RSB 103), disregards the fact that whether there is a reasonable possibility that a unanimous verdict had been coerced, the appellate court “must attempt to ascertain whether, *from the affected juror’s perspective*, the court’s remarks tended to displace independent judgment of the juror in favor of considerations of compromise and expediency.” (*People v. Keenan* (1988)

46 Cal.3d 478, 547, citing *People v. Carter* (1968) 68 Cal.2d 810, 817 and *People v. Gainer, supra*, 19 Cal.3d at pp. 849-850, emphasis in original.) The concern is not what the court intended to convey or thought it was conveying but, instead, what the affected juror or jurors could reasonably understand the court's statements to mean. (*People v. Keenan, supra*, 46 Cal.3d at p. 547.)

Here, the timing and the substance of the instructions made it likely that the independent judgment of the holdout juror would be displaced. The instructions were not neutral, but were instead ones that placed undue emphasis on the very issue of concern for the lone holdout juror – circumstantial evidence relating to the identity of the perpetrator and eyewitness identification – as well as contained multiple admonitions as to what were “inappropriate” and “proper” considerations for the jurors. The instructions also emphasized that jurors should not hesitate to change a vote if it is wrong. Moreover, consistent with the information the foreperson had provided to the court about the holdout juror, the instructions told the jury that it was improper to have an emphatic view early on in the deliberations. The instructions, however, did not include any cautionary admonitions informing the jurors that they need not give up their conscientiously-held beliefs or that they needed to agreed. Thus, while the instructions may not have constituted a direct admonition to the minority, they had the same effect. (*People v. Barraza, supra*, 23 Cal.3d at p. 865.)

Contrary to respondent's assertions (RSB 103-104, 107), it was of little consequence that: (1) the court did not mention the 11-1 division between the jurors, (2) there was no evidence the minority juror was aware the foreperson's note was sent to the court, and (3) the court did not specifically direct its comments to or single out the juror. Apart from the

fact that it could not have escaped any of the jurors that the instructions were directed at the holdout, minority jurors “always know their minority status, and if fearfully inclined, may presumably suspect a disgruntled judge can find them out.” (*United States v. Burgos* (4th Cir. 1995) 55 F.3d 933, 940.) The majority jurors also knew the identity of the lone juror, and their knowledge of this fact in conjunction with the tenor and substance of the court’s instructions was sufficient to place additional pressure upon the minority juror to capitulate to the majority view. (*People v. Gainer, supra*, 19 Cal.3d at pp. 848-849, 850; see *People v. Engleman, supra*, 28 Cal.4th at p. 446 [additional pressure on the minority juror would have disrupted the natural deliberative process of the jury].)

As this Court has recognized, “there is always a potential for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror favoring acquittal.” (*People v. Sheldon* (1989) 48 Cal.3d 935, 959-960.) Contrary to respondent’s assertion (RSB 107), the circumstances show that the potential for coercion was realized in this case. The instructions could have only been interpreted by the holdout as an agreement by the court with the position taken by the 11 jurors. Indeed, the court made clear its favor of the majority view over that of the minority juror by stating:

There is no legal requirement, as I have set forth, for a particular sort of thing, fingerprint evidence or eyewitness evidence, confession evidence or anything like that. ¶ If there was, I would tell you that.

(67 RT 7592.)

Although the court made no specific urging of the verdict, obtaining a verdict and assuring that the verdict was consistent with the majority view, was implicit in the instructions themselves. This was especially so

