No. S074624

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TOMMY JESSE MARTINEZ,

Defendant and Appellant.

Automatic Appeal from a Judgment of Death
of the Superior Court of the State of California
County of Santa Barbara
Case Nos. SM 103236; SM 101161
Honorable Rodney S. Melville

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN INQUIRY AS TO THE COMPETENCE OF JUROR NUMBER 12 – DANA W., AND HENCE, NOT ONLY ABUSED ITS DISCRETION IN VIOLATION OF STATE LAW, BUT ALSO DEPRIVED APPELLANT OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

A. Factual and Procedural Background.

Respondent seeks to obfuscate the trial record. (RB 62-71)[1] First, Respondent suggests that Appellant Martinez made only one challenge for cause as to Juror No. 12 – Dana W. (RB 62-64). However, the record is clear that Appellant in fact made two challenges for cause, both of which were denied by the trial court. (AOB 97-100).[2]

Second, Respondent asserts that Appellant Martinez could have exercised a peremptory challenge as to Juror No. 12 – Dana W. (RB 70). However, the issue regarding the communication between Tom Barnes of the District Attorney's Office and Juror No. 12 – Dana W. (684037) which resulted in the inquiry by Juror No. 12 as to whether investigator Barnes "could get her off the jury" did not take place until after the jury had been empaneled. (AOB 100-104).

Third, Respondent contends that the trial court was not required to conduct an inquiry as to Juror No. 12 – Dana W. (684037) regarding her competence and/or her inquiry as to Investigator Barnes on the question of whether he could get her off the jury. (RB 67-70). However, Respondent

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[1] All references to "RB" are references to Respondent's Brief filed by the Attorney General on behalf of the People of the State of California, Plaintiff and Respondent.

[2] All references to "AOB" are to Appellant's Opening Brief filed on behalf of Appellant, Tommy Jesse Martinez, Jr.

fails to address in detail the fact that the court conducted such an inquiry as to Juror No. 6 (Barbara C.) (016264) regarding a prankster call that she had received. (RB 64-66) (AOB 100-104).

Fourth, Respondent asserts that the unanswered questions which remain regarding whether Juror No. 12 was biased, incompetent, and/or otherwise able to serve as a juror were previously answered during voir dire, particularly when Juror No. 12 stated that she could be fair and impartial, notwithstanding her knowledge of Appellant and his juvenile record. (RB 68). The assurance by Juror No. 12 – Dana W. during voir dire was clearly brought into question by virtue of her subsequent inquiry as to whether Investigator Barnes "could help her get off the jury," thereby raising critical questions concerning her motivation and desire to get off the jury as well as whether the request by D.A. Investigator Barnes for "disciplinary reports" further refreshed and/or reinforced her knowledge regarding Appellant, thereby impacting her ability to serve as a fair and impartial juror. (AOB 100-104 and 106-108).

Finally, Respondent suggests that Appellant has somehow waived the issue presented here with respect to "the points he now seeks to raise" as to the competence of Juror No. 12 – Dana W. (684037) and the court's duty of inquiry. (RB 69). A review of the record makes clear that Appellant carefully preserved his concerns regarding Juror No. 12 – Dana W. (684037) regarding her relationship and knowledge of Appellant Martinez, particularly his "extensive juvenile record," the fact that he had not made "real good choices" as well as the reservations concerning the severity of the charges, in light of the two challenges for cause as to Juror No. 12, which were denied by the trial court. (AOB 97-100). The record further reflects that after the communication by the D.A. Investigator Barnes to

Juror No. 12 – Dana W. (684037), that Juror No. 12 inquired as to whether Investigator Barnes "could help her get off the jury." Defense counsel then properly sought an inquiry concerning the competence of Juror No. 12 to serve, that is, whether she was "willing and able and fit for further duty." The trial court emphatically declined to conduct such an inquiry when it stated: 'I'm not willing to do that, Counsel. . . ." (AOB 97-104). Under these circumstances, Appellant clearly preserved "the points" he raises in his appeal concerning Juror No. 12.

B. Communication Between D.A. Investigator Barnes and Juror No. 12 – Dana W.

After the jury had been empaneled (CT 01125-01127), the prosecution team sought to obtain any disciplinary reports that might exist in the juvenile hall files of Appellant Martinez. (A/C CT 00516).[3] D.A. Investigator, Tom Barnes, contacted the juvenile hall in Santa Barbara and spoke with Juror No. 12 – Dana W. (684037) as reflected in the following memorandum Investigator Barnes prepared concerning his communication with Juror No. 12 – Dana W. that was presented to the trial court which provides in pertinent part as follows:

> I phoned Juvenile Hall in Santa Maria and spoke with "Dana" [Juror No. 12 (684037)]. After explaining what I needed, Dana spoke with her supervisor (name unknown) and said that I would need a court order in order to access the juvenile file.

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[3] All references to A/C CT are references to the Accuracy/Correction Clerk's Transcript which was augmented and corrected per Orders of the Santa Barbara Superior Court of November 5, 2003, January 5, 2004, February 19, 2004 and certified for accuracy on March 8, 2004 by the Santa Barbara Superior Court. The California Supreme Court certified the record for accuracy on May 27, 2004.

> Over the next 30 or so minutes, in coordinating this matter with Tracy Grossman and Juvenile Hall, I spoke with Dana two or three additional times. During one of these subsequent calls, Dana informed me that she was "on the jury panel" for the Martinez case, to which I responded that I found it unusual that one side or the other hadn't excused her. I then asked Dana [Juror No. 12 (684037)] her last name and she stated "W." Dana, somewhat jokingly, then asked [i]f [sic] I could get her off the jury, and I responded that I could not, and I terminated the call.

(A/C CT 00516).

Here, D.A. Investigator, Tom Barnes, characterized the comment by Juror No. 12 (Dana W.) regarding her request for his assistance to "get her off the jury" as being "somewhat jokingly." (A/C CT 00516). Defense counsel, Peter Dullea, interpreted this characterization as being "half joking." (CRT 1458).[4] Whether the comment can be characterized as "half joking" as noted by defense counsel, Peter Dullea, or "somewhat jokingly" as noted by D.A. Investigator, Tom Barnes, the only person who can speak with authority regarding the tone of the comment was Juror No. 12 – Dana W. (684037). Defense counsel, Peter Dullea, sought the opportunity to explore the attitude reflected by the tone of the comment, but was precluded from doing so by the trial judge who stated: "I'm not willing to do that, Counsel." (CRT 1458).

Moreover, the nature of the comment whereby Juror No. 12 – Dana W. (684037) solicited the assistance of a member of the prosecution team to help "get her off the jury" similarly was not explored or pursued by the trial

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[4]CRT references the Corrected Transcript Pages to the Reporter's Transcript on appeal per the Trial Court's 12-10-90 Order; see also (A/C CT 00304-00314).

court as to Dana W. – Juror No. 12 (684037). Again, the trial court precluded defense counsel from exploring or pursuing the nature of the comment by Dana W. – Juror No. 12 (684037) as reflected in the statement by the trial judge that: "I'm not willing to do that, Counsel." (CRT 1458).

Thus, whether Dana W. – Juror No. 12 (684037) was half joking, half serious, or completely serious, was not explored or pursued by the trial court. Only Juror No. 12 could explain both the tone and nature of her comment to the prosecution team in which she requested their assistance to help her get off the jury. As a consequence, numerous questions remain regarding both the tone and nature of the inquiry by Dana W. – Juror No. 12 (684037) as noted in Appellant's Opening Brief (AOB 106-107). These questions include but are not limited to the following:

(1) Whether the motivation of Dana W. - Juror No. 12 (684037) to get off the jury, as expressed to the D.A. Investigator, stemmed from either: (a) her knowledge that Appellant Martinez had an "extensive juvenile record"; (b) her opinion that Appellant Martinez had not made "better choices" or "real good choices" in his lifetime; (c) her concern that this was a "very serious case" as reflected in the severity of the charges; and/or (d) all of the above.

(2) Whether her desire to get off the jury was as a consequence of her belief that she could not be a fair and impartial juror in light of: (a) her knowledge that Appellant Martinez had an "extensive juvenile record", (b) her opinion that Appellant Martinez had not made "better choices" or "real good choices" in his lifetime; (c) her concerns that this was a "very serious case" as reflected in the severity of the charges; and/or (d) all of the above.

(3) Whether the request by the D.A. Investigator for "disciplinary reports" as to Appellant Martinez further refreshed and/or reinforced: (a) her knowledge concerning his "extensive juvenile record", (b) her opinion concerning his failure to make "real good choices" in his lifetime, and (c) her concerns relative to the severity of the charges, thereby impacting her ability to serve as a fair and impartial juror.

These questions and more remain unanswered as a consequence of the trial court's refusal to afford defense counsel the opportunity to inquire of Dana W. – Juror No. 12 (684037) regarding both the tone and nature of her comment regarding her request for assistance from the prosecution team to help her get off the jury as well as the failure of the trial court to conduct its own independent inquiry in this regard. (CRT 1458).

C. Abuse of Discretion Standard.

Respondent argues that the trial court did not abuse its discretion when it precluded defense counsel from inquiring of Dana W. – Juror No. 12 (684037) as to her communication with D.A. Investigator, Tom Barnes, regarding whether he "could get her off the jury." Further, Respondent argues that the trial court did not abuse its discretion by failing to independently inquire of Dana W. – Juror No. 12 as to her statement to the investigator regarding getting her off the jury. (RB 67-70). A review of the record demonstrates that the trial court abused its discretion by failing to permit an inquiry as to the competence of Juror No. 12 – Dana W. (684037) in light of her communication with the District Attorney investigator wherein she inquired as to whether he "could get her off the jury." (A/C CT 00516). Defense counsel, Peter Dullea, sought to inquire of Dana W. – Juror No. 12 (684037) as to whether she was "willing and able and fit for further duty in light of the comment" to the D.A. investigator asking if he

"could get her off the jury." (CRT 1458-1459 and A/C CT 00516). The trial court responded: "I'm not willing to do that, Counsel." (CRT 1458).

At the time that the trial court made the determination that it would not permit defense counsel to inquire as to the competence of Dana W. – Juror No. 12 (684037) and further refused to independently inquire as to the competence of Dana W. – Juror No. 12 (684037), the trial court had just permitted both the prosecution and the defense to inquire as to the competence of Juror No. 6 – Barbara C. (016264) regarding a prank phone call that she had received. Judge Melville not only inquired of Juror No. 6 – Barbara C. (016264) regarding the phone call as well as whether it would affect her decision in this case, but also permitted both the prosecution and defense counsel to ask questions of Juror No. 6. (CRT 1451-1460, A/C CT 00513, and AOB 100-103).

By contrast, Judge Melville not only failed to inquire of Juror No. 12 – Dana W. (684037) as to her comment seeking assistance from the D.A. investigator to help her "get off the jury," but also precluded defense counsel from conducting any inquiry in this regard. Of note, the situation involving Juror No. 12 – Dana W. (684037) presented a much more compelling circumstance for conducting an inquiry regarding the competence of Juror No. 12 – Dana W., and the import of her comment to the District Attorney investigator in which she sought his assistance to help "get her off the jury."

The court had previously conducted an inquiry as to the fitness of Juror No. 12 – Dana W. (684037) to serve on the jury during voir dire and had denied two challenges for cause by the defense. During voir dire, the court clearly learned that Juror No. 12 – Dana W., recognized the name of Tommy Martinez from the news media and other sources concerning the

case, because he had been at the Santa Maria Juvenile Hall where she worked. (CT 04198 and 04187). Further, she had already formed the opinion that this was a "very serious case." (CT 04199). She readily acknowledged that she would be inclined towards the death penalty in the event of a guilty verdict with special circumstances, because of the severity of the charges. (RT 1088-1089). After this information came to light during voir dire, defense counsel challenged Dana W. – Juror No. 12, for cause predicated on her leaning towards the death penalty which would impose a substantial burden on the defense. (RT 1101). The challenge for cause was denied. (RT 1103).

During further voir dire by defense counsel, Dana W. – Juror No. 12 (684037) acknowledged that it would be difficult for her to serve on the jury because she knew the defendant as well as the severity of the charges. (RT 1155). The court then conducted confidential questioning of Dana W. – Juror No. 12 (684037) outside the presence of the other prospective jurors. (RT 1154, 1155, and 1157). The court then inquired as to whether Dana W. – Juror No. 12 (684037) could be a "fair juror" in this case, to which she indicated a hesitation as reflected in the following colloquy:

> Q. (JUDGE MELVILLE): Does the - - does the knowledge that you have about him (Appellant Martinez) prevent you from being a fair juror in this case?
>
> A. I don't -- how do I want to say this? Just I am totally aware that he had an extensive juvenile record, and I think that he's had a lot of choices to make in his lifetime, and I don't see that he's made any better choices.

(RT 1158-1159). After further questioning by the court, Dana W. – Juror No. 12, said that she could be impartial in this case. (RT 1159-1160). However, in follow-up questions by defense counsel, Peter Dullea, Juror

No. 12 – Dana W. (684037) again reiterated that she knew Tommy Martinez from her work at the juvenile hall and reaffirmed that Tommy Martinez had made a lot of choices but that in her judgment they had not been "real good choices." (RT 1160-1161). Defense counsel, Peter Dullea, then made a second challenge for cause as to Juror No. 12 – Dana W. (684037) in light of the fact that she had been a supervisor over Martinez at juvenile hall and knew that he had committed prior offenses which were not otherwise admissible on the guilt phase of the trial. (RT 1181). The court also denied the second challenge for cause. (RT 1182).

Therefore, Judge Melville was well aware of the fact that Dana W. – Juror No. 12 (684037) had been a supervisor over Martinez at the Santa Maria Juvenile Hall where she worked, that she was aware of his "extensive juvenile record," had concluded that he had not made "real good choices" in his lifetime, knew that he had been incarcerated at the juvenile hall for prior offenses, considered the case to be "very serious," acknowledged that she would be inclined towards the death penalty, and expressed reservations when the court inquired as to whether she could be a fair juror. (AOB 97-100). These facts were clearly in the record before the trial court and were also the basis for two motions to challenge Dana W. – Juror No. 12, for cause. Consequently, Judge Melville was well aware of these facts and circumstances when defense counsel, Peter Dullea, sought to inquire as to the competence of Dana W. – Juror No. 12 (684037) in light of the subsequent communication between Dana W. – Juror No. 12 and the District Attorney investigator, Tom Barnes, in which she sought his assistance to help "get her off the jury."

Respondent suggests that the information disclosed during voir dire as to Dana W. – Juror No. 12 regarding her knowledge of Martinez and his

extensive juvenile record, her conclusion that he had not made "real good choices" in his lifetime, her opinion that this was a "very serious case," her inclination towards the death penalty, and her hesitation on the question of whether she could be a "fair juror" should have been restated by defense counsel as a basis to conduct a further inquiry as to the competence of Juror No. 12 – Dana W. Respondent further suggests that the failure to restate these facts which had already been developed and noted in the record, as well as considered by the trial court when it denied two challenges for cause, should not be considered by this Court in determining whether the trial court abused its discretion since these grounds were not restated by defense counsel. Respondent's argument misses the mark.

Here, the record reflects that the trial court was well aware of the knowledge, opinions and conclusions that Juror No. 12 – Dana W. had regarding Martinez. This information was already before the court, formed the basis for two challenges for cause, and did not need to be further restated as an additional ground for conducting an inquiry as to the competence of Juror No. 12 – Dana W. by defense counsel as the point had been previously made and the trial court was clearly aware of this information as reflected in the record. Thus, when Juror No. 12 – Dana W. sought the assistance of the D.A. investigator to help "her get off the jury," the trial court was charged with the responsibility of making a determination as to whether such an inquiry was necessary. The trial court simply concluded that no such inquiry would be made nor was it necessary as reflected in the following:

> THE COURT: I'm not willing to do that, Counsel. Every one of these jurors would like to not be on this jury. . . . [T]hat you accepted the jury. And, you know, I just think that what she's expressing there is not -- doesn't relate to her

> qualifications. It just relates to, you know, a feeling that we would all have if we sat there. "Is there any way I don't have to do this?"
>
> And to then go back and give her an option, another option, not to serve is -- is -- you know, if we gave that to each juror, I'm sure they would take it. . . . [It] is something I'm not willing to delve into. She'd just tell us she doesn't want to be here, you know, and so would the other 14, 13, if we could ask them.

(CRT 1458-1459). (AOB 103-104).

Here, the trial court concluded that Juror No. 12 – Dana W., wanted to get off the jury but refused to allow counsel to inquire as to the basis for her motivation or desire not to serve on the jury. The court asserted that all jurors wanted to get off the jury and she was no different. This reasoning could well have been wrong about the other jurors and was certainly wrong in its refusal to see the ways in which she was biased against Appellant. The court failed to independently inquire as to the basis for the motivation or desire of Juror No. 12 – Dana W. (684037) not to serve on the jury.

Thus, this leaves numerous relevant questions as outlined above regarding the motivation and/or desire of Dana W. – Juror No. 12 (684037) to get off the jury and whether this motivation or desire related to her knowledge that Appellant Martinez had an extensive record, her opinion that Appellant Martinez had not "made better choices" or "real good choices" in his lifetime, and/or her concern that this was a "very serious case" as reflected in the severity of the charges.

Further, it is unknown whether the request by the D.A. investigator for "disciplinary reports" as to Appellant Martinez refreshed and/or reinforced her knowledge, opinions, and concerns noted above. Thus, for

Respondent to conclude that there is no relationship between Dana W. – Juror No. 12's request for assistance from the D.A. investigator to help "her get off the jury" and the aforementioned knowledge, opinions and concerns reflected above is without merit. At a minimum, the court was duty bound to conduct an inquiry to determine, as requested by defense counsel, whether Dana W. – Juror No. 12, was "willing and able and fit for further duty," e.g., competent, in light of her request for assistance in getting off the jury. In light of these circumstances, the trial court abused its discretion in failing to conduct an appropriate inquiry as to the competence of Juror No. 12 – Dana W., to serve on the jury, particularly in light of her communication to the D.A. investigator regarding assistance in helping her "get off the jury."

Moreover, the record reflects that the court did not act in an even-handed manner in this regard when such an inquiry was conducted as to Juror No. 6 – Barbara C. (016264) which involved a prankster call, but refused to conduct a similar inquiry as to Juror No. 12 – Dana W. (684037) in which she had requested that the D.A. investigator assist her in getting off the jury.

In People v. Farnam (2002) 28 Cal.4th 107, 140-141 (2002), this Court reiterated the rule that it is the trial court's duty to make a reasonable inquiry when put on notice to determine whether a juror should be discharged and that the failure to make such an inquiry is error as reflected in the following:

> When a trial court is put on notice that good cause to discharge a juror may exist, "it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error." (People v. Burgener (1986) 41

Cal.3d 505, 520 [224 Cal.Rptr. 112, 714 P.2d 1251], overruled on another point in People v. Reyes (1998) 19 Cal.4th 743 [80 Cal.Rptr.2d 734, 968 P.2d 445]; see People v. Williams (1997) 16 Cal.4th 153, 231 [66 Cal.Rptr.2d 123, 940 P.2d 710].)

(See also AOB 104-108).

It follows from People v. Farnam that the trial court committed error when it failed to conduct an inquiry as to the competence of Dana W. – Juror No. 12 (684037) since the court was clearly placed on notice in light of her comment to the D.A. investigator in which she solicited his assistance to help her "get off the jury."

D. Due Process and Fair Trial.

The trial judge refused to conduct an inquiry into the competence, that is, the willingness, ability, and fitness of Juror No. 12 – Dana W. (684037) to serve as a juror. The failure to conduct such an inquiry undermined Appellant's right to due process and a fair and reliable sentencing determination by an impartial jury, in violation of Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 16, and 17 of the California Constitution. (See Zant v. Stephens (1983) 462 U.S. 862, 879; Woodson v. North Carolina (1976) 428 U.S. 280, 304 [plurality opinion]; Johnson v. Mississippi (1988) 486 U.S. 578, 584-585; In re Hamilton (1999) 20 Cal.4th 273; People v. Nesler (1997) 16 Cal.4th 561, 577.

Respondent argues that because Juror No. 12 – Dana W. (684037) had previously stated that she would be fair and impartial and also notes that there is no indication to the contrary, that Appellant was not deprived of a fair trial or due process. This argument is not supported by the record. First, Juror No. 12 – Dana W. initially did not state that she could be a fair

juror, and in fact, expressed hesitation when the question was posed to her by the court during voir dire as follows:

> Q. (BY THE COURT):Does the -- does the knowledge that you have about him [Appellant Martinez] prevent you from being a fair juror in this case?
>
> A. I don't -- how do I want to say this? Just I am totally aware that he had an extensive juvenile record, and I think that he's had a lot of choices to make in his lifetime, and I don't see that he's made any better choices.

(RT 1158-1159). Thus, contrary to the assertion by Respondent, Juror No. 12 – Dana W. did not state that she could be a fair juror. After further inquiry by the court, Juror No. 12 – Dana W. did indicate that she could be impartial in this case. (RT 1159-1160). Again, this was during voir dire in which Juror No. 12 – Dana W. acknowledged that it would be difficult for her to serve on the jury because she knew the defendant as well as the severity of the charges. (RT 1155). Further, she advised the court that she was aware of his "extensive juvenile record." (RT 1159). In follow-up voir dire by defense counsel, Peter Dullea, Juror No. 12 – Dana W. again reiterated that she knew Appellant Martinez from her work at juvenile hall and further reaffirmed that he had made a lot of choices but that in her judgment they had not been "real good choices." (RT 1160-1161).

After the jury had been empaneled and sworn on May 12, 1998, the court was recessed until May 19, 1998 (CT 01125-01127). In the interim, on May 15, 1998, Juror No. 12 – Dana W. was contacted by the D.A. investigator, Tom Barnes, who was seeking to obtain any disciplinary reports that might exist in Appellant Martinez's juvenile hall file. In fact, D.A. Investigator Barnes spoke with Juror No. 12 – Dana W., three or four times during the 30-minute period. He spoke with Juror No. 12 – Dana W.

regarding her being on the "jury panel" for the Martinez case and even discussed the fact that neither side had excused her. In the context of this discussion, Juror No. 12 – Dana W., asked this member of the prosecution team whether he "could get her off the jury." (A/C CT 00516; see AOB 101-102).

This subsequent communication with a key member of the prosecution team, after the jury had been impaneled, goes to the heart of whether Juror No. 12 – Dana W., could in fact be impartial as a juror, that is, whether she was competent. Defense counsel clearly raised the issue as to whether Juror No. 12 – Dana W., was "willing and able and fit for further duty in light of the comment." (RT 1458).

Thus, the expressed hesitation as to whether she could be a fair juror in light of her knowledge of Appellant Martinez and his extensive juvenile record, her opinion that he had not made "better choices" or "real good choices" in his lifetime, and her concern that this was a "very serious case" as reflected in the severity of the charges, coupled with her question to the D.A. investigator concerning if he could "get her off the jury," whether somewhat joking or serious, raises a number of obvious and important questions regarding the competence of Juror No. 12 – Dana W. These questions remain unanswered in light of the failure of the trial court to conduct an appropriate inquiry as to the competence or impartiality of Juror No. 12 – Dana W. These questions also include whether the request by the D.A. Investigator for "disciplinary reports" as to Appellant Martinez further refreshed and/or reinforced her knowledge concerning Appellant's "extensive juvenile record," her opinions concerning his failure to make "real good choices" in his lifetime, and/or her concerns relative to the severity of the charges. See ante at pp.5-6.

These questions regarding the motivation and desire of Dana W. – Juror No. 12 regarding her jury service as well as the potential impact of the request by the D.A. investigator for "disciplinary reports" as to Appellant Martinez may have impacted her ability to serve as a fair and impartial juror. Consequently, the failure of the trial court to conduct an appropriate inquiry deprived Appellant Martinez of his rights to a fair trial and due process. The assertion by Respondent that there is no indication that Juror No. 12 – Dana W. would not be fair or impartial is belied by this record.

Moreover, Respondent asserts that jurors are presumed to follow the court's instructions, and cites a number of cases to support this proposition. (RB 70). Further, Respondent references CALJIC 1.0 regarding the respective duties of the jury not to be influenced by passion or prejudice and to determine the facts from the evidence received in the trial. (RT 70). In light of this instruction and the presumption that jurors follow the court's instructions, Respondent infers that Juror No. 12 – Dana W. (684037) properly followed the court's instruction, and hence, Appellant Martinez was not deprived of his right to a fair trial or to due process. The fundamental flaw in this argument is that it presumes that Juror No. 12 – Dana W., was competent to serve on the jury, that is, impartial. Thus, the presumption that Respondent relies on that jurors follow the instructions is predicated on the jurors being qualified to serve on the jury to begin with, that is, competent, i.e., impartial.

This point is best illustrated in the Supreme Court decision of Wainwright v. Witt (1985) 469 U.S. 412, 424, wherein the high court held as follows:

> We therefore take this opportunity to clarify our decision in Witherspoon [(1968) 391 U.S. 510], and to reaffirm the

> above-quoted standard from Adams [(1980) 448 U.S. 38] as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

In People v. Ghent (1987) 43 Cal.3d 739, 767, this Court adopted the aforementioned review standard. See 5 WITKIN AND EPSTEIN, CALIFORNIA CRIMINAL LAW, 3d ed., §§ 467-468 at pp. 665-668 (West Group 2000). It follows from both Wainwright v. Witt and People v. Ghent that both the federal and state standard for applying the presumption that the jurors follow the court's instructions is predicated on the juror being qualified to serve on the jury to begin with. The express holding of Wainwright v. Witt, which was adopted by this Court in People v. Ghent, is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Thus, in order for the presumption that the jurors follow the court's instructions to apply, the juror must be deemed competent, i.e., impartial, to begin with.

The record indicates that Juror No. 12 – Dana W., was not qualified to serve on this jury. This was brought to the court's attention following her communication with the D.A. investigator wherein she sought his assistance to help her "get off the jury." This request by Juror No. 12 – Dana W., whether joking or serious, was sufficient to put the trial court on notice that a further inquiry as to the competence of Juror No. 12 was in order. This is particularly true in light of the information disclosed during voir dire regarding her familiarity with Appellant Martinez prior to being called as a juror in the context of her work (his "extensive juvenile record,"

her opinions that Appellant Martinez had not made "better choices" or "real good choices" in his lifetime). Under these circumstances, the presumption that a juror follows the court's instructions does not apply in light of the questions raised regarding the qualifications of Juror No. 12 – Dana W., to serve on the jury to begin with.

E. Prejudice.

In this Court's recent decision of People v. Stanley (2006) 39 Cal.4th 913, 950, this Court concluded that juror misconduct, such as reading a newspaper article and inadvertent receipt of information outside the court proceedings, gives rise to a rebuttal presumption of prejudice. Said the Court:

> Juror C.'s reading of the newspaper article, and "his inadvertent receipt of information outside the court proceedings," was misconduct giving rise to a rebuttable presumption of prejudice. (People v. Zapien (1993) 4 Cal.4th 929, 994 [17 Cal.Rptr.2d 122, 846 P.2d 704]; see also People v. Holloway (1990) 50 Cal.3d 1098, 1108 [269 Cal.Rptr. 530, 790 P.2d 1327].) " ' "[W]hether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed. . . .

Id.

It follows from People v. Stanley that the communication by Dana W. – Juror No. 12, to the D.A. investigator wherein she in effect sought his assistance to help "her get off the jury" should similarly give rise to a rebuttable presumption of prejudice. As discussed below, Respondent has failed to rebut the claims of prejudice asserted by Appellant Martinez as to

both the guilt and penalty phases whether said prejudice be presumed or otherwise.

(1) Guilt Phase

Respondent asserts that Appellant Martinez was not prejudiced in the guilt phase by virtue of the fact that Juror No. 12 – Dana W., was well aware of his extensive juvenile record. (RB 70). As noted, Juror No. 12 – Dana W., stated that she was "totally aware that he [Martinez] had an extensive juvenile record." (RT 1159). This extensive juvenile record was the subject of the communication by the D.A. Investigator, Tom Barnes, who inquired of Juror No. 12 – Dana W. concerning the "disciplinary reports" that may exist in the juvenile hall files of Appellant. (A/C CT 00516).

The trial record confirms that the juvenile record was extensive and included the following: (1) the juvenile adjudication of the attempted robbery at Pepe's Liquors on February 23, 1994; (2) the juvenile adjudication of grand theft of person of Alicia Anaya at the Delicias De Mexico Ice Cream Shop on April 24, 1992; (3) the juvenile adjudication of possession of a deadly weapon, to wit, a hunting knife on April 22, 1995 at the Strawberry Festival; and (4) the Wellencamp incident of September 1, 1993, regarding the possession of a dagger. (AOB 111-112 and 53-54).

The request by the D.A. investigator to Juror No. 12 – Dana W. for the disciplinary reports of Appellant Martinez served to both highlight and emphasize the importance of his juvenile record. However, the juvenile record was not relevant to the guilt phase of the proceedings. This request by the D.A. investigator ultimately precipitated the request by Juror No. 12 – Dana W., for assistance in being removed from the jury. (A/C CT 00516). Thus, the guilt and innocence of Appellant was determined by a

juror who had knowledge of his extensive juvenile record which was inadmissible in the guilt phase, thereby tainting the jury and depriving Appellant Martinez of his rights to a fair and impartial jury.

As this Court noted in People v. Holloway (1990) 50 Cal.3d 1098, 1112, a criminal defendant is entitled to be tried by 12 competent jurors, not 11. The prejudice suffered by Appellant Martinez as a consequence of Juror No. 12 – Dana W. serving on the jury was compounded by the fact that she served as the jury foreperson during the guilt phase deliberations. (RT 2744-2750).

Respondent seeks to rely on the indication by Juror No. 12 – Dana W. during voir dire to the court that her knowledge of Appellant would not affect her ability to be impartial in this case. (RB 70) (RT 1159-1160). However, after being sworn as a juror, when the D.A. investigator sought to obtain the disciplinary reports of Appellant Martinez, Juror No. 12 – Dana W. sought his assistance in being removed from the jury. (CT 01125-01127 and A/C CT 00516). Respondent also asserts that trial counsel could have exercised a peremptory challenge as to Juror No. 12 following the denial of his challenge for cause. (RB 70). This argument misses the mark. At the time that the D.A. investigator sought the disciplinary reports from Juror No. 12 – Dana W., the jury had already been empaneled and sworn, and hence, a peremptory challenge was no longer available to Appellant Martinez. (CT 01125-01127 and A/C CT 00516).

Thus, the suggestion that trial counsel should have exercised a peremptory challenge and failed to do so is simply a red herring. The critical event resulting in defense counsel, Peter Dullea, seeking to inquire as to whether Juror No. 12 – Dana W. was "willing and able and fit for further duty in light of the comment" to the D.A. investigator took place

after the jury had been empaneled and Dana W. had become sworn as Juror No. 12. (CRT 1458-1459 and A/C CT 00516).

(2) Penalty Phase.

Respondent asserts that Appellant's argument of prejudice during the penalty phase predicated on the prosecutor's closing argument is "sheer speculation." (RB 70-71). Respondent argues that there is no evidence to support the argument that the prosecutor "remembered" Juror No. 12's comment made during voir dire, and hence, directed his argument regarding Appellant's "choices" at Juror No. 12 – Dana W. The record speaks for itself. In her juror questionnaire (CT 04185-04216) Juror No. 12 – Dana W. (684037) noted that she was employed as the lead clerk in the Santa Barbara Probation Department at the Juvenile Hall located in Santa Maria and had been so employed for twenty years. (CT 04187-04188). She also noted that she recognized the name Tommy Martinez from news media and other sources concerning the case, because he had been at the Santa Maria Juvenile Hall where she worked. (CT 04198 and 04187). Thus, there is no doubt that D.A. Sneddon was well aware of the fact that Juror No. 12 – Dana W. had not only worked at the Santa Barbara Probation Department for twenty years, but she knew Appellant Martinez from her work there. During voir dire, she acknowledged that it would be difficult for her to serve on the jury because she knew Appellant Martinez as well as the severity of the charges. (RT 1155). She made it known during confidential questioning that she was "totally aware that he [Martinez] had an extensive juvenile record." (RT 1158-1159). She also opined that "he's [Martinez] had a lot of choices to make in his lifetime, and I don't see that he's made any better choices." (RT 1159). In response to further questioning by defense counsel, Peter Dullea, Juror No. 12 – Dana W. reiterated that she

knew Martinez from her work at the juvenile hall and reaffirmed that he had made a lot of choices but that in her judgment they had not been "real good choices." (RT 1160-1161). Thus, Dana W. – Juror No. 12's employment at the Santa Maria Juvenile Hall, her knowledge of Appellant Martinez's extensive record, her concern regarding the severity of the charges, and her opinion that he had not made "real good choices" in his lifetime certainly could not have gone unnoticed by District Attorney Sneddon, who was present throughout the proceedings. (RT 1066-1257).