because there were no cautionary instructions that jurors need not give up their conscientiously-held beliefs simply to secure a verdict or that they did not have to agree. Contrary to respondent's assertion (RSB 109), such admonitions were necessary because the supplemental instructions were unbalanced as they focused on the issue that was the reason for the minority juror's vote, supported the majority view, effectively singled out the minority juror, and strongly suggested that the juror was not following his/her oath by maintaining a position contrary to the majority. While the jury was told that they were not to "decide any question in a particular way because the majority of the jurors, or any of them, favor such a decision" (67 RT 7596), they were not told that the lone juror might remain unconvinced by the majority, and was thus entitled to rest on his or her conscientiously-held beliefs. Thus, to counter-balance the pressure which would have been brought to bear upon the minority juror resulting from the instructions as well as the eleven other jurors, a specific admonition reminding the single juror of the propriety to hold onto his/her conscientiously-held beliefs was essential. The failure to do so "strongly supports the conclusion that the jury was impermissibly coerced to render a unanimous verdict." (*Jimenez v. Myers, supra*, 40 F.3d at p. 981; accord *Smalls v. Batista* (2d Cir. 1999) 191 F.3d 272, 279-281 [necessary component of any *Allen*-type charge requires trial judge to admonish jurors not to surrender their own conscientiously-held beliefs];²³ *United States v.*

²³ "Whether an *Allen* charge was appropriate in a given case hinges on whether it tends to coerce undecided jurors into reaching a verdict. Coercion may be found when jurors are encouraged to abandon, without any principled reason, doubts that any juror conscientiously holds as to a defendant's guilt." (*Smalls v. Batista, supra*, 191 F.3d at pp. 278-279, (continued...))

Mason (9th Cir. 1981) 658 F.2d 1253, 1268 [“integrity of individual conscience must not be compromised”]; compare *Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 235-236 [challenged instruction included admonition “do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict”].)

The same can be said with regard to an admonition that the jury could remain deadlocked, or that they had a right not to agree. Contrary to respondent’s assertion (RSB 110), the directive included in the supplemental instructions that the jurors must do their “very best conscientiously and under the law to arrive at a verdict based on these instructions and the evidence” (67 RT 7598) was not tempered by the portion in CALJIC No. 17.40 which stated that the jury “must consider the evidence for the purpose of reaching the verdict if you can do so” (67 RT 7596). Nor would an admonition that the jury did not have to agree have been repetitive of CALJIC No. 17.40. (RSB 110.)

Appellant’s reliance on *Jimenez v. Myers*, *supra*, 40 F.3d 976 is not misplaced. (RSB 108-109.) Respondent is correct that opinions of lower federal courts are not binding on this Court (RSB 109); nonetheless, “they are persuasive and are entitled to great weight.” (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320; *People v. Cleveland*, *supra*, 25 Cal.4th at p. 480.) As in *Jimenez*, *supra*, 40 F.3d at pp. 980-981, the combination of the trial court’s conduct and comments in this case effectively coerced the unanimous guilt verdict. When faced with the

²³(...continued)
quoting *United States v. Melendez* (2d Cir. 1995) 60 F.3d 41, 51.)

information contained in the foreperson's note, the court here did much more than deliver neutral instructions on the jury's duty to deliberate. Instead, the court conducted an overly invasive inquiry which confirmed the 11-1 division between the jurors and revealed the reasoning behind the holdout juror's disfavor of conviction. Acting on that information, the court then fashioned instructions which presumed the juror was not following the law, validated the majority view and did not inform the jurors they need not give up their conscientiously-held beliefs. Because of the specific content and focus of the instructions, they constituted a continuation of the court's intrusion into the sanctity of deliberations as well as the court's improper interference with and the usurping of the fact-finding role of the jury. (See *United States v. Thomas, supra*, 116 F.3d at p. 622.) This interference with and undue influence on the deliberations implicitly coerced the holdout into relinquishing his/her views in favor of the majority.

The jury deliberated for almost 14 hours over the course of 5 partial days; in addition to the time the jury spent in deliberations, they twice requested information from the court.²⁴ The jury's initial request for readback of key prosecution witnesses Jessica Brock and Lloyd Bulman, as well as information provided in the foreperson's note and the jury's later request for clarification of the meaning of circumstantial evidence, demonstrate that there was concern amongst the jurors about the sufficiency of the prosecution's case and that the circumstantial evidence presented relating to the identity of the perpetrator was an important issue during the