Certainly the memorandum, dated May 15, 1998, from D.A. Investigator, Tom Barnes, to D.A. Tom Sneddon reinforced the fact that Dana W – Juror No. 12 worked at juvenile hall and was on the jury. (A/C CT 00516). The memorandum was provided to the court and was the subject of much discussion as to whether a further inquiry should be made of Juror No. 12 – Dana W. in light of her comment to the D.A. investigator as to whether he "could get her off the jury." (A/C CT 00516, RT 1457-1459). Moreover, Juror No. 12 – Dana W. served as the jury foreperson during the guilt phase deliberations. (RT 2744-2750).

The assertion by Respondent that District Attorney, Tom Sneddon, who is an experienced prosecutor, somehow forgot about Dana W. – Juror No. 12's comments regarding "better choices" and "not real good choices" (RT 1159-1160) is simply without merit. The record clearly reflects that D.A. Sneddon was most certainly aware of Juror No. 12 – Dana W. as she was the subject of a memorandum directed to his attention, which was brought to the court's attention because of the communication between Dana W. – Juror No. 12 and one of his investigators, Tom Barnes. (A/C CT 00516).

In the penalty phase closing argument when addressing the question of mitigation (RT 3977-4024), D.A. Sneddon referenced the words "choose," "choice," and "choices" 42 times. (AOB 113). The use of the terms "choose," "choice" and "choices" was obviously intended by D.A. Sneddon to exploit the misgivings of Dana W. – Juror No. 12 regarding the choices made by Appellant as she noted during voir dire. As noted, this is clear from a review of the record in which he referenced the words "choose," "choice," and "choices" 42 times in closing argument in addressing the question of mitigation. (RT 3979, 3990-3997, 3997-3999, 4000, 4006, 4012, 4022, and 4024) (see also AOB 113-114). The use of the terms "choose," "choice," and "choices" in closing argument is illustrated in the following two passages:

> But the one thing we have control over, no matter where you are or who you come from, the one thing you can control is how far you are going to sink. You can choose to do wrong things, you can choose to be a juvenile delinquent, you can choose to be a robber, you can choose to be a rapist, you can choose to be a murderer. And if you choose to do those things, you can choose to be a success, a successful criminal.

(RT 4006).

> That's what's really aggravating. I don't understand just the fact of the death of Sophia Torres. They were all planned, ladies and gentlemen. They were planned. They were deliberate. He stalked, he waited, he lied in wait, he came out of the shadows, always with his knife. He chose the place, he chose the victim, he chose the time, he chose the weapon. He chose everything. Those were his choices every single time.

(RT 4012).

The foregoing passages using "choose," "chose," and "choices" are illustrative of D.A. Sneddon exploiting and directing his argument to Dana

W. – Juror No. 12, who noted her misgivings regarding the choices made by Appellant Martinez. For Respondent to suggest that D.A. Sneddon was not directing his argument at Juror No. 12 – Dana W. is disingenuous and simply without merit. The record reflects that D.A. Sneddon was directing his argument to Dana W. – Juror No. 12 as his comments pertaining to "choices" paralleled those noted by Dana W. – Juror No. 12 during voir dire wherein she expressed reservations concerning her ability to be a fair juror in light of the "choices" Appellant had made as reflected in his extensive juvenile record. Consequently, Appellant Martinez was prejudiced by the trial court's failure to inquire concerning Dana W. – Juror No. 12's competence, that is, her willingness, ability and fitness to serve as a juror.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING THE STATEMENTS OF APPELLANT IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

Respondent asserts that Appellant's statements to Officer Lopez and Detectives Carroll and Aguillon were equivocal or conditional. (RB 72). Therefore, Respondent concludes that Appellant did not invoke his right to remain silent nor did he invoke his right to counsel, and hence, there were no Miranda violations. (RB 72). Assuming arguendo that there was a Miranda violation, Respondent asserts that any violation was harmless. (RB 81).

A. Officer Lopez – Right to Remain Silent.

Officer Lopez was the first law enforcement officer to interview Appellant Martinez following his arrest with respect to the assault on Sabrina Perea. (AOB 118-120; 129-132; and 153-158). Officer Lopez had transported Appellant Martinez to the Santa Maria Police Department where he then advised Appellant Martinez of his Miranda rights. (AOB 119-121; 129-131). Appellant Martinez said that he understood his rights and noted that he wished to speak with Officer Lopez. (AOB 129). Officer Lopez interviewed Appellant Martinez for ten (10) minutes, focusing on the crimes committed against Sabrina Perea when Appellant Martinez terminated the interview by stating: "That's all I can tell you." (AOB 157) (RT 691-692).

Respondent disputes that Martinez terminated the interview, and further, disputes that he invoked his right to remain silent. (RB 77). Respondent concedes that the trial court determined that Appellant Martinez stated to Officer Lopez "that's all I have to say" or "that's all I have to talk about." (RB 75) (AOB 157) (RT 754). Respondent asserts that

Appellant Martinez was simply ending the conversation as opposed to invoking his right to remain silent. (RB 77). Further, Respondent disputes that Officer Lopez understood that Appellant was invoking his right to remain silent. (RB 77).

The question presented here involves the reasonable officer test as articulated by this Court in People v. Gonzalez (2005) 34 Cal.4th 1111, 1126, as follows:

> The question is not what defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood defendant to be saying.

While People v. Gonzalez involved the invocation of the right to counsel as set forth by the United States Supreme Court in Davis v. United States (1994) 512 U.S. 452, this Court extended the Davis holding to the right to remain silent in People v. Stitely (2005) 35 Cal.4th 514, 535. The reasonable officer inquiry is an objective one. Gonzalez, 34 Cal.4th at 1125-1127; Stitely, 35 Cal.4th at 535-536; United States v. Nelson, (2006) 450 F.3d 1201, 1212 (10th Cir.) (noting that determining whether a suspect has invoked his right to counsel or to remain silent involves an objective inquiry, citing Davis, 512 U.S. at 459); James v. Marshall (2003) 322 F.3d 103, 108 (1st Cir.) (noting that the Davis decision makes clear that the threshold inquiry is an objective one).

A review of the record demonstrates that during the interview with Officer Lopez, Appellant Martinez indicated that he wanted to terminate the interview, and further, that Officer Lopez terminated the interview, thereby recognizing that Martinez had invoked his right to remain silent. This is reflected in the colloquy between D.A. Sneddon and Officer Lopez as follows:

Q. [Mr. Sneddon] Did, at any time during that conversation, Mr. Martinez indicate he wanted a lawyer?

A. [Officer Lopez] No, he did not.

Q. Did he indicate that he wanted to terminate the conversation?

A. He told me at one point that this is all the information that he can tell me.

Q. And then you --

A. And then I stopped talking to him.

(AOB 130) (RT 669). On cross-examination, Officer Lopez confirmed that Appellant Martinez had stated "that's all I can tell you." (AOB 131) (RT 691-692). The question posed by D.A. Sneddon to Officer Lopez was whether Appellant Martinez indicated that he wanted to "terminate" the conversation. The word "terminate" in the law enforcement context obviously implicates the right to remain silent. Officer Lopez recognized this, and ceased further questioning, e.g., "I stopped talking to him." Thus, under these circumstances, Appellant Martinez not only terminated the interview but invoked his right to remain silent. (AOB 153-159).

Of note, Martinez had similarly invoked his right to remain silent and terminated his interview with Officer Jorge Lievanos who had arrested him in connection with a fight. This was the only prior incident proffered by the prosecution as to Martinez when he was an adult. (AOB 155). The following colloquy took place between D.A. Sneddon and Officer Lievanos:

Q. [Mr. Sneddon] . . . [A]t any time during that conversation, did Mr. Martinez request the presence of a lawyer, or invoke his right not to talk any further?

A. There at the very end.

Q. What happened at the very end?

A. Where he indicated he had nothing further to state.

Q. And then you terminated the conversation?

A. That's correct.

(AOB 128) (RT 653). On cross-examination, Officer Lievanos confirmed that Martinez did not want to discuss the matter any more. (AOB 128-129) (RT 655). The evidence adduced at the hearing with respect to the fight indicated that Martinez did invoke his right to remain silent. (AOB 155).

Here, contrary to the assertion by Respondent, the record reflects that Appellant Martinez invoked his right to remain silent and terminated the interview with Officer Lopez. The conduct and actions by Officer Lopez in response to the statement by Martinez, e.g., "that's all I can tell you," which resulted in Lopez terminating the interview, thereby recognizing that Martinez had invoked his right to remain silent, reflects the objective view of Officer Lopez; that is, Martinez had invoked his right to remain silent, and hence, all questioning must cease.

While generally the subjective beliefs of an officer are irrelevant in the Miranda context, this is not the situation presented here. See, e.g., People v. Roquemore (2005) 131 Cal.App.4th 11, 31-36. Officer Lopez by his conduct demonstrated his view that Martinez had in fact invoked his

right to remain silent – a view accurately reflecting Martinez's words, and hence, Officer Lopez terminated the interview.

It is the uncommunicated subjective opinion of the officer that is irrelevant for Miranda purposes. In People v. Roquemore, 131 Cal.App.4th at 32, the Court of Appeal noted as follows:

> [T]he uncommunicated subjective opinion of an officer as to whether an individual being questioned is a suspect is irrelevant in terms of determining whether an accused is in custody for Miranda purposes. In. Stansbury v. California (1994) 511 U.S. 318, 322-324 [128 L.Ed.2d 293, 114 S. Ct. 1526], the Supreme Court held, "It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of Miranda." (See Thompson v. Keohane (1995) 516 U.S. 99, 114, n15 [133 L.Ed.2d 383, 116 S. Ct. 457]; People v. Farnam (2002) 28 Cal.4th 107, 180-181 [121 Cal.Rptr.2d 106, 47 P.3d 988].)

(emphasis added). Here, we are not dealing with an "uncommunicated subjective opinion" as to Officer Lopez, but the objective manifestation of his opinion, to wit, the termination of the interview in response to the statement of Appellant Martinez invoking his right to remain silent.

This objective manifestation by Officer Lopez, who was conducting the interview, should be dispositive of the reasonable officer test. Officer Lopez, as a reasonable officer, concluded that Martinez had invoked his right to remain silent by virtue of the statement "that's all I can tell you," and hence, terminated the interview. It follows that Martinez invoked his right to remain silent, and the trial court erred in its determination of this issue.

Respondent asserts that the statement by Appellant "that's all I can tell you" is ambiguous and that Appellant did not seek to clarify the statement. However, Officer Lopez understood the statement as an invocation of the right to remain silent and properly terminated the interview. No clarification was needed.

The first interview by Detectives Carroll and Aguillon following Appellant Martinez's invocation of his right to remain silent and the termination of his interview with Officer Lopez constituted a reinterrogation without the required fresh set of Miranda warnings in violation of Michigan v. Mosely (1975) 423 U.S. 96. (See generally, AOB 153-166, and specifically, AOB 159-162 for Mosely discussion). Two of the factors outlined in Michigan v. Mosely were not satisfied relative to the reinterrogation by Detectives Carroll and Aguillon with respect to their first interview of Martinez. First, Appellant Martinez did not receive a fresh set of Miranda warnings as contemplated by Michigan v. Mosely. Second, the reinterrogation by Detectives Carroll and Aguillon was not restricted to the crimes that had been the subject of the earlier interrogation by Officer Lopez.

Respondent concedes that Martinez "was not readvised verbatim of his Miranda rights." (RB 79). Instead, Respondent seeks to rely on the oblique reference made by Detective Carroll regarding Officer Lopez reading him his rights the night before, the inquiry as to whether he remembered and understood "them and everything," and whether he "still want[s] to talk" to which Martinez responded "yeah." (CT 03069 at 03071) (AOB 162) (RB 79). This brief exchange, which took place after the detectives had commenced the reinterrogation and, in fact, had already asked Appellant Martinez 26 questions, does not satisfy the requirement of

a fresh set of Miranda warnings before reinterrogation as contemplated by Michigan v. Mosely, 423 U.S. at 106. (See AOB 159-164).

Respondent also concedes that the first interview by Detectives Carroll and Aguillon partially pertained to the "same Perea incident" that had been the subject of the Lopez interview. (RB 78). In fact, a review of the transcript of the first interview by Detectives Carroll and Aguillon demonstrates that the interview initially focused on the crimes against Sabrina Perea. (CT 03069 at 03071-03073) (AOB 162-163). It was only after interrogating Martinez concerning the Perea incident that Detectives Carroll and Aguillon then questioned Martinez concerning the Sophia Torres homicide. (CT 03069 at 03074-03083) (AOB 163).

Thus, as conceded by Respondent, the second factor in the Michigan v. Mosely analysis has not been satisfied. That is, the reinterrogation (e.g., the first interview by Detectives Carroll and Aguillon) was not confined to a crime (e.g., Torres homicide) that had not been the subject of the initial Lopez interview (Sabrina Perea case), as the reinterrogation involved both the Torres homicide and the Perea crimes. Thus, the second Michigan v. Mosely factor has not been satisfied. 423 U.S. at 106. It follows that the admission of the first recorded interview between Appellant Martinez and Detectives Carroll and Aguillon violated the Miranda rights of Martinez in light of Michigan v. Mosely. Id.

B. First Interview by Detectives Carroll and Aguillon.

Respondent asserts that the statement by Appellant Martinez, that "I don't want to talk about it anymore right now," did not constitute an unambiguous and unequivocal invocation of his right to remain silent. (RB 79-80). However, Respondent has failed to address the statement in the

context that it was made. People v. Peracchi (2001) 86 Cal.App.4th 353, 361-362, cert. denied, 534 U.S. 901; (See AOB 166-170).

Respondent notes that the statement was made "during his interview" with Detectives Carroll and Aguillon. (RB 79). However, a review of the record demonstrates that the statement was made at the conclusion of the first interview conducted by Detectives Carroll and Aguillon. (AOB 122-123 and 169); (see CT 00956; 00864). Martinez had been interrogated at length by Detectives Carroll and Aguillon regarding both the Perea incident and the Torres incident. Both Detectives Carroll and Aguillon advised Martinez that they did not believe him and pointed out inconsistencies in his story, and further, Detective Carroll advised Martinez that he should think it over and tell the truth. (RT 725-726). It was after this confrontation, when no questions were pending and everyone was preparing to leave, that Martinez stated: "I don't want to talk about it anymore right now." (RT 726-728; RT 712, and RT 754). (See AOB 169).

Detective Carroll responded by saying that this was fine, that they were going to take a break, and suggested to Martinez that he "think about it," and that they would "come back and talk with" him. (RT 712). Martinez responded "Okay." (RT 712-713). (AOB 146). Later that day, Detectives Carroll and Aguillon picked Martinez up from the Santa Barbara Sheriff's Department Jail and transported him by car to the Valley Community Hospital for the S.A.R.T. exam. (RT 714 and 731). Detective Carroll inquired as to whether Martinez had followed Detective Aguillon's suggestion of "thinking it over." Martinez responded "No, not really." (RT 715-716 and 731) (AOB 146-147).

The context of the statement, "I don't want to talk about it anymore right now" reflects that Martinez was invoking his right to remain silent.