²⁴Appellant indicated in the supplemental opening brief that the jury's deliberations totaled approximately 16 ½ hours. (ASOB 149.) A recalculation of the deliberation here indicates that approximately 14 hours is the correct total. (XIV CT 3847-3851.)

deliberations. Indeed, the length of the jury’s deliberations demonstrates that the case was close on the issue of guilt. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907, citing *People v. Woodward* (1979) 23 Cal.3d 329, 341 [deliberations of only six hours indicate that the issue of guilt is not “open and shut” and strongly suggests that errors are prejudicial]; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612, citing *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 855 [nine hours of deliberations deemed “protracted”].) When “viewed together and against the backdrop of the particular circumstances of the case, the trial court’s comments and conduct amounted to giving the jury a de facto *Allen* charge, which instructs the jurors to work towards unanimity and the minority to reexamine its views.” (*Jimenez v. Myers, supra*, 40 F.3d at p. 980.)

In light of the totality of the circumstances of this case, it cannot be said that court’s intrusion, which encompassed the invasive inquiry and the resulting unbalanced and implicitly coercive supplemental instructions, did not improperly disrupt the natural deliberative process of the jury or that the presumption of prejudice has been rebutted. (*People v. Engleman, supra*, 28 Cal.4th at p. 446.)

B. Prejudice

Respondent offers no answer to appellant’s argument that the error here was prejudicial, relying instead on the contention that no error occurred. Appellant has shown in his supplemental opening brief why the error requires reversal of the judgment. (ASOB 150-152.) Accordingly, no further reply on this point is necessary.

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THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY ITS RESPONSE TO THE JURY'S DEADLOCK DURING THE PENALTY DELIBERATIONS

Appellant has argued that the cumulative actions of the trial court which were undertaken in response to the jury's note announcing they were deadlocked constituted an impermissible intrusion into the penalty phase deliberations. This intrusion interfered with the jury's natural deliberative process, effectively coerced the unanimous verdict and improperly precluded the jurors from giving meaningful consideration and effect to defense mitigation evidence they were required to consider in reaching their penalty determination (*Brewer v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 1706, 1710). (ASOB 153-174.) Respondent alleges that the trial court's conduct with regard to the jury's note neither coerced the verdict nor precluded the jury from considering mitigation evidence appellant had presented. (RSB 112-129.) Respondent's arguments are without merit.

A. The Trial Court Impermissibly Intruded Upon The Jury's Deliberative Process When It Acted Upon Mental Process Information Relating To The Lone Holdout Juror And Provided Supplemental Instructions Which Effectively Coerced The Unanimous Death Verdict

Respondent recognizes that the trial court's comments must be evaluated in context and under all circumstances of the case. (RSB 117, 119.) However, as with the argument concerning the court's intrusive actions during the guilt phase deliberations (Arg. XXIX, *supra*), respondent has failed to do exactly that. By arguing that no discriminatory admonition was directed to the minority juror to rethink his/her position in light of the views of the majority, (RSB 116-118), respondent takes the instructions out

of their proper context and ignores the totality of the circumstances regarding the penalty deliberations. Respondent's argument also demonstrates a misunderstanding of the magnitude of the court's intrusion on the jury's deliberative process, of which the instructions were a significant part, and the coercive impact the intrusion had on their penalty determination.

The jury here not just informed the court that they had reached an 11-1 deadlock and then sought advice about how they should proceed. Rather, the events and length of the deliberations indicate that the discussions on penalty were contentious and that the issue of which penalty to impose was not "open and shut." The day before the deadlock was announced, the second day of deliberations, the jury had requested to be excused early in order to "allow feelings to cool down." (XV CT 3880.)²⁵ Moreover, besides revealing that the holdout juror "would not listen to reason," the jury's next note, announcing the deadlock, contained ambiguous information which the court was not entitled to know, much less act on in the manner that it did, regarding the thought processes of the minority juror and the reasoning behind his or her vote for life. (XV CT 3881.)²⁶ Rather than inquiring whether further deliberations would be productive, merely admonishing the jury to continue deliberations, or conducting a very limited inquiry to determine if there was any failure or refusal by the lone juror to fulfill his/her duties so as determine whether further instruction was even warranted (see *People v. Cleveland* (2001) 25

²⁵The first note submitted by the jury is set out in full at ASOB 154.