The detectives had just confronted Martinez, in effect, calling him a liar. The interview had essentially been concluded as everyone was preparing to leave and no questions were pending when Martinez made the statement. Thus, these circumstances are hardly similar to those presented in People v. Stitely (2005) 35 Cal.4th 514, 533-536, where the defendant stated: "I think it's about time for me to stop talking," in the middle of the interview.

In Stitely, this Court outlined the record of the suppression hearing as follows:

> The record of the suppression hearing also showed that defendant received no new Miranda warnings at the station. Officers placed him in an interview room, activated the tape recorder, and asked questions. After defendant admitted that he gave Carol a ride, Detective Coffey suggested that the pair fought. The following exchange then occurred:
>
> > DEFENDANT: "Okay. I'll tell you. *I think it's about time for me to stop talking.*" (Italics added.)
> >
> > COFFEY: "You can stop talking. You can stop talking."
> >
> > DEFENDANT: "*Okay.*"
> >
> > COFFEY: "It's up to you. Nobody ever forces you to talk. I told you that. I read you all that (untranslatable)."
> >
> > DEFENDANT: "Well, I mean (untranslatable) God dam accused of something that I didn't do. I'm telling you the truth. And you're not believe [sic] me. You're not believing me. I'm telling you the truth."
> >
> > COFFEY: Richard, the only problem is, I can prove otherwise. The only reason I - - listen to me."

> DEFENDANT: "The only thing you can prove is I took her out of that bar, man. That's all I did. That's the only thing I've done."
>
> Detective Coffey explained at the suppression hearing that if defendant had decided to stop talking, the interview would have ended. Because defendant's statements were unclear in this regard, Coffey did not believe that questioning had to stop. Nevertheless, in an abundance of caution, Coffey "reinforced" the notion that defendant was free to exercise his right to silence.

35 Cal.4th at 534.

In this case, unlike Stitely, the interview was essentially complete. No questions were pending, and everyone was preparing to leave. (AOB 169 and 132-146). In Stitely, the statement at issue was made in the middle of the interview. Detective Coffey advised the defendant that he could "stop talking" and made it clear that it was up to the defendant as to whether he wished to continue talking, and moreover, noted that "[n]obody ever forces you to talk," and then referred to his Miranda rights, e.g., "I read you all that." Further, Detective Coffey explained that the interview would have ended if the defendant had decided to stop talking. 35 Cal.4th at 534. Thus, the defendant's statements in Stitely are dramatically different from those presented here

After the statement by Martinez that he did not want to talk anymore (RT 726-727; RT 712, and RT 754), Detective Carroll noted that this was fine, that they were going to take a break, and suggested to Martinez that he "think about it," and that they would "come back and talk with" him. (RT 712). Martinez responded "Okay." (RT 712-713) (AOB 146 and 169). The "Okay" by Martinez was similar to the "Okay" by defendant Stitely in response to Detective Coffey's statement: "You can stop talking." As this

Court noted in Stitely, 35 Cal.4th at 535, the "Okay" was a "nonsubstantial response [which] merely implied that defendant understood what he had just heard." Id. at 536. Thus, the "Okay" by Martinez did not waive his right to remain silent nor did it grant the detectives permission for further interrogation.

In fact, when later that day the detectives were transporting Martinez by car to the Valley Community Hospital for the S.A.R.T. exam, Detective Carroll inquired as to whether Martinez had followed Detective Aguillon's suggestion of "thinking it over." Martinez responded "No, not really." (RT 715-716 and 731); (AOB 146-147). Again, Martinez neither waived his right nor gave the detectives permission to conduct a further interrogation in violation of his right to remain silent. Thus, while the defendant in Stitely after his statement continued answering questions, notwithstanding the repeated reassurance by the detective that he could "stop talking" as well as further reminding him of his Miranda rights ("I read you all that"), Martinez did not indicate that he wished to continue with questioning following his statement. In Stitely, this Court concluded that "[u]nder the circumstances," Detective Coffey was not prevented from continuing the exchange. 35 Cal.4th at 536. Here, the statement by Martinez which invoked his right to remain silent as well as his conduct did not permit further questions.

Respondent further asserts that it was reasonable for the detectives to interpret by his statement that Martinez would continue to speak with police, "just not 'right now'." (RB 79). The record does not support this claim. Martinez invoked his right to remain silent. His subsequent responses to the detectives' inquiries could not reasonably be interpreted by

the detectives as a waiver of his rights or permission to continue with the interrogation in light of the invocation of his right to remain silent.[5]

This case is similar to the decision of People v. Peracchi (2001) 86 Cal.App.4th 353, 361-362, cert. denied, 534 U.S. 901, wherein the Court of Appeal held that the statement "I don't want to discuss it right now" invoked the right to remain silent. The Court of Appeal framed the issue as follows:

> . . . Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context. (Footnote omitted).

Peracchi, 86 Cal.App.4th at 359-360. Moreover, the Court stated further:

> Pursuant to Miranda, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (Footnote omitted). The United States Supreme Court has recently affirmed that the Miranda warnings are rights of constitutional dimension. (Footnote omitted). The California Supreme Court has previously observed "that no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent (People v. Randall [, supra,] 1 Cal.3d 948, 955 . . .), and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely. (People v. Burton, supra, 6 Cal.3d 375, 382.) (Footnote omitted). . . .

Id. at 360.

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[5]See AOB, 170, fn.11 for a discussion regarding waiver and the invocation of the right to remain silent being entirely separate inquiries, and that the two must not be blurred by merging them together, citing Smith v. Illinois (1984) 469 U.S. 91, 97-98.

The context of the statement was critical to the Court's analysis. People v. Peracchi, supra, 86 Cal.App.4th at 361. (See also AOB 168-169). The language employed in Peracchi as well as the circumstances are similar to those presented in this case. Just as Peracchi indicated his intent to invoke his right to remain silent predicated on the statement "I don't want to discuss it right now," Martinez similarly invoked his right to remain silent by virtue of his statement "I don't want to talk about it anymore right now." (AOB 169-170). Thus, the trial court erred.

C. Third Interview with Detectives Carroll and Aguillon.

Respondent asserts that the statement, "I think I need to talk to my lawyer before I take a polygraph," made during the third interview with Detectives Carroll and Aguillon, was equivocal and ambiguous based on the use of the term "I think" as well as conditional in light of the reference to a "polygraph." (RB 80-81). Respondent cites a number of cases to establish the proposition that the use of the term "I think" in conjunction with a request for a lawyer renders the statement equivocal or ambiguous. (RB 80).

Although Respondent cites to this Court's decision in People v. Gonzalez (2005) 34 Cal.4th 1111, 1119, 1122-1127, for the proposition that a request "to talk to a public defender" was determined to be equivocal and ambiguous, Respondent fails to come to grips with the "reasonable officer" standard articulated by this Court in Gonzalez as discussed in Appellant's Opening Brief. (See AOB 155-159 and 173-179). The conduct and actions by Detectives Carroll and Aguillon in responding to the statement of

Martinez by ceasing their interrogation efforts clearly reflects that both detectives believed that he had invoked his right to counsel.[6]

Martinez had already been interviewed at length by Detectives Carroll and Aguillon on three separate occasions over a 10-hour time frame. Two interviews involved lengthy tape-recorded statements. He had also undergone a physical examination, including blood and other testing. Thus, after the three interviews and a physical examination, in the early evening hours of December 5, 1996, after he had been handcuffed again, Detective Aguillon asked if he would take a polygraph and stated that they could have someone there in five minutes. (AOB 176). In this context, what is transpiring is a request by Detective Aguillon that the interrogation continue via a polygraph examination within five minutes. See People v. Franklin (1987) 115 Ill.2d 328, 334; 504 N.E.2d 80, 82; People v. Wilberton (2004) 348 Ill.App.3d 82, 87; 809 N.E.2d 745, 750, appeal denied, 823 N.E.2d 977 (cases noting that a polygraph examination is itself a form of interrogation).

Further, the first portion of the statement by Martinez, "I think I need to talk to my lawyer," evidences a clear requirement that he speak with his attorney. The second portion of his statement, "before I take a polygraph," shows the immediacy of his request as the detectives contemplated the interrogation continuing within five minutes via the polygraph exam. (AOB 176-177). In light of this, Detectives Carroll and Aguillon, as reasonable police officers, clearly formed the belief as reflected by their conduct and actions that Martinez had invoked his right to counsel. Consequently, while

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[6] The same analysis applies to the assertion that both Detectives Carroll and Aguillon believed that Martinez had also invoked his right to remain silent. (See AOB 178, indicating that Martinez was invoking both his right to counsel as well as his right to remain silent.)

Detectives Carroll and Aguillon contemplated continuing the interrogation via the polygraph within five minutes, they knew that Martinez had invoked his right to counsel, and hence, the interrogation could not continue and they ceased their questioning. (See AOB 177-178).

In Clark v. Murphy (2003) 331 F.3d 1062 (9th Cir.), cert. denied, 540 U.S. 968 (cited by Respondent at RB 80), Judge O'Scannlain of the Ninth Circuit Court of Appeals addressed the question of what constitutes an equivocal or unequivocal request for counsel and concluded that both the pre-Davis and post-Davis cases [Davis v. United States (1994) 512 U.S. 452] are in conflict on the issue. The cases involving the request to speak with counsel coupled with the phrase "I think" have had mixed results; some cases finding the request unequivocal while others found the request to be equivocal as reflected in the following:

> Our own precedent is not much help since it is somewhat inconsistent on what constitutes an equivocal request for a lawyer. The only case containing the critical words "I think" is Shedelbower v. Estelle 885 F.2d 570, 571 (9th Cir. 1989), where we assumed without deciding that the statement "[y]ou know, I'm scared now. I think I should call an attorney," was a valid invocation of the suspect's right to an attorney. However, that case pre-dates the Supreme Court's decision in Davis, and nothing in the court's analysis hinged on the presence or absence of the phrase "I think."
>
> Our post-Davis cases differ significantly from this case on their facts, and therefore provide little guidance. See e.g., Alvarez v. Gomez, 185 F.3d 995, 998 (9th Cir. 1999) (finding suspects questions "(1) Can I get an attorney right now, man? (2) You can have attorney right now? and (3) Well, like right now you got one?" constituted an unambiguous request); United States v. Doe, 170 F.3d 1162, 1166 (9th Cir. 1999) (holding the statement "What time will I see a lawyer?" not an unambiguous request for counsel); United States v. Doe, 60

> F.3d 544, 546 (9th Cir. 1995) ("maybe he ought to see an attorney" not a clear and unambiguous request for counsel); United States v. Cheely, 36 F.3d 1439, 1448 (9th Cir. 1994) ("my attorney does not want me to talk to you" in tandem with a refusal to sign written waiver of right to attorney form was an unambiguous request for counsel).
>
> Other circuits to have considered a suspect's statement containing the words "I think" have reached opposite conclusions. In a decision predating Davis, the Eleventh Circuit assumed without analysis that the statement "I think I should call my lawyer" was an unequivocal request for counsel. Cannady v. Dugger, 931 F.2d 752, 754 (11th Cir. 1991). Similarly, in a pre-Davis decision the Fifth Circuit found that the phrase "I think I want to talk to a lawyer" was an unequivocal request for counsel. United States v. Perkins, 608 F.2d 1064, 1066 (5th Cir. 1979). On the other hand, two circuits that have considered similar language post-Davis found that there was no unequivocal request for counsel. The Second Circuit in Diaz v. Senkowski, 76 F.3d 61, 63 (2d Cir. 1996) found a suspect's statement "[d]o you think I need a lawyer" was ambiguous within the meaning of Davis. The statement in this case is more emphatic than the one considered in Diaz, in that it is not in the form of an interrogatory. In Burket v. Angelone, 208 F.3d 172, 198 (4th Cir. 2000), the Fourth Circuit considered the statement "I think I need a lawyer." The court held that "[t]his statement does not constitute an unequivocal request for counsel. In fact, Burket's statement is quite similar to the defendant's statement in Davis ("Maybe I should talk to a lawyer"), which the Supreme Court found ambiguous." Id. at 198. The statement at issue here, if anything is more ambiguous than the one at issue in Burket since Clark stated that he thought he would like to talk to an attorney.

Clark, 331 F.3d at 1070-1071 (emphasis in original).

Given the incongruity of the case law as noted by Judge O'Scannlain in Clark concerning whether a request for a lawyer is equivocal or

unequivocal when the term "I think" is employed, it follows that this Court's articulation of the reasonable police officer standard is dispositive of the question presented here. The response by Detectives Carroll and Aguillon in ceasing their interrogation, objectively manifests their reasonable belief that Martinez had invoked his right to counsel when he made his statement, "I think I need to talk to my lawyer, before I take a polygraph." Accordingly, the trial court erred.

D. The *Miranda* Errors Were Not Harmless.

Respondent asserts, assuming arguendo that the trial court erroneously denied Appellant's motion to suppress based on Miranda, any error was harmless. (RB 81). The evidence relied on by Respondent, that is, the semen match, 911 call, and Appellant's version of the events as to the homicide of Sophia Torres, generally stemmed from the first recorded interview between Appellant Martinez and Detectives Carroll and Aguillon on December 5, 1996. (See AOB 164-166). Thus, the prejudice suffered by Appellant Martinez relative to the admission of the first recorded interview was overwhelming.

The recorded interview was played to the jury, and further, the transcript of the interview was admitted into evidence at trial. (AOB 164). Appellant Martinez did not testify at trial, but his tape-recorded statement relative to the first interview was, as noted, played to the jury. (AOB 165). This case was largely a circumstantial case since there were no eyewitnesses to the actual homicide of Sophia Torres. Much of the prosecution's case focused on disproving the recorded statement of Appellant Martinez with respect to the first interview of December 5, 1996, involving Detectives Carroll and Aguillon. (AOB 165-166). Therefore, rather than seeking to prove that Martinez killed Sophia Torres, the

prosecution sought to disprove his statements contained in the first recorded interview. (AOB 165-166). This prejudiced Appellant Martinez and it cannot be said that the admitted recorded statement obtained in violation of Miranda was harmless beyond a reasonable doubt with respect to the Torres murder conviction. Chapman v. California (1967) 386 U.S. 18, 24.

Respondent has failed to demonstrate that the admission of the first recorded statement was harmless beyond a reasonable doubt with respect to the Torres murder conviction. Respondent relies on the semen match between the victim Torres and Appellant Martinez,[7] asserts that only Martinez could have made the "911 call," and further, argues that based on his own version of the events, Martinez established that he had gone to the park to meet Sophia Torres. From this evidence, Respondent asserts that Appellant's guilt was overwhelming regarding the murder of Sophia Torres. (RB 81). However, the problem with this argument is that the evidence regarding Appellant Martinez making the 911 call as well as the statements pertaining to his version of the events were established by way of the first recorded statement itself.

A review of the first recorded statement makes clear that Martinez identified himself as the maker of the 911 call (CT 03113 at 03117-03118) and further, his version of the events regarding going to the park was also established by way of the first recorded statement. (CT 03113 at 03117-03126). (AOB 164-166). Thus, since Respondent has failed to establish that it would have obtained the identity of the maker of the 911 call (e.g., Appellant Martinez) as well as establish Appellant's version of the events

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[7] The semen match alone is insufficient to establish that Appellant Martinez committed the homicide of Sophia Torres, particularly in light of the evidence that the sexual contact was consensual. (See AOB 180-193).

independent of the first recorded interview itself, it follows that Respondent has failed to demonstrate that said evidence could have been purged of the primary taint stemming from the initial Miranda violation. See People v. Sims (1993) 5 Cal.4th 405, 444-447, citing Wong Sun v. United States (1963) 371 U.S. 471, 487-488; see also, 5 WITKIN AND EPSTEIN, CALIFORNIA CRIMINAL LAW, 3d ed., Criminal Trial, § 133 entitled Miranda Violation, pp. 220-222.

As set forth in Appellant's Opening Brief (AOB 166-172), much of the evidence presented by the prosecution was directed at refuting the exculpatory and highlighting the inculpatory statements of Appellant Martinez. This is particularly true with regard to the second tape recorded statement (e.g., the third interview) and the transcript of the tape (RT 2061and CT 03127-03139) (AOB 172-173). The tape recording was played to the jury (RT 1949), and further, a copy of the transcript was admitted into evidence. (RT 2061 and CT 03127-03139) (AOB 172-173). The admission of the second tape recorded interview (e.g., Interview #3) again reflected on the 911 call and the observations of Martinez as to what took place at Oakley Park involving Sophia Torres as well as the crimes against Morales and Perea. (CT 03127-03139) (AOB 173).

Again, Respondent asserts that only Appellant could have made the 911 call and that his version of the events established that he had gone to the park to meet Sophia Torres. From this evidence, Respondent concludes that Appellant's guilt was overwhelming. (RB 81). However, as with the first recorded interview, the problem with this argument is that the evidence regarding the 911 call and Appellant's version of the events at the park were established by way of the second recorded statement itself. (CT 03127-03139) (AOB 172-173). Respondent has also failed to demonstrate

that said evidence could have been purged of the primary taint stemming from the second Miranda violation. See People v. Sims, 5 Cal.4th at 444-447.

As to the non-capital offenses pertaining to Maria Morales and Sabrina Perea, there can be no doubt that the Miranda violations discussed in Appellant's Opening Brief (AOB 153-178) regarding both the invocation of the right to remain silent and the right to counsel led to the exculpatory/inculpatory statements as to Morales and Perea. In the fourth interview, Appellant Martinez stated, referring to Morales and Perea, that he only intended to rob them, not rape them. (CT 00866-00867; CT 00961; and RT 720-722) (AOB 147-148 and 171).

The prejudice suffered by Appellant Martinez as a consequence of the introduction of his statements relative to Morales and Perea is self-evident. The exculpatory/inculpatory statement that he was not going to rape either Morales or Perea, but was only going to rob them, implicated him in crimes against both Morales and Perea. (RT 1967) (AOB 178). Respondent correctly notes that both Morales and Perea positively identified Martinez. (RB 81). However, it cannot be said that these admissions obtained in violation of Miranda were harmless beyond a reasonable doubt as to the Perea and Morales convictions. Chapman v. California, 386 U.S. at 24.

III. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE ISSUE OF CONSENT AS TO THE CRIME OF RAPE.

Respondent acknowledges that the trial court, even in the absence of a request, must instruct on the general principals of law relevant to the issues raised by the evidence, citing People v. Sedeno (1974) 10 Cal.3d 703, 715-716. Further, Respondent acknowledges that a trial court has the duty to instruct on all material issues presented by the evidence, citing People v. Breverman (1998) 19 Cal.4th 142, 154. Finally, Respondent asserts that a trial court is not obliged to instruct on theories that lack substantial support in the evidence, again citing Breverman, 19 Cal.4th at 162. (RB 86).

Respondent argues that the trial court properly refused to instruct the jury with CALJIC 1.23.1 (Consent) and CALJIC 10.65 (Belief as to Consent) regarding consent. (RB 86). Respondent then discusses at length CALJIC 10.65 which embodies the defense of a mistaken belief as to consent recognized in People v. Mayberry (1975) 15 Cal.3d 143, which is also referenced as the Mayberry defense. (RB 86-87). However, on appeal, while Appellant Martinez has noted that the CALJIC 10.65 (Belief as to Consent) instruction was proposed by defense counsel as one of two instructions on the issue of consent, along with CALJIC 1.23.1 (Consent), Appellant Martinez has not raised the refusal to give the CALJIC 10.65 Mayberry defense instruction as an issue on this appeal. (AOB 180-193).

The reference to CALJIC 10.65 (Belief as to Consent) is discussed in the context of the instructions presented to the trial court for consideration and is part of the record in conjunction with the requested consent instruction reflected in CALJIC 1.23.1. (AOB 180-186). Appellant's opening brief makes clear that the issue presented here is that "the trial

court clearly erred in refusing to give the instruction on actual consent reflected in CALJIC 1.23.1." (AOB 185).

Respondent asserts that defense counsel's request for CALJIC 1.23.1 "was tied to his request for CALJIC 10.65." (RB 87). This assertion is without merit. Defense counsel noted that the CALJIC 1.23.1 instruction "defines consent" which was not otherwise defined in the instructions. Further, defense counsel noted that "consent, or lack thereof, is an element of rape." (RT 2452-2453) (AOB 183). Defense counsel also noted that CALJIC 1.23.1 was an accurate statement of the law. (RT 2452-2453). Although defense counsel did note, as Respondent points out, that CALJIC 1.23.1 "probably has meaning if you give 10.65" which had been rejected by the Court, defense counsel still requested the instruction, noting that it reflected "an accurate statement of the law." (RT 2452-2453). Defense counsel also reaffirmed his desire for the court to give the CALJIC 10.65 instruction in conjunction with the CALJIC 1.23.1 instruction. (RT 2452-2453). Thus, defense counsel requested that the CALJIC 1.23.1 (Consent) instruction be given, as the instruction was "an accurate statement of the law," and defined "consent" which constituted "an element" of the crime. (RT 2452-2453). (See also AOB 183).

The defense of consent and the Mayberry defense are separate and distinct defenses. People v. Romero (1985) 171 Cal.App.3d 1149, 1155 (noting that defense of consent and the Mayberry defense are two distinct defenses); CALIFORNIA JURY INSTRUCTIONS – CRIMINAL, Comment to CALJIC 10.65, p. 730 (2004 revision) (Thomson/West, Fall 2006 ed.) (noting that "[a]ctual consent and good faith belief of consent are two separate defenses and when justified by the evidence both instructions must be given."). It follows that the trial court erred when it predicated its

rejection of the actual consent instruction reflected in CALJIC 1.23.1 on its prior rejection of the reasonable belief as to consent instruction reflected in CALJIC 10.65 (RT 2452-2453).

In People v. Romero, supra, at 1155-1156, the Court of Appeal discussed at length the conceptual differences in the two defenses as well as the respective differences in their evidentiary burdens as follows:

> The defense of consent and the Mayberry defense are two distinct defenses. Where the defendant claims that the victim consented, the jury must weigh the evidence and decide which of the two witnesses is telling the truth. The Mayberry defense, on the other hand, permits the jury to conclude that both the victim and the accused are telling the truth. The jury will first consider the victim's state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not. (People v. Mayberry, supra, 15 Cal.3d 143 at pp. 159-160.) A defendant relying on a Mayberry defense must produce some evidence of equivocal conduct by the victim which led him to reasonably believe that there was consent where in fact there was none. The defense of consent on the other hand might only involve the contention that the complaining witness lied about the events that took place, rather than a claim that her conduct was misleading. There would in that case be no evidence that the victim acted equivocally.

In this case, as noted below, there was more than sufficient evidence to support the defense of actual consent, thereby requiring the court to give the requested CALJIC 1.23.1 instruction.

Notwithstanding the fact that defense counsel both proposed and requested the CALJIC 1.23.1 (Consent) instruction (AOB 180), the court

also had a sua sponte duty to instruct the jury on the issue of consent as one of the elements of the crime of rape. See CALCRIM, JUDICIAL COUNCIL OF CALIFORNIA, CRIMINAL JURY INSTRUCTIONS, INSTRUCTION 1000, BENCH NOTES, INSTRUCTIONAL DUTY, p. 621 (Fall 2006 ed.) (rape or spousal rape by force, fear or threats) ("The court has a **sua sponte** duty to give an instruction defining the elements of rape."); see also, People v. Cummings (1993) 4 Cal.4th 1233, 1311 (noting that the "trial court must instruct even without request on the general principals of law relevant to and governing the case" which "includes instructions on all of the elements of a charged offense."); see generally, People v. Breverman, 19 Cal.4th at 154 (quoting People v. St. Martin (1970) 1 Cal.3d 524, 531) (noting "that in criminal cases, even in the absence of a request, the trial court must instruct on the general principals of law relevant to the issues raised by the evidence.").

Respondent also asserts that there was no evidence to support the instruction on consent. (RB 82). However, a review of the record clearly demonstrates that there was substantial evidence to support the defense of actual consent reflected in CALJIC 1.23.1 as to the charge of rape. (AOB 186-187). This substantial evidence includes the autopsy on the body of Sophia Torres performed by Dr. Robert Failing, pathologist. (RT 1801-1808). The examination of the vagina performed by Dr. Failing in which he found no bruising, no tearing and no trauma to the vagina. (RT 1829). The conclusion by Dr. Failing in which he noted that he had handled sexual assault cases in which he had found trauma to the vagina and other cases in which he had not found trauma to the vagina. (RT 1830). The further conclusion reached by Dr. Failing that the lack of bruising, tearing or trauma to the vagina does not rule out the "possibility" of a sexual assault. (RT 1830). The determination by Dr. Failing that the victim, Sophia

Torres, suffered multiple blows. (RT 1809-1830). The time of death of Sophia Torres which was established to be 10:30 or 11:00 p.m. on November 15, 1996, by Sergeant Dennis L. Prescott. (RT 1780-1791). The 911 call received by the Santa Maria Police Department at 11:07 p.m. on November 15, 1996, as acknowledged by the police dispatcher. (RT 1607-1611, Exhibit 12). The fact that a male caller informed the dispatcher of an attack on a lady at the Westside Little League Park, Oakley Park, and repeatedly stated "send help." (Exhibit 12, CT 03112). Appellant Martinez later acknowledged that he made the 911 call. (RT 1925, Exhibit 61, see also CT 03113-03126; Exhibit 61A).

This evidence, as set forth in Appellant's opening brief (AOB 186-187), supports the defense contention of consensual sex between Appellant Martinez and Sophia Torres. The lack of injury to the vagina, multiple blows which resulted in the death of Sophia Torres, the time of death at 10:30 p.m. to 11:00 p.m., and the 911 call shortly thereafter at 11:07 p.m., in which Martinez reported that a lady was in trouble at the Oakley Park and requested that police "send help quick" supports the following scenario. Appellant Martinez and Sophia Torres meet at Oakley Park, eventually have consensual sex, things turn sour, Torres sustains multiple blows resulting in her death, and Martinez attempts to remedy the situation by calling the police and requesting that they "send help quick." It should be noted that this scenario is consistent with the position asserted by the defense in closing argument that Appellant Martinez had consensual sex with Sophia Torres, which represented a form of "pain relief" for Torres in light of her loneliness and depression. (RT 2657-2662) (AOB 188). As defense counsel argued: "Sophia Torres may have sought connectedness, warmth, comfort, pain relief, a sense of relatedness, a sense of belonging, whatever

you want to call it, through sex with a stranger." (RT 2660-2661) (AOB 188).

Moreover, the prosecutor conceded in closing argument that there was substantial evidence on the issue of consent when he posed the following question to the jury: "[D]id Sophia Torres have consensual sex in a park on that night with the defendant in this case?" (RT 2517) (AOB 188). The prosecutor further conceded that the defense was entitled to argue that Appellant Martinez had consensual sex with Sophia Torres (e.g., they had consensual sex) (RT 2427) (AOB 183). Thus, the trial record clearly establishes that there was substantial evidence to support the instruction for consensual sex as reflected in CALJIC 1.23.1.

This Court's decision in People v. Stitely (2005) 35 Cal.4th 514, 542-543, also indicates that the evidence was substantial enough to require the consent instruction reflected in CALJIC 1.23.1. In Stitely, this Court concluded that the determination of whether the lack of vaginal injury means that the victim was not raped rests with the jury. 35 Cal.4th at 541-542. Thus, the jury must be instructed on the issue of actual consent as reflected in CALJIC 1.23.1, just as the jury was in Stitely. 35 Cal.4th 552-553. It follows from Stitely that the trial court was obligated to give the CALJIC 1.23.1 (Consent) instruction in light of the evidence presented in this case and the failure to do so was error.

Respondent seeks to characterize the trial defense of Appellant Martinez as "one of complete innocence and lack of any physical contact with Torres, as opposed to an admission that he had sex with Torres, but that the sex was consensual. (RB 88). Respondent mischaracterizes the defense of Martinez, which was essentially to require that the prosecution meet its burden on the elements of the crimes charged. As defense counsel

noted in arguing the instructions on consent, "the prosecution has the burden of demonstrating lack of consent. That's an element." (RT 2426-2427) (AOB 183).

Respondent purports to summarize the defense of Appellant Martinez as follows:

> Appellant's defense was that he went to the park to buy "crank" from victim Torres, then, upon arriving at the park, saw two Black females beating her. (17RT 1940-1941.) In order words, appellant denied having any physical contact with Torres, let alone raping or killing her.

(RB 87). Martinez did not testify at trial. (AOB 9-96). The above reference to RT 1940-1941 reflects the testimony of Detective Carroll (RT 1933) who was testifying regarding his interview with Martinez while he was being transported from the Sheriff's office to the hospital for the purpose of a S.A.R.T. exam. (RT 1940-1941). The statement attributed to Appellant Martinez by Detective Carroll had been the subject of a motion to exclude and related to the prior two recorded taped interviews, both of which Appellant Martinez sought to have excluded. (AOB 120-150 and 153-179; see also, ante, Argument II, pp. 25-44).

Contrary to the assertions by Respondent, there can be no doubt that in closing argument, the defense asserted that Appellant Martinez had consensual sex with Sophia Torres. (RT 2657-2662). The defense also argued as follows:

> Sophia Castro Torres was obviously depressed, . . . It's obvious that the woman was isolated, for whatever reason, disconnected from her own family.
>
> What do we know about human beings? People in this kind of obvious pain sometimes seek to relieve that pain. Many human beings, many of us, will seek pain relief in a

> variety of ways. Sophia Castro Torres didn't drink, which is one of humanity's favorite ways. She didn't use drugs, which is another one that's unfortunately growing in popularity. But she may have used another that's even older than alcohol. Sophia Castro Torres may have sought connectedness, warmth, comfort, pain relief, a sense of relatedness, a sense of belonging, whatever you want to call it, through sex with a stranger. People -- people, human beings, do things like that.

(RT 2660-2661) (See AOB 188).

Respondent also asserts that Appellant's "all-or-nothing defense" made the requested CALJIC 1.23.1 consent instruction inconsistent with the defense of complete innocence. (RB 88). As noted, Appellant Martinez sought to have the prosecution meet its burden on the elements of the crimes charged. Assuming arguendo, that the requested instruction on consent as reflected in CALJIC 1.23.1 was, in effect, inconsistent with a defense of innocence, the position of Respondent is still without merit.

It is well settled that inconsistent defenses are normally permitted in criminal cases. 1 WITKIN AND EPSTEIN, CALIFORNIA CRIMINAL LAW, DEFENSES, §97, pp. 435-436 (3d ed., West Group 2000). See People v. Keel (1928) 91 Cal.App. 599, 605 (defendant denied killing, but evidence raised issue of self defense, and he was entitled to instruction on it); People v. West (1956) 139 Cal.App.2d Supp. 923, 926 (noting that "[a] defendant may present inconsistent defenses" and holding that a defendant who denies some of the elements of an offense charged, may still assert an entrapment defense.); see also 1 WITKIN AND EPSTEIN, CALIFORNIA CRIMINAL LAW, supra, §97, p. 436 (3d ed.) (A "defendant should not be compelled to waive the fundamental presumption of innocence by an admission of guilt, as a condition to invoking the policy defense of entrapment." (emphasis added)).

It follows that the trial court erred by failing to give the instruction on consent, even assuming arguendo, that Respondent is correct that such defense was inconsistent with the purported "all-or-nothing defense." (RB 88).

As Witkin and Epstein note:

> [T]he judge must give any correct instruction on the defendant's theory of the case that the evidence justifies, no matter how weak or unconvincing that evidence may be. (citations omitted).

5 WITKIN AND EPSTEIN, CALIFORNIA CRIMINAL LAW, supra at §607, p. 866 (3d ed.). Here, the evidence justified the instruction on consent as outlined above, ante at 48-50, and in Appellant's opening brief. (AOB 186-190).