²⁶The second note submitted by the jury is set out in full at ASOB 154.

Cal.4th 466, 479-480 and cases cited therein), the court construed the ambiguous mental process information contained in the second note as indicative of misconduct by the holdout juror. The court then delivered a supplemental instruction consistent with that belief and required the jury to continue deliberating. The collective actions of the court in this regard constituted an impermissible intrusion into the jury's deliberative process which effectively coerced the unanimous death verdict.

Without clarification as to the meaning of the ambiguous language concerning the minority juror and his/her reason for voting for life over death which was contained in the second note, respondent is mistaken in asserting that it was incumbent upon the court to correct the juror's "improper consideration of certain evidence" or to focus the jury on the "correct state of the law." (RSB 118-119.) The comments regarding the minority juror included in the note did not substantiate any misconduct on the part of the juror, including a refusal to follow the law or a failure to properly consider relevant aggravating and mitigating circumstances before making a penalty determination. Respondent's assertions to the contrary are purely speculative. As respondent acknowledges (RBS 120), there is an increased "potential of coercion" when a trial court learns that there is a single juror preventing a unanimous verdict. (*People v. Bell* (2007) 40 Cal. 4th 582, 617.) Because the jury's note announced they were deadlocked 11-to-1, it was important that the court not take any action that would improperly disrupt and intrude upon the jury's natural deliberative process or cause the lone juror to capitulate to the majority. (*Burton v. United States* (1905) 196 U.S. 283, 307; *People v. Cleveland, supra*, 25 Cal.4th at p. 483; *Jimenez v. Myers, supra*, 40 F.3d at p. 981.) Yet, this is exactly the kind of action the court did take.

By its failure to recognize the significance and legitimacy of the lone holdout juror, the court did not fulfill its obligation to exercise the “most extreme care and caution” necessary to preserve appellant’s constitutional rights when it responded to the jury’s note. (*Burton v. United States, supra*, 196 U.S. at p. 307.) Indeed, by not first determining whether further deliberations might overcome the deadlock, and then assuming without substantiation that the holdout juror was not fulfilling his/her duties or failing to follow the law in delivering the supplemental instruction, the court created the grave possibility that the lone juror would unnecessarily capitulate. Adding to that problem was the court’s failure to provide any cautionary instructions, such as that jurors could hold onto their conscientiously held beliefs (*Jimenez v. Myers, supra*, 40 F.3d at p. 981 [failure to give specific admonition that a juror need not give up his conscientiously-held belief “strongly supports conclusion that the jury was impermissibly coerced to render a unanimous verdict”]) or that they did not have to agree (*People v. Miller* (1990) 50 Cal.3d 954, 1009 [implying when there is a deadlock as to appropriate penalty, the court may be required to instruct that jury has choice not to deliver any verdict]).

Contrary to respondent’s assertions (RSB 117), even when taken out of the context of the broader intrusion that occurred in this case, the court’s supplemental instruction was not neutral. Instead, it was skewed to the majority view that the minority juror was not “listening to reason” or, as was implicitly suggested by the instruction itself, not properly fulfilling his/her duties and following the law. Moreover, the instruction was improperly directed to the minority juror to rethink his/her position in light of the majority. Consistent with the unsubstantiated belief that the note indicated that the minority juror was not doing that which was required, the

instruction focused on the very issue that had been reported to be the basis of the dispute between the jurors and the reason the minority juror was holding out for life – mitigating evidence relating to appellant’s family. The instruction strongly suggested that the minority juror was not deliberating properly, that the juror’s determination of penalty was based on consideration of evidence which did not constitute proper mitigation, or that his/her reliance on that mitigating evidence as the basis for a life vote was inappropriate or the result of a failure by that juror to properly weigh the mitigating and aggravating factors. The instruction also included warnings by the court that jurors should follow the law, that they should not hesitate to change their position if it is wrong, and that if jurors fail to both understand or follow the law it is the duty of the other jurors to so inform the court. These admonitions only added to the implicit message by the court, and the likely perception of all of the jurors, that by holding onto his/her beliefs the minority juror was not only “not listening to reason,” but was also not following the law or properly deliberating, and thus committing misconduct. (XV CT 3884-3885.)

The fact that the court did not specifically direct its comments to the minority juror, or mention the 11-to-1 split, did not render the instruction any less focused on the lone juror. (RSB 118.) Apart from the deadlock itself, the primary subject of the instruction was the reason attributed to the minority juror’s favor of life over death. There was no indication that any juror was unaware that the note had been submitted to the court informing it of the 11-to-1 division between the jurors, that the minority juror would “not listen to reason,” and that the juror’s unwillingness to vote for death was “based on the children.” In light of the substantive content of the court’s instruction which “clarified” the duties and considerations of the

jury, including what the court warned to be “inappropriate” and “improper” considerations as well as how the jury should consider the mitigating evidence relating to appellant’s relationship with his family, the instruction could not have been interpreted as anything but one intended to address the minority juror and his/her reasoning which was in stark contrast to the majority. As this Court has recognized, it does not matter that the judge does not know the identity of the dissenter; rather it is the fact that “their fellow jurors know, and the danger immediately arises that ‘the Allen charge can compound the inevitable pressure to agree felt by minority jurors.’” (*People v. Gainer, supra*, 19 Cal.3d at p. 850, quoting *People v. Smith* (1974) 38 Cal.App.3d 401, 406.)

Similarly, the fact that the court warned jurors not to change their position simply because “a majority of the jurors favor such a change,” did not render the instruction any less coercive or one unlikely to result in the minority juror capitulating to the majority. (RSB 117.) This is especially so because the warning by the court was preceded with the admonition that jurors “not hesitate to change [their] position if . . . convinced that it is wrong.” (XV CT 3884.) The warning in full strongly suggested that the minority juror’s reasoning was wrong as opposed to the majority; moreover, it sent a message to the majority validating their view of the evidence and also to convince the holdout that a contrary view was wrong.

Even though the court did not specifically state that the case must at some time be decided (RSB 118), there could have been no other reasonable interpretation of the court’s actions both in formulating the particular instruction as well as delivering it in the face of the deadlock. Here, without inquiring whether further deliberations would overcome the deadlock, the court simply gave instructions which presumed that the

minority juror was not properly following his/her oath and the law, and then sent the jury to continue their deliberations. The conduct of the court in this regard, especially since no instruction was given informing the jurors they did not have to surrender their conscientiously-held beliefs, or that they did not need to agree, implicitly conveyed to the jury to overcome the deadlock and to return a verdict.

Contrary to respondent's assertion (RSB 120), the record in this case substantiates that the potential for coercion arising from the court's knowledge there was a single holdout juror was in fact "realized." The magnitude of the court's intrusion during the penalty deliberations was significant, beginning with its unsubstantiated and prejudicial second-guessing of the reasoning behind the minority juror's vote, and then following with the supplemental instruction reflecting that interpretation. Far from neutral, the instruction placed additional focus on the minority juror and the basis for his/her disagreement with the majority and included admonitions which strongly suggested that by maintaining a position contrary to the majority the holdout juror was not fulfilling his/her oath and duties.

As noted above, the court took no steps to ameliorate the coercive effect of its intrusion, including the provision of instructions properly cautioning the jurors not to give up their conscientiously held beliefs simply to return a verdict (*Jimenez v. Myers, supra*, 40 F.3d at p. 981; *Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 366 [one factor to consider whether instruction is coercive is form of instruction, including whether offsetting cautionary instruction informing jurors they need not give up conscientiously held beliefs]; *Smalls v. Batista* (2d Cir. 1999) 191 F.3d 272, 279-280 ["fatal flaw of jury charge" was "the lack of any cautionary

language which would discourage jurors from surrendering their own conscientiously held beliefs”]; compare *People v. Keenan* (1988) 46 Cal.3d 478, 534 [court repeatedly cautioned that no juror should surrender his individual judgment and conscience even if it meant no unanimous decision could be reached].)