Finally, Respondent asserts that any error in not giving CALJIC 1.23.1 was harmless since consent is a "commonly understood term." (RB 89). However, this argument is belied by the Legislature, the Committee on California Criminal Jury Instructions, and the Judicial Council of California. The Legislature has defined consent in rape cases in Penal Code §§ 261.6 and 261.7. The Committee on California Criminal Jury Instructions defined consent in rape cases in CALJIC 1.23.1. CALJIC, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, CALJIC 1.23.1, p. 22 (Thomson/West, Fall 2006 ed.),. The Judicial Council has also defined consent in rape cases in CALCRIM, JUDICIAL COUNCIL OF CALIFORNIA, JURY INSTRUCTIONS, Instruction 1000, p. 619 (Rape or Spousal Rape by Force, Fear or Threats) (Thomson/West, Fall 2006 ed.). If the term "consent" in rape cases was "commonly understood" as Respondent asserts, then there would have been no reason for the Legislature, the Committee on California Jury Instructions, and the Judicial Council to define it for

criminal trials. Moreover, the Committee on California Jury Instructions made clear by its USE NOTE that the definition of consent reflected in CALJIC 1.23.1 should be used in the prosecution of rape cases. CALJIC, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, supra at p. 23 (Fall 2006 ed.). Thus, the failure to properly instruct the jury on the issue of consent was not harmless under any standard.

IV. THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENTS IN THE GUILT PHASE OF THE TRIAL COMPELS REVERSAL.

Respondent asserts that the alleged appeals to passion and prejudice do not constitute prosecutorial misconduct, that the failure to object by defense counsel resulted in a waiver of the issue, and, finally, that any error was harmless. (RB 90-100). Respondent also asserts that the injection of the subject of penalty or punishment during the guilt phase closing argument did not constitute prosecutorial misconduct, that the failure to object by defense counsel resulted in a waiver of the issue, and that the error was harmless. (RB 100-103). Finally, Respondent asserts that the prosecutorial vouching did not constitute misconduct and that any error was harmless. (RB 103-106).[8]

A. Appeals to Passion and Prejudice.

Respondent asserts that comments by the prosecutor at the conclusion of his initial guilt phase closing argument were "an attempt to 'humanize' Torres" and were also to demonstrate that she did not have consensual sex with Appellant Martinez. (RB 97). A review of the closing argument by DA Sneddon does not bear out this assertion as reflected in the following:

> And I can't sit down without saying to you, is there no dignity or fairness for Sophia Torres even in death? Well, you have the power, and knowledge is power. And the power isn't in the rhetoric of anybody speaking to you. The power is

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[8] Respondent initially notes that Appellant asserts that the trial court committed reversible misconduct during his guilt phase closing argument. (RB 90). Appellant makes no such contention. Appellant asserts that the prosecutor committed prejudicial misconduct during the guilt phase closing argument. (AOB 194-214).

> in the knowledge and the compelling force of the facts of this particular case. By the power of that knowledge and your responsibility, you 12 people have the ability in this case to tell everyone, you have the ability to tell everybody in this courtroom, you have the ability to tell everybody in this community, you have the ability to tell everybody on both sides of this lawsuit, everyone, by your verdict, that Sophie Torres was a kind person, that she was a nice person, that she was a gentle person, that she was a loner, and that the only thing that, at this point in her life, that she ever asked, the only thing she was ever asking was to be left alone so she could contemplate - depressed, contemplative - the loss of the person that she loved more than anybody else in life, her boyfriend that was killed. All she ever asked.
>
> You have the power, by your verdicts, to tell everybody that she was not a promiscuous woman, that she was not somebody who would engage in a one-night stand with the defendant. Ladies and gentlemen of the jury, you have the power to tell everyone, and especially the person responsible for those lies and for her death, . . . to tell . . . Tommy Jesse Martinez, that Sophia Torres was raped, Sophia Torres was robbed, and Sophia Torres was beaten to submission and left for dead by the defendant. I and Miss Grossman are asking you to do that.

(RT 2580-2581 and AOB 197-198).

Here, the prosecutor's remarks were calculated to arouse passion and prejudice. This is reflected in the rhetorical question posed by the prosecutor as follows: "[I]s there no dignity or fairness for Sophia Torres even in death?" The question itself constitutes an appeal for sympathy for the victim, Sophia Torres. However, an appeal for sympathy for the victim has no place during an objective determination of guilt. People v. Stansbury (1993) 4 Cal.4th 1017, 1057 (noting that it is settled that "an appeal for sympathy for the victim is out of place during an objective

determination of guilt") (citations omitted)), reversed on other grounds by Stansbury v. California (1994) 511 U.S. 318. Moreover, the repeated references to the jury having the "power" to "tell everyone," and to "tell everybody" that Sophia Torres was a "kind person," "nice person," and a "gentle person" was simply irrelevant to the guilt phase determination. The issue at the guilt phase is not whether Sophia Torres was a good or bad person, but whether Appellant Martinez was responsible for her death. The so-called efforts to "humanize" Torres were both irrelevant and prejudicial to the guilt phase determination.

By asking the jury to vindicate the reputation of Sophia Torres by their verdict, which would "tell everyone that she was not a promiscuous woman" (RT 2581), the prosecutor committed misconduct by appealing to the passions of the jury. Id. This argument was not calculated to rebut a claim of consensual sex as Respondent asserts (RB 97), but was intended to arouse the passions of the jury by suggesting that they vindicate the reputation of Torres which the prosecutor suggested had been soiled by the claim of consensual sex. (RT 2579-2581). There is no relationship between vindication of a reputation and a verdict of guilt as to the rape felony-murder charge other than the efforts by the prosecutor to arouse the passions of the jury. Ironically, Respondent here asserts that the prosecution's inflammatory argument was calculated to address the issue of consensual sex. (RB 97). However, as discussed above in Argument III, the jury was not instructed on the issue of consent. (See ante, 45 - 54).

By the same token, the reference to the "violent capabilities" of Appellant was also intended to appeal for sympathy for the victim. (RB 98). DA Sneddon linked the "violent capabilities" to the "suffering of the victim" as reflected in the following:

> [If] it makes you uncomfortable [e.g., the photographs], it's probably a measure of the true violent capabilities of the defendant in this case and the true measure of the suffering of the victim in this case.

(RT 2560; AOB 197). Thus, the prosecutor equates the "true violent capabilities" of Martinez with the "true measure of the suffering" by Torres. In doing so, the prosecutor appealed for sympathy for the victim. Consequently, the reference to "violent capabilities" was not simply an appropriate epithet as suggested by Respondent. (RB 98).

Similarly, the reference to the attack on Torres as a "savage beating" in conjunction with the rhetorical notation "that one human being could do that to another," was an appeal to passion and prejudice which sought to evoke sympathy for the deceased victim, Sophia Torres. (RT 2513) (AOB 196-197). Thus, contrary to the assertion by Respondent (RB 98), these epithets were principally aimed at arousing the passion and prejudice of the jury by evoking sympathy for the deceased victim. See People v. Pensinger (1991) 52 Cal.3d 1210, 1251; People v. Stansbury, 4 Cal.4th at 1057.

Respondent asserts that DA Sneddon was simply "stating the obvious" when he noted that the victims would not forget Appellant's attacks. (RB 98). However, a review of the record demonstrates that DA Sneddon sought to exploit the suffering of the surviving victims. (AOB 96). This is reflected in the references to "the memory of each of the victims" being "scarred" as a result of "their individual suffering" as noted in the argument by DA Sneddon as follows:

> [I]t is clear from the psyche that the memory of each of the victims will always be scarred from their individual suffering and the terror created by the attacks of the defendant in this case on them.

(RT 2515; AOB 196). Of note, Respondent in discussing the prosecutor's characterization of the demeanor of surviving victim, Maria Morales while testifying, quotes the rhetorical question posed by DA Sneddon to the jury as follows:

> And would any of you forget if this happened to you, about what happened to them?

(RT 2530; RB 99). Here, DA Sneddon violates the golden rule by asking the jury to place themselves in the shoes of victim Morales in an obvious appeal for sympathy for the victim. See Stansbury, 4 Cal.4th at 1057.

It follows from the foregoing that DA Sneddon engaged in prosecutorial misconduct during the initial guilt phase closing argument in which he made various appeals to passion and prejudice, principally seeking to exploit the suffering of both the deceased victim and surviving victims. (AOB 194-199).

Respondent asserts that the failure of defense counsel to object constitutes a waiver of the claims of prosecutorial misconduct on appeal. (RB 93-96). Further, Respondent asserts that defense counsel simply made a "rational tactical" decision to respond to the prosecutor's argument by way of his closing argument. (RB 94-96). As noted in Appellant's Opening Brief, objections would have been futile to remedy the prosecutorial misconduct. (AOB 200-201). Repeated objections would only have served to magnify, rather than reduce, the harm. People v. Kirkes (1952) 39 Cal.2d 719, 726. (AOB 201). Moreover, the prosecutorial misconduct consisted of improper comments that were "injected gradually into the argument" which precluded an admonition to remedy the harm. People v. Bandhauer (1967) 66 Cal.2d 524, 530. (AOB 201). Thus, the reign in argument asserted by Respondent has no merit. (RB 94). As to

Respondent's argument that defense counsel made a "rational tactical" decision (RB 94), defense counsel was simply making the best out of a bad situation with respect to the prosecutor's argument. (RT 2582-2584; RB 95-96). Defense counsel's rebuttal of the prosecutor's argument, as opposed to objecting to said argument, given the futility of objecting noted above, does not constitute a waiver or acquiescence in the prosecutor's misconduct.

Respondent also asserts that Appellant's federal claims of due process of law guaranteed by the Fifth and Fourteenth Amendments, as well as his Eighth Amendment right to a reliable verdict (AOB 194) have been waived as a consequence of defense counsel's failure to object. (RB 93-94). However, this Court has noted that a defendant's federal claims of due process as well as his right to a reliable verdict should be addressed on the merits as opposed to being denied on the theory of waiver. In People v. Cole (2004) 33 Cal.4th 1158-1195, n.6, this Court stated in pertinent part as follows:

> For the first time on appeal, defendant claims that the trial court's asserted error in admitting evidence of his prior cohabitant abuse of Mary Ann violated his right to due process under the Sixth and Fourteenth Amendments to the United States Constitution and his right to a reliable verdict under the Eighth Amendment to that Constitution. We believe that to consider defendant's federal claims on the merits is "more consistent with fairness and good appellate practice than to deny the claim as waived. ..."

It follows from People v. Cole that Appellant's federal claims of due process and to a reliable verdict should be decided on the merits which this Court has determined to be "more consistent with fairness and good appellate practice than to deny the claim as waived." Id., see also, People v.

Boyer (2006) 38 Cal.4th 412, 441 n.17 (noting that defendant's new constitutional arguments were not forfeited on appeal).

Respondent also asserts that any error was harmless in light of the overwhelming evidence of Appellant's guilt. (RB 99-100). First, Respondent asserts that Appellant's sperm was found on Torres thereby proving that he raped her. (RB 99-100). However, as noted in the discussion concerning the consent instruction, ante at 48-50, the presence of sperm alone does not equate to rape as Appellant asserted that the sexual contact was consensual. Further, as noted, ante at 48-52, there was evidence that the sexual contact was consensual, and hence, the instruction on consent should have been given. With respect to the 911 call, as noted, ante at 49-50, said call was also indicative of consensual sex. As to the so-called "inconsistent stories," Appellant did not testify at trial. Thus, there was no purported inconsistent story proffered by Appellant Martinez, but only his prior recorded statements which the prosecution sought to attack. (See ante, 25-44, with regard to the challenges asserted as to the statements of Martinez). Under these circumstances, the evidence can hardly be considered overwhelming.

B. The Subject of Penalty and Punishment in the Guilt Phase Argument.

Respondent asserts that the reference to the "second trial" did not constitute prosecutorial misconduct. Initially, Respondent contends that it is not reasonably likely that the jury understood what "second trial" the prosecutor was referring to. Further, Respondent asserts that it is not reasonably likely that the jury interpreted the prosecutor's statement to mean that once they made a guilt determination that they could proceed

with the punishment of Martinez. (RB 102). Both assertions are without merit.

During voir dire, the jury was informed that there were two potential phases in the trial, one to determine guilt or innocence and the other to determine punishment. In fact, the record makes clear that the jury knew that the reference to the "second trial" was to the penalty phase which would commence after a guilt determination as they had been so informed by the trial judge during voir dire. (RT 879, 896 and 897). Judge Melville expressly advised the jury during voir dire that there was the potential for two phases of the trial, one guilt and the other penalty, with the penalty phase proceeding only if there was an adjudication of first degree murder with special circumstances. Judge Melville advised the jury as follows:

> Ladies and gentlemen, at this time I would like to impart to you some general information that may be of some assistance to you in the next couple of days as we select a jury, and it will definitely be of assistance to those jurors who end up sitting on the case:
>
> . . .
>
> Today as we question you as to your qualifications as jurors, we are going to be questioning you about your views of the death penalty, along with other questions. In a death penalty case in California, there may be two separate phases. Whether or not we have a second phase of the trial depends on what happens in the first phase, which we call the guilt phase. If, in the guilt phase, the jury finds the defendant not guilty of first-degree murder or finds that the special circumstances are not true, the case will end there, like any other criminal case.
>
> However, if, in the guilt phase, all 12 jurors find the defendant guilty of first-degree murder and also find true the special circumstance, then, and only then, will we go to the

> second phase, which we call the penalty phase. In the penalty phase, if we have one, the jury must decide whether the punishment shall be life imprisonment without the possibility of parole or death.
>
> First-degree murder is defined as premeditated, deliberate and willful murder, or by a concept called the felony murder rule, which I will define later.
>
> A special circumstance is a legal term and means a certain kind of first-degree murder. In this case, the special circumstances charges are murder in the course of rape, and murder in the course of robbery.
>
> If, and only if, the jury in the guilt phase finds the defendant guilty of first-degree murder and finds true the special circumstance will we even enter a penalty phase. If not, there will be no penalty phase.

(RT 879, 896 and 897). Contrary to the argument advanced by Respondent, the record makes it abundantly clear that the jury had been informed by the trial judge that the reference to the second trial was to the penalty phase, which would only commence following a determination of guilt of first-degree murder as well as a finding of special circumstances at the conclusion of first phase of the trial.

The reference to the second trial, particularly in conjunction with the term "precursor," clearly suggested to the jury that the guilt phase determination was simply a warm-up to the penalty phase. As DA Sneddon stated: "The simple truth is this trial went quickly and it's a precursor to the second trial in this case." (RT 2547) (AOB 203). Thus, the use of the term "precursor" in reference to the second trial indicated to the jury that once the guilt determination had been made, that they could then proceed with the punishment determination. (AOB 203).

Respondent also asserts that the rhetorical question posed by DA Sneddon, to wit, "Are there no lessons learned in life?" was simply made in "exasperation," citing People v. Hill (1998) 17 Cal.4th 800, 819. (RB 102). Further, Respondent asserts that there is no reasonable likelihood that the jury interpreted this rhetorical question as meaning that since Appellant had failed to learn lessons in life, that he should receive the death penalty as a lesson. (RB 102-103). Respondent's citation to People v. Hill as authority for the proposition that the prosecutor was justified in making the "no lessons learned in life" comment in exasperation is without merit. The cited page to People v. Hill, 17 Cal.4th at 819, makes clear that prosecutors "are held to an elevated standard of conduct."

While Respondent seeks to justify the rhetorical question based on the "sequence of crimes" as noted in Appellant's Opening Brief (RB 102) (AOB 204), the context of the rhetorical question makes clear that DA Sneddon was injecting punishment and/or the penalty phase issue into the jury's guilt phase determination by suggesting that Appellant Martinez was beyond rehabilitation as he was incapable of learning lessons in life. The context of the rhetorical question posed by DA Sneddon as to the murder of Sophia Torres in conjunction with the other crimes bears this out:

> How about after the murder? Is there anything in the defendant's conduct after the murder -- and by the way, isn't that a scary thought, that we not only have somebody before, we have somebody who is killed and then we have somebody out there doing this again? Are there no lessons learned in life?

(RT 2543) (AOB 203-204). Thus, the context of the rhetorical question demonstrates the intent of the question, which was to suggest that Appellant Martinez was beyond rehabilitation as he was incapable of learning lessons

in life and not simply addressing the "sequence of crimes" as asserted by Respondent as a justification for the rhetorical question. (RB 102).