Respondent argues that because the court advised the jury that they were not to decide any question in a particular way because the majority of jurors, or any of them favor such a decision, such instructions were duplicative and unnecessary. (RSB 121.) In reaching this erroneous conclusion, respondent apparently disregards the fact that the instruction was a central part of the court’s overall intrusion which amounted to an implicitly coercive response to the jury’s deadlock. Moreover, the instruction contained a specific admonition similar to former CALJIC No. 17.41.1 which effectively advised jurors to “police” fellow jurors if they believed someone failed to understand or follow the law.²⁷ This admonition only added to the coercive impact of the instruction and the overall intrusion by the court on the jury’s deliberative process. Although the provision of CALJIC No. 17.41.1 has been determined not to violate a

²⁷This portion of the court’s supplemental instruction paraphrasing former CALJIC No. 17.41.1 is as follows:

It is important that all jurors both understand as well as follow the law. If a juror or jurors do not understand the law, the court will continue to attempt to clarify it. If a juror or jurors refuses or fails to follow the law, the court should be notified of that fact. If any juror, whether in the majority or the minority, cannot, in good conscience, follow the law, it is the duty of that juror or jurors to notify the court of that fact.

(XV CT 3884.)

defendant's constitutional rights (RSB 121), this Court has nonetheless recognized that the admonition "creates a risk to the proper functioning of jury deliberations and that it is unadvisable and unnecessary to create this risk." (*People v. Engleman* (2002) 28 Cal.4th 436, 449.)²⁸

It is within the context of the extensive intrusion by the court during the penalty deliberations in this case, including the overall substance of the instruction that was delivered in response to the jury's announcement of the 11-to-1 deadlock, that the effect of the court's failure to provide sufficient cautionary instructions must be considered. (*Jimenez v. Myers, supra*, 40 F.3d at pp. 979-980.) Here, the court's failure in this regard was exacerbated by the admonition that jurors report to the court any juror who they believed to not understand or follow the law. The "policing" admonition reinforced the tenor of the entire instruction that the minority juror was in fact not doing either of these things by disagreeing with the majority. Moreover, inclusion of that particular admonition made it even more likely that the court's instruction adversely affected the deliberations leading to the implicit coercion of unanimous death verdict by: (1) inhibiting the freedom of the minority juror to express his/her views, (2) distorting any further discussions, (3) curtailing the proper receptivity the

²⁸ In *People v. Engleman, supra*, 28 Cal.4th at p. 449, this Court explained:

[W]e believe the instruction has the potential to intrude unnecessarily on the deliberative process and affect it adversely – both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors.

majority jurors should have accorded to the lone juror, and (4) effectively allowing and/or reinforcing the majority jurors to pressure the juror that he/she was reasoning improperly or not appropriately following the law or the court's instructions. (*People v. Engleman, supra*, 28 Cal.4th at pp. 440, 445, 447.)

In this case, the jury's penalty deliberations consisted of approximately 10 hours over the course of four partial days.²⁹ The jury's note announcing the deadlock was submitted on the third day of deliberations; after receiving the supplemental instruction, the jury deliberated for 25 minutes before being excused for the weekend. On the following Monday, the last day of deliberations, the jury deliberated for only 10 minutes before announcing they had reached the unanimous verdict. (XIV CT 3876-3878; XV CT 3985.) Thus, the total length of the penalty deliberations, as well as the short amount of time the jury deliberated after the court delivered the supplemental instruction, support the conclusion that the potential coercion from the court's collective actions in response to the jury's note announcing their 11-1 deadlock was in fact "realized." (*Tucker v. Catoe* (4th Cir. 2000) 221 F.3d 600, 612 [penalty deliberations in total were 10 ½ hours; jury returned death verdict 1 ½ hours after receiving modified *Allen* charge].)