Respondent also asserts that the prosecutor's comments regarding the victims carrying the memories of Appellant's attacks was simply an observation that having suffered "a tragic event at the hands of Appellant," they would be unlikely to forget it, which was simply "a basic truism of human nature and memory." (RB 103). This so-called observation by the prosecutor was wholly unnecessary to the guilt phase determination. Contrary to the assertion by Respondent that this was simply an observation by DA Sneddon reflecting a "basic truism," the record reflects that by his references to the suffering of both the deceased victim and surviving victims, DA Sneddon sought to inject the question of victim-impact into the guilt phase deliberations, which was only relevant to the penalty determination. (AOB 204-205). An example of DA Sneddon injecting victim-impact with respect to the surviving victims is reflected in the following comments made by DA Sneddon:

> In observing the surviving victims in this case and their testimony . . ., it is clear from the psyche that the memory of each of the victims will always be scarred from their individual suffering and the terror created by the attacks of the defendant in this case on them.

(RT 2515-2516) (AOB 204-205). This is more than simply an observation by DA Sneddon; he injected the issue of victim-impact into the guilt phase deliberations.

Respondent also asserts that the above noted instances of prosecutorial misconduct have been waived on appeal as a consequence of defense counsel's failure to object and request an admonition. (RB 101). However, Respondent acknowledges that the trial court, after closing

arguments, instructed the jury with CALJIC 17.42 which expressly provided that the jury was not to consider the subject of penalty or punishment in their deliberations. (RB 101) (RT 2721 at 2722). The jury was instructed both before argument by way of CALJIC 8.83.2 and after argument by way of CALJIC 17.42, that the subject of penalty or punishment must not affect the verdict. In fact, the CALJIC 17.42 instruction was supplemental to the CALJIC 8.83.2 instruction. (See AOB 205-206).

The failure to object did not preclude the trial court from giving a curative instruction relative to the improper conduct by the prosecution as the trial court de facto gave such an instruction by virtue of CALJIC 17.42, and hence, the issue must be deemed preserved. The obvious purpose of objecting to misconduct and requesting an admonition is to allow the court to cure the harm caused by the misconduct. People v. Hill, 17 Cal.4th at 820-822. Here, the jury was instructed both before and after argument that the subject of penalty or punishment should not affect their verdict by way of CALJIC instructions 8.83.2 and 17.42. (RT 2461 at 2491 and RT 2721 at 2722) (AOB 202-203). The failure to object did not preclude the trial court from giving a curative instruction as reflected in CALJIC 17.42. However, under the circumstances of this case, the instruction did not negate the improper reference to punishment by the prosecutor.

In People v. Holt (1984) 37 Cal.3d 436, 458, this Court held that such an instruction did not negate the improper reference to punishment by the prosecutor as reflected in the following:

> While the jury was instructed at the conclusion of the guilt phase that the subject of penalty or punishment was not to be discussed and must not affect the verdict [footnote omitted]

> the instruction did not negate the improper reference to punishment by the prosecutor.

Similarly, here, the CALJIC 17.42 instruction did not negate the improper reference to punishment by the prosecutor.

Respondent asserts that any error in argument by the prosecutor was harmless. (RB 103). First, Respondent argues that the CALJIC 17.42 instruction which was presumably followed by the jury cured any improper argument. However, as this Court determined in People v. Holt, 37 Cal.3d at 458, such an instruction "did not negate the improper reference to punishment by the prosecutor." Second, Respondent asserts that the evidence of Appellant's guilt was overwhelming. As discussed, ante at 48-50, the evidence presented regarding the rape and the rape felony-murder charges was in conflict with respect to the issue of consensual sex. (See Argument III, ante 45-54, discussing the consent instruction.). Thus, the misconduct cannot be deemed harmless.

C. Prosecutorial Vouching

Respondent asserts that there was no prosecutorial vouching as to the consistency of the testimony of Maria Morales. (RB 104). First, Respondent asserts that the prosecutor was simply responding to defense counsel's argument that the testimony of Maria Morales was "bollixed up" and "muddled." (RB 104). Second, Respondent argues that the prosecutor may have been referring to Officer Kelleen Brooks' testimony regarding Morales' disheveled appearance. (RB 104). Finally, Respondent contends "it is possible" that the prosecutor was referring to the prior identification of Appellant Martinez by Morales as her attacker to police and/or her conversation with Officer Brooks after the attack. (RB 105).

Respondent seeks to obfuscate the record in an effort to demonstrate that there was no prosecutorial vouching regarding the testimony of Maria Morales. The statement at issue was made by ADA Grossman in closing argument regarding the consistency of the testimony of Maria Morales as follows:

> What Maria Morales said -- which she has said, ladies and gentlemen, every time she's been asked. Every time. She's been consistent with police, in prior testimony, and here before you.

(RT 2689) (AOB 208) (RB 104). There was no such consistent discussions with police or prior testimony referenced in the evidence at trial. (AOB 207-213).

In closing argument, defense counsel, Mr. Dullea, challenged the testimony of Maria Morales on the issue of movement in connection with her encounter with Martinez in the alley. (RT 2599-2617). While he did note that the testimony of Morales was "bollixed up" (RT 2606) and "muddled" (RT 2599 and 2605), this comment pertained to her testimony regarding the distance traveled and movement down the alley when she was confronted by Appellant Martinez. Said testimony was also compared and contrasted with the testimony of independent witness, Francisco Lopez, who was the good samaritan who appeared on the scene to rescue her. In closing argument, defense counsel compared and contrasted the two different versions of the encounter attested to by Morales and Lopez as to the distance traveled by Morales and Martinez down the alley. (RT 2603-2608). The testimony of Morales indicated that the distance traveled was 175 feet while the testimony of Lopez indicated that the distance was much less. The issue of movement down the alley relative to the testimony of

Morales and Lopez was discussed at length in defense counsel's closing argument as follows:

> Now, Maria Morales has been telling us that Mr. Martinez escorted, her, what, Detective Carroll says it's 171 feet somewhere down here,
>
> . . .
>
> Now, what's wrong with that? Mr. Lopez had to cover 50, 75, 100 feet. He was unencumbered. Didn't have anything that would slow him down, and he was walking fast. He went this way.
>
> . . .
>
> Miss Morales wants us to believe that in the time it took Mr. Lopez to go 75 feet, she was taken 171 feet, resisting, struggling.
>
> . . .
>
> Now, I asked Miss Morales at some length about whether she knew Mr. Lopez was coming and what he was carrying in his hands and what she heard, that is, what noise she heard that she associated with Francisco Lopez. And it seemed to me that the responses that she made indicated that she was confused and muddled. She said at one point, "That's when he took me halfway down. I was trying to stop him with my eyes. He was making noises."
>
> . . .
>
> . . . Mr. Lopez's version is the accurate one.
>
> What really happened, then? Mr. Lopez activates the alarm just as the two disappear. Mr. Martinez hears it, looks up surprised, as Mr. Lopez told us, quickly pulls her a little ways down the alley. This is - - when we're talking about the elements of crimes, this is the incidental movement necessary

> to complete the robbery. He takes her down far enough so that he can finish what he had in mind, which was to search the pockets, take what property he could, but he was interrupted by the rapid arrival of Mr. Lopez,
>
> . . .
>
> I think the prosecution knows that the movement down the alley to the point "X"'d by Mr. Lopez in I isn't enough for a substantial distance within the meaning of the jury instruction.

(RT 2603-2607).

Thus, the issue at hand involved whether the movement down the alley constituted a "substantial distance" within the meaning of the jury instruction. This issue of movement impacted the crimes charged against Appellant Martinez for the Morales incident which was addressed by defense counsel. (RT 2608 and 2614-2616). For example, defense counsel noted that the difference between substantial movement in connection with the encounter as contrasted with movement that was incidental impacted the jury's determination of the charges against Appellant Martinez for the Morales incident. This is reflected in his argument as follows:

> Now, how do we conclude this? What do we do with Mr. Martinez in the Morales incident? Obviously guilty of Count 1. Not guilty of Count 2, the assault with intent to commit rape. Why? Because there are several missing elements. Not guilty of Count 3, which I think is the assault with - - I'm sorry, the kidnap with intent to commit robbery, because, again, there is no substantial movement. There is no increase in the danger. This movement was incidental to the robbery.

(RT 2614).

Therefore, the argument advanced by defense counsel in closing argument pertained to Morales' view of the encounter with Martinez and the question of movement during the encounter. In response, ADA Grossman sought to vouch for the credibility of Morales on this issue by reference to prior discussions with the police and prior testimony, and in doing so, reached outside the record.

As to Respondent's argument that the prosecutor "may have been" referring to the testimony of Officer Kelleen Brooks regarding Morales' disheveled appearance, such testimony bears no relationship to the issue of movement or the encounter between Morales and Martinez as addressed by defense counsel which the prosecutor was seeking to rebut. As to Respondent's contention that "it is possible" that the prosecutor was referring to the identification of Martinez by Morales to police and/or her discussions with Officer Brooks after the attack, again, the record does not support this contention. The identification of Martinez as to the Morales incident was not an issue in closing argument nor was it raised by defense counsel. Again, the prosecutor was seeking to bolster the testimony of Morales on the issue of movement in the alley as to her encounter with Martinez. Thus, the identification of Martinez and/or the discussion between Morales and Officer Brooks did not relate to this issue. Thus, the record confirms that the vouching by ADA Grossman as to the Morales issue is directed to the central issue of "substantial movement" during the encounter between Morales and Martinez in the alley.

Respondent asserts that any error in prosecutorial vouching was harmless. (RB 105-106). The record does not support this assertion. The record clearly reflects that the prosecutor vouched for victim witness, Maria Morales, on the key issue of asportation relative to the kidnapping charge.

Defense counsel argued at length the impact of the asportation element, that is, substantial movement as opposed to incidental movement. (RT 2599-2617). The evidence was in dispute on this issue when comparing and contrasting the testimony of Morales and Lopez as noted by defense counsel in closing argument. (RT 2599-2617). As defense counsel, Peter Dullea, argued, there was no kidnap with intent to rape and no kidnap with intent to rob as reflected in the following: "We don't have kidnap with intent to commit rape. We don't have kidnap with intent to commit rob [sic]." (RT 2614). The reason that there was no kidnap with intent to either rape or rob was due to the lack of "substantial movement" as reflected in the following:

> [B]ecause, again, there is no substantial movement. There is no increase in the danger. This movement was incidental to the robbery.

(RT 2614; see also 2608).

Thus, the key to the kidnap with intent to rape as well as the kidnap with intent to rob rested in large on part on the question of asportation, that is, whether there was substantial movement or movement that was incidental. The prosecutorial vouching in this instance sought to bolster the testimony of Maria Morales on this key issue.

The jury found Appellant Martinez guilty of Count Two as to the crime of kidnapping with intent to commit rape, in violation of Penal Code § 208(d), and guilty of Count Three as to the crime of kidnapping for robbery, in violation of Penal Code § 209(b). (See CT 02683-02684 and CT 1287 and 1289). The issue of movement was critical to both the charge of kidnapping with intent to commit rape and kidnapping for robbery as set forth in Counts Two and Three of the Second Amended Information (CT 2683 and 2684). These charges were addressed in the jury instructions for

both the kidnapping with intent to commit rape and kidnapping to commit robbery, CALJIC 9.52.1 and CALJIC 9.54 (CT 1250 and CT 1252). In fact, the jury received a special CALJIC instruction entitled "CALJIC - Special" which addressed the issue of movement as to the crimes of robbery and/or rape, clearly advising the jury that "the movement" must subject the victims to "a substantial increase in the risk of harm." (CT 1254). As noted, the CALJIC instructions 9.52.1 regarding kidnapping with intent to commit rape and CALJIC 9.54 regarding kidnapping to commit robbery both address the issue of "movement by physical force of a person without that person's consent for a substantial distance where the movement is not merely incidental to the commission of the" crime of rape or robbery. (CT 1250 and 1252).

In this instance, the prosecutorial vouching was on a critical issue relative to the kidnapping with intent to commit rape and kidnapping for robbery charges. Under these circumstances, the prosecutorial vouching was not harmless.

V. THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL.

Respondent asserts that there are no guilt phase errors to accumulate and, assuming arguendo, that if there were errors, they were harmless. (RB 107-108). As set forth in Appellant's Opening Brief (AOB 97-214), and herein, ante at 1-73, there were multiple errors whose cumulative effect prejudiced Appellant in the guilt determination of both the capital case involving deceased victim, Sophia Torres, and in the non-capital cases involving the surviving victims.

For example, Respondent argues that "Appellant's semen was found on the victim" as proof positive for both the rape and rape felony-murder convictions. (RB 108). However, the presence of semen simply proves sexual contact, not rape or rape felony-murder, as the sex may have been consensual. However, the court refused to give an instruction on the issue of consent as to the crime of rape as reflected in CALJIC 1.23.1. (AOB 180-190, and ante, 45-48).

Moreover, the trial court refused to conduct an inquiry as to the competence of Juror No. 12, Dana W., who solicited assistance from a member of the prosecution team to help "get her off the jury." (AOB 97-113, and ante, 1-24). Juror No. 12, Dana W., served as the foreperson during the guilt phase deliberations. (RT 2744-2750 and AOB 113).

Further, as to non-capital victim, Maria Morales, the prosecution vouched for her credibility by reaching outside the record in an effort to establish that she had been consistent in her testimony on the question of movement down the alley with Appellant Martinez. (AOB 206-214, and ante, 67-73). The issue of movement, e.g., asportation, was a critical element in the charged crimes of kidnap with intent to rape (Penal Code §

208(d)) and kidnap with intent to rob (Penal Code § 209(b)). (AOB 206-214; ante 68-73). These are just a few of the errors whose cumulative effect prejudiced Appellant as to the guilt determination in both the capital and non-capital cases.

It is respectfully submitted that this Court should find more than one error, and thus, the impact of all errors in the guilt phase should be considered cumulative, and not one by one. See, People v. Coffman and Marlow (2004) 34 Cal.4th 1, 128-129 (reviewing guilt phase errors cumulatively to determine whether they significantly influenced the fairness of defendant's trial); see also, People v. Cunningham (2001) 25 Cal.4th 926, 1038.

VI. THE GUILT PHASE ERRORS MUST BE DEEMED PREJUDICIAL TO THE PENALTY PHASE UNLESS THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT.

Respondent first seeks to limit the claimed guilt phase errors which Appellant submits should be deemed prejudicial to the penalty phase to the "admissibility of statements, admissions and confessions" by Appellant Martinez, citing Appellant's Opening Brief at page 217. (RB 109). Second, Respondent professes ignorance of any case in which this Court has determined guilt phase errors to have a prejudicial "spillover" effect at the penalty phase. (RB 109). Finally, Respondent asserts that the prosecutor did not rely on Appellant Martinez's statements to the police at the penalty phase, and hence, said statements would not have impacted the penalty phase. (RB 109). These three assertions must be rejected as they are not supported by the record.

First, Appellant relies on all guilt phase errors asserted in his Opening Brief as prejudicially impacting the penalty phase determination of death. (AOB 217 and AOB 97-216) ("Should this Court hold that the guilt phase errors were harmless as to the guilt determination, it should nonetheless reverse the death sentence because of the prejudice those errors caused Martinez at the penalty phase."). While Respondent correctly notes that Appellant specifically references the "statements, admissions and confessions by Martinez" and notes their impact on "his defense at the penalty phase" (AOB 217), this was done for illustrative purposes only.

As to Respondent's contention that there is no case that addresses the so-called prejudicial "spillover" effect of guilt phase errors to the penalty phase, this Court's decision in People v. Brown (1988) 46 Cal.3d 432, 464,

addresses that issue. Justice Mosk, in his concurring opinion, quoting from this Court's earlier decision of People v. Hamilton (1963) 60 Cal.2d 105, 136-137, notes the following:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. . . . [I]n determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, . . . the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed.

(People v. Brown (1988) 46 Cal.3d at 464 (conc. opn., Mosk, J., quoting from People v. Hamilton (1963) 60 Cal.2d 105, 136-137).

Justice Mosk stated further as follows:

> Although Hamilton was decided more than 20 years ago, its teaching, as I shall explain, is in accord with the principles of present-day Eighth Amendment jurisprudence and hence has not none of its persuasive force.

Id. at 464. Thus, Justice Mosk's concurring opinion which references this Court's earlier decision in Hamilton clearly addresses the so-called "spill-over" issue.