²⁹The jury's deliberations began mid-day on Wednesday, March 13, 1996; they continued on Thursday, March 14 and on Friday, March 15, 1996 when the jury was excused early to allow "feelings to cool down." The jury's verdict was announced after ten minutes of deliberations on Monday, March 16, 1996. (XIV CT 3876-3878; XV CT 3985.)

B. The Supplemental Instruction Effectively Told The Jurors That Evidence Of Appellant's Relationship With His Family Could Not Be Considered In Their Penalty Determination

Consistent with the argument that the supplemental instruction by the court was not coercive, respondent also contends that nowhere in the instruction did the court state that the jury could not consider the mitigating evidence of appellant's relationship with his family. (RSB 126.) In support of this contention, respondent erroneously focuses on the formal language of the court's instruction rather than properly examining the admonition as a whole and within its proper context. As appellant has argued, the instruction was the product of the court's improper second-guessing of the motivation behind the minority juror's vote for life over death and, accordingly, constituted an impermissible intrusion into the jury's penalty deliberations. Respondent's contention also disregards the implicitly coercive message conveyed by the supplemental instruction in its entirety as well as by the totality of circumstances under which it was given, including the fact that it: (1) focused on both the holdout juror and the basis of his/her reason for life, (2) contained numerous admonitions as to what constituted "inappropriate" and "improper considerations," and (3) was delivered when the jury was on its third day of deliberations, after the jury had announced it was deadlocked and was a single juror away from a unanimous verdict.

Respondent's assertion that it is "inconceivable that under this instruction the jury could have cast aside the evidence appellant offered in mitigation" and "accepted the narrow view of the factor (k)" evidence that appellant offers (RSB 127) is not supported by the record. Moreover, respondent's claim that no constitutional violation occurred because there is nothing to indicate that jurors "actually applied" the challenged instruction

in a way that prevented their consideration of appellant's mitigating evidence" (RSB 127), demonstrates a misunderstanding of the standard set forth by *Boyde v. California, supra*, 494 U.S. at p. 380, which is whether looking at the instruction as a whole there is a reasonable, objective likelihood that the jury was misled. (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1162-1163, implicitly overruled on other grounds in *Calderon v. Coleman* (1998) 525 U.S. 141, 146-147 [*Boyde* does not require a defendant to prove the jury has actually applied challenged instruction in an impermissible way to show that a constitutional violation has occurred].) Contrary to respondent's assertion (RSB 127), appellant has demonstrated that in addition to the implicitly coercive message conveyed by the instruction as a whole, it is precisely "the context of the proceedings" that would have led reasonable jurors to believe that mitigating evidence demonstrating sympathy for both appellant and his family could not have been considered in mitigation. (See 74 RT 8349 [trial court misled jury that they could not base penalty determination on effect it would have on anyone else].)

The mitigation evidence of appellant's character as evidenced by his relationship with his family, and particularly his four children, was substantial and thereby constituted compelling as well relevant mitigating evidence the jury was required to consider. When weighed with all mitigating and aggravating factors, jurors in this case could have found this mitigating evidence to be of significant weight so as to impose a penalty determination less than death. (See Arg. XX, *supra* [Trial Court Improperly Failed To Instruct The Jury That A Single Mitigating Factor Could Support a Penalty Less Than Death].) The brief amount of time the jury deliberated after receiving the court's supplemental instruction demonstrates that the

jurors, and especially the holdout juror, were misled by the instruction with regard to the mitigating evidence. As such, the instruction precluded the jurors from giving meaningful consideration and effect to significant mitigation evidence regarding appellant's character as demonstrated by his relationship with his family. (*Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047, 1051 [short period of deliberation was more likely due to focus placed on erroneous and misleading instruction suggesting that the defendant would be paroled if not sentenced to death].)

C. Prejudice

Appellant has argued that the trial court's intrusion into the jury's penalty deliberations, which included the supplemental instruction, was coercive and precluded the jury from giving meaningful consideration and effect to mitigating evidence concerning appellant's family as it related to his character. The intrusion subverted appellant's right to trial by jury, usurped the fact-finding role of the jury, and was so inherently prejudicial that it constituted reversible per se error. Even assuming, arguendo, that the intrusion is not per se reversible error, it cannot be determined to be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The length of the penalty deliberations demonstrate that the jury's determination of which penalty to impose was close notwithstanding the factors in aggravation presented by the prosecution. Respondent's claim that the instruction was harmless in light of the numerous and substantial aggravating factors in relation to the minimal defense mitigation (RSB 128-129) is undermined by the brevity of deliberations following the instruction. (*Coleman v. Calderon, supra*, 210 F.3d at p. 1051.) "At the very least, [this Court] 'cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that

the judgment was not substantially swayed by the error.” (*Ibid.*)

Accordingly, reversal of the penalty determination is required.

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XXXI

**THE INSTRUCTION DEFINING THE SCOPE OF THE
JURY'S SENTENCING DISCRETION, AND THE NATURE
OF ITS DELIBERATIVE PROCESS, VIOLATED
APPELLANT'S CONSTITUTIONAL RIGHTS, AND
REQUIRES REVERSAL OF THE DEATH JUDGMENT**

In his supplemental opening brief, appellant argued that the modified version of CALJIC No. 8.88 which was delivered to appellant's penalty jury was constitutionally flawed in numerous ways. (ASOB 175-188.)

Respondent disagrees, again relying entirely on decisions of this Court rejecting arguments similar to those made by appellant. (RSB 131-132.)

For all the reasons set forth in appellant's supplemental opening brief, appellant respectfully asks this Court to reconsider its prior rulings in this area, hold that instructing the jury pursuant to CALJIC No. 8.88 violated appellant's fundamental constitutional rights, and reverse the judgment of death.

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XXXII

**APPELLANT'S DEATH SENTENCE VIOLATES
INTERNATIONAL LAW AND THE EIGHTH AND
FOURTEENTH AMENDMENTS**

In his supplemental opening brief, appellant argued that capital punishment violates the Eighth Amendment's prohibition because it is contrary to international law, fundamental precepts of international human rights and evolving international norms of decency. Appellant further argued that, even if capital punishment itself does not violate the Eighth Amendment, using it as a regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does. (ASOB 189-193.) Respondent's opposition to appellant's claims rests solely upon the ground that this Court has previously rejected such arguments. (RSB 133.) Appellant is aware of this Court's decisions in this area, but respectfully requests this Court to reconsider its position on this issue and to reverse the judgment of death.

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CONCLUSION

For all of the reasons stated above and the briefing previously filed in this case, the judgment of conviction and sentence of death in this case should be reversed.

DATED: September 9, 2008

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



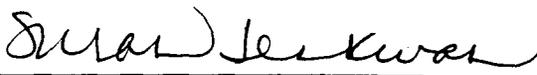
SUSAN TEN KWAN
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Attorneys for Appellant

**CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.520(d))**

I, Susan Ten Kwan, am the Senior Deputy State Public Defender assigned to represent appellant, Andre S. Alexander, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 24,714 words in length excluding the tables and certificates.

DATED: September 9, 2008



SUSAN TEN KWAN

DECLARATION OF SERVICE

Re: *People v. Alexander*

No. S053228

I, Victoria Morgan, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105, that I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

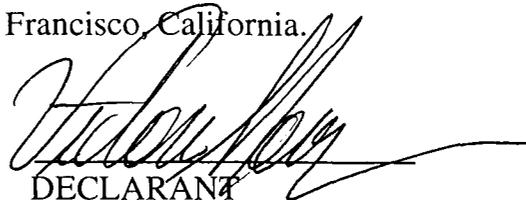
Stacy Schwartz
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Mr. Andre S. Alexander
(Appellant)
[To Be Hand-Delivered by Counsel]

Each said envelope was then, on September 9, 2008, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on September 9, 2008, at San Francisco, California.


DECLARANT