Further, as to Respondent's assertion that the prosecutor did not rely on Appellant's statements to the police at the penalty phase, this is not supported by the record. In fact, the prosecution did rely on the facts and circumstances of the guilt phase, which necessarily included the statements

to police by Appellant Martinez (e.g., the recorded statements), in closing argument by DA Sneddon as reflected in the following:

> [BY MR. SNEDDON:] What we're not talking about is whether the defendant raped, robbed and murdered Sophia Torres. That was determined in that other trial. And we're not talking about whether the defendant kidnapped at knifepoint and hauled Maria Morales down the alley for the purpose of raping her. We're not talking about whether the defendant approached and assaulted Laura Zimmerman with the intent to rape her, nor are we talking about whether the defendant again used a knife in an attempt to kidnap Sabrina Perea for the purpose of rape.
>
> All of those matters have been conclusively determined by you as true, and the defendant stands convicted of those. And you, in your deliberations, are entitled to consider those, and the full impact of not only the convictions, but the facts and the circumstances surrounding those convictions.

(RT 3960-3961) (emphasis added). The "facts and circumstances" surrounding the convictions necessarily included the recorded statements by Appellant Martinez to the police, which were an integral part of the evidence presented to the jury by the prosecution.

Finally, Respondent asserts that reliance on the length of time that the jury deliberated is simply too speculative to establish that any guilt phase errors prejudiced Appellant at the penalty phase. (RB 109-110). However, Appellant Martinez not only relies on the length of time that the jury deliberated as support of his position that the guilt phase error impacted the jury's penalty phase deliberations (AOB 220), but also the juror questions during the penalty phase deliberations (AOB 220; CT 1755), which necessitated a special jury instruction. (CT 1559). See People v.

West (1983) 139 Cal.App.3d 606, 610 (jury's requests during deliberations material to prejudice analysis).

On June 23, 1998, during the penalty phase deliberations, the jury posed questions to the court regarding the sentence of life imprisonment as well as the possibility that a change in the law could result in a reduced sentence as reflected in the following questions:

> With the sentence of life imprisonment without possibility of parole, can the accussed [sic] receive a reduced sentence based on good behavior? Is there any possibility this could change if the law changes?

(CT 1755). After discussions with counsel (RT 4093-4102), the court responded by giving the jury an agreed upon special instruction advising that a death sentence means that the defendant will be executed and that a life sentence means that there is no possibility of parole as reflected in the following instruction:

> You are to assume that a death sentence means that the defendant will be executed, and that a sentence of life in prison without the possibility of parole means that the defendant will spend the rest of his natural life in prison.
>
> You must not engage in speculation concerning possible future changes in state law.

(CT 01559; RT 4104-4105).

Since the jury deliberated for eight hours over a two-day period and had two questions for the court concerning the punishment to be imposed (RT 4081 and 4106; CT 01494 and 01497; and RT 4105-4105 and CT 01496-01497), it follows that this was a close case as to the penalty determination. Consequently, as to the guilt phase errors, Respondent

cannot meet the "reasonable-possibility" and/or the "harmless beyond a reasonable doubt" standard, and hence, the death verdict must be set aside.

VII. THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT MARTINEZ'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW BY ADMITTING PREJUDICIAL VICTIM IMPACT EVIDENCE.

Respondent asserts that the victim impact testimony of family members, Victoria Francisco and Gilberto Torres, as to the capital crime involving deceased victim, Sophia Torres, and the testimony of surviving victims, Maria Morales and Sabrina Perea, as to the non-capital crimes was proper. (AOB 115-119). The testimony of Victoria Francisco and Gilberto Torres was improper as it involved their characterizations and opinions concerning the crime. Moreover, the testimony of surviving victims, Maria Morales and Sabrina Perea, did not involve the nature and circumstances of a capital offense, and hence, said testimony was not permissible victim-impact evidence.

A. The Testimony of Victoria Francisco and Gilberto Torres.

Respondent boldly asserts that the victim impact testimony of Victoria Francisco and Gilberto Torres was proper, because "their testimony told the jury nothing that it was not already aware of." (RB 115). The issue is not whether there was sufficient evidence to support the characterizations or opinions of either Victoria Francisco or Gilberto Torres concerning the nature of the crime which resulted in the death of their sister, Sophia Torres, but whether their testimony was proper victim-impact evidence. Respondent cites extensively to this Court's decision in People v. Pollock (2004) 32 Cal.4th 1153, to support its position that the testimony of family members Francisco and Torres was proper but omits this Court's reiteration of the basic principle of victim-impact evidence that it does not

include characterization or opinions about the crime as reflected in the following:

> In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eight or Fourteenth Amendments to the federal Constitution. (Payne v. Tennessee (1991) 501 U.S. 808, 825-827 [115 L.Ed.2d 720, 111 S. Ct. 2597].) Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case. (People v. Boyette, supra, [2002] 29 Cal.4th [381] at p. 444; People v. Edwards (1991) 54 Cal.3d 787, 835-836 [1 Cal.Rptr.2d 696, 819 P.2d 436].) But victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members or friends, and such testimony is not permitted. (People v. Smith (2003) 30 Cal.4th 581, 622 [134 Cal.Rptr.2d 1, 68 P.3d 302].)

Pollock, 32 Cal.4th at 1180.

It follows from this fundamental principle concerning victim-impact evidence that the testimony of both Victoria Francisco and Gilberto Torres was improper as their respective testimony reflected their characterizations and opinions concerning the crime. In this regard, Victoria Francisco testified as follows:

> [W]hat hurts me the most is, you know, she didn't die of natural death, you know. And, you know, thinking all that she went through, you know, that night, you know, it hurts me a lot. You know, all she suffered that night, you know. And I know, you know, that she never do no harm to anybody, you know". . .

(RT2958) (AOB 225). Here, the testimony by Victoria Francisco that what hurts her the most is that her sister did not "die of natural death," and "all

that she went through" – "all she suffered that night", as well as "she never do no harm to nobody" clearly involves a characterization or opinion concerning the crime. (RT2958) Contrary to the trial court's determination, this testimony did involve a characterization or opinion concerning the crime. (RT 2984-2986) (AOB 232).

Moreover, Gilberto Torres testified as follows: "Well, I think of her every day, especially for the brutal way she died." (RT3002). Thus, this characterization and opinion of the crime regarding "the brutal way she died" served to buttress the testimony of Victoria Francisco regarding the fact that her sister did not "die of natural death" and "all she suffered that night." The characterizations or opinions by Victoria Francisco and Gilberto Torres regarding the suffering experienced by Sophia Torres as well as the brutality involved with respect to her murder clearly constitutes characterizations and/or opinions concerning the crime, which is precluded both by state law and by the federal constitution.

The inflammatory nature of the reference to the suffering experienced by the victim as well as the brutality involved resulted in a sentencing determination which was fundamentally unfair and a denial of due process under both the state and federal constitutions. While Respondent seeks to characterize the testimony as "brief," (RB 117) which "told the jury nothing that it was not already aware of" (RB 115), the testimony carried a powerful emotional message. As noted, it was for the jury to determine whether the crime was "brutal" and/or not a "natural death," based on the evidence. The characterizations and opinions by family members that the crime was "brutal" and/or that the deceased victim, Sophia Torres, "suffered that night" is inflammatory and prejudicial and did not address the purpose of victim-impact evidence which is "to demonstrate

the immediate harm caused by the defendant's criminal conduct." Pollock 32 Cal.4th at 1183.

In addressing objections to the above noted testimony of Victoria Francisco, the trial court conceded in part that the testimony of Francisco involved a characterization of the crime by noting that: "yeah, in a sense it is, but it's not, I think, the type of characterization they're trying to prohibit." (RT 2983-2986) (AOB 225-228). Moreover, the trial court concluded that Victoria Francisco was simply communicating "her feeling" regarding "imagining what her sister went through in that attack." (RT 2983-2986) (AOB 225-228). The court also concluded that it did not find the testimony "prejudicial or beyond the area that they (the prosecutors) can go into." (RT 2983-2986) (AOB 225-228). Whether the trial court correctly determined that Francisco and subsequently Torres were describing their feelings, the net effect of their testimony resulted in characterizations or opinions regarding the nature of the crime which is improper. Pollock, 32 Cal.4th at 1180. See also, Turrentine v. Mullin (2004) 390 F.3d 1181, 1201 (10th Cir.) (indicating that the reference to the murder as being "brutal" was "improper").

Respondent cites a litany of reasons why the testimony involving the characterizations and opinions by Francisco and Torres as to the crime, e.g., "brutal" death, not a "natural death," and "all that she suffered that night," was harmless. The reasons range from the testimony consuming "only a few lines of the transcript" to "the lack of significant mitigating circumstances." (RB 117). The position asserted by Respondent is not supported by the record. A review of the record demonstrates that this was an extremely close penalty phase case where one comment or piece of evidence could make a difference in a life or death verdict. (See AOB 217-

303 and AOB 51-96). This is borne out by the questions posed by the jury during the penalty phase deliberations in which they inquired as to whether "the sentence of life imprisonment without possibility of parole" could be "reduced" based "on good behavior" and, further, whether there was "any possibility this could change if the law changes." (CT 1755) Accordingly, the error was not harmless.

B. The Testimony of Maria Morales and Sabrina Perea.

Respondent asserts that the issue concerning the admissibility of victim-impact evidence regarding non-capital crimes as reflected in the testimony of Maria Morales and Sabrina Perea has been waived, since Appellant "only interposed an Evidence Code Section 352-type objection." (RB 117-118). This position is without merit and is not supported by the record.

Appellant Martinez filed an extensive motion to limit "Victim Impact" evidence (CT 01329-01375). In the motion, Appellant expressly addressed the testimony of Maria Morales and Sabrina Perea. (CT 01349-01350). Appellant sought to exclude the testimony under Evidence Code § 352 as "cumulative and repetitive" and on the grounds that such testimony would be "inflammatory and prejudicial," and further that the "prejudicial effect of such testimony would outweigh its probative value." (CT 01349). Moreover, Appellant requested an "evidentiary hearing" to determine the admissibility of the further testimony of Morales and Perea. (CT 01350). Appellant also raised consideration of the Eighth Amendment and Article I, Section 17 of the California Constitution as well as the Due Process Clause of the Fourteenth Amendment relative to the Morales and Perea testimony. (CT 01352-01353). The trial court held a hearing regarding the victim-impact evidence motion. (RT 2796). After considering the motion and

argument, the trial court agreed to allow the victim-impact testimony subject to the "self-imposed" limits proffered by the prosecution. (RT 2805-2806).

Respondent cites to People v. Davenport (1995) 11 Cal.4th 1171, 1205, as support for its waiver theory, that is, the issue of victim-impact evidence as to non-capital crimes has been waived. (RB 118). However, Davenport is inapposite as the waiver of the evidentiary error in that case was predicated on a failure to object. Id. at 1205. Here, Appellant not only objected but sought to exclude the testimony of Morales and Perea by way of a written motion. (CT 01329 at 01349-01350).

Respondent correctly notes that the theory that the testimony of Morales and Perea should have been excluded based on their testimony involving victim-impact evidence as to non-capital crimes was not proffered as a basis for exclusion by Appellant. However, the issue of exclusion of said testimony was raised by Appellant, and further, the court was well aware of the fact that both Morales and Perea were victims of non-capital crimes as opposed to the capital crime. (CT 01349). Under these circumstances, the issue was preserved.

It is well settled that a new theory involving only a question of law may be considered on appeal. People v. Carr (1974) 43 Cal.App.3d 441, 446. Assuming arguendo that the question of whether Appellant Martinez preserved the issue is "close and difficult," the court assumes the issue is preserved and addresses it on the merits. People v. Hernandez (2003) 30 Cal.4th 835, 863. The consideration of the Eighth and Fourteenth Amendments, particularly the consideration of due process, provides an additional ground for consideration of the issue. (See AOB 237). This is particularly true in this case where both Eighth and Fourteenth Amendment

considerations were noted in Appellant's Motion to Limit Victim-Impact Evidence. (CT 01329 at 01352-01353). See also People v. Cole (2004) 33 Cal.4th 1158, 1195, n.6 (wherein this Court noted that "'no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal'," quoting from People v. Yeoman (2003) 31 Cal.4th 93, 117. This Court also noted that 'to consider defendant's federal claims on the merits is "more consistent with fairness and good appellate practice than to deny the claim as waived,'" again quoting from Yeoman, 31 Cal.4th at 117).

Respondent effectively concedes, as it must, that the testimony of Morales and Perea pertaining to victim-impact evidence in non-capital cases was improper. (RB 118-119). See People v. Mitcham (1991) 1 Cal.4th 1027, 1062-1063 (wherein this Court noted that "[e]vidence of the impact of the defendant's conduct on victims other than the murder victim is relevant if related directly to the circumstances of the capital offense."). Here, the testimony of Morales and Perea did not relate to the circumstances of the capital offense involving Sophia Torres. See also, People v. Smith (2003) 30 Cal.4th 581, 622 (noting that the views of a crime victim, especially of the victim of one of the non-capital crimes, regarding proper punishment has no bearing on the circumstances of the offense, citing Skipper v. South Carolina (1986) 476 U.S. 1, 4); see generally, Kaczmarek v. Nevada (2004) 120 Nev.314; 91 P.3d 16, 34-35 (noting that "evidence of the impact to victims of prior crimes" is "inadmissible during the penalty phase" of a capital case.).

Respondent also asserts that the victim-impact testimony of Morales and Perea was harmless. (RB 118-119). However, in closing argument, DA Sneddon argued that their lives had been "unalterably changed and indelibly affected by" Martinez which could "never be changed" (RT 4022), and hence, this served as a basis for a verdict of death. (RT 4022-4024). As noted above, ante at 79-80, this was an extremely close penalty case in which a single piece of evidence or comment can make the difference in a life or death verdict. Accordingly, the error was not harmless.[9]

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[9] Respondent also notes that § 190.3, factor (a) is constitutional. (RB 119-120). Appellant has acknowledged that as a general matter § 190.3(a) is not unconstitutionally overbroad or void for vagueness. (AOB 238). However, the point that Appellant makes in his Opening Brief is that a "distortion" of § 190.3, subdivision (a)'s statutory phrase "circumstances of the crime" to include characterizations or opinions of the crime by family members under the guise of expressing their feelings as well as victim-impact testimony by non-capital victims regarding other crimes raises both state and federal constitutional concerns about vagueness and the arbitrary application of this section. (AOB 238-241).

VIII. THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT'S RIGHT TO DUE PROCESS AND RELIABILITY IN THE PENALTY DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY LIMITING THE TESTIMONY OF CORRECTIONAL EXPERT, JAMES ESTEN.

Respondent asserts that the conditions of confinement were not relevant, and hence, the trial court did not err in excluding them as a basis for Esten's testimony. (RB 123-125). Moreover, Respondent asserts that trial counsel never argued that Dr. Wu's testimony rendered Esten's testimony on prison conditions relevant and cites to Evidence Code § 353 as a basis to conclude that the issue has been waived on appeal. Respondent also asserts that Appellant was not deprived of "a meaningful opportunity to present a defense" and relies on Crane v. Kentucky (1986) 476 U.S. 683, 690, in this regard. (RB 125). Finally, Respondent asserts that "the prosecutor made no claim of future dangerousness," and therefore, Esten's testimony was not relevant to rebut an express or implied claim of future dangerousness. (RB 125-126). None of these assertions have merit.

A. Relevance.

The defense sought to introduce expert testimony by James Esten as to "prison conditions" which were germane to his opinion that Martinez had the potential to make a "successful" adjustment to life in prison without the possibility of parole and to rebut an express or implied allegation of "future dangerousness." (CT 01420-01421) (AOB 245). The "details" of confinement that defense counsel sought to rely on were essential to establishing "the validity of Mr. Esten's opinion about Mr. Martinez's character" as well as to rebut the implied or express case for future dangerousness. (RT 3484-3487) (AOB 250 and 254).

The defense theory as to the penalty phase was that given the highly structured environment of a prison (e.g., Level 4), that Martinez would be able to make a successful adjustment to life in prison without the possibility of parole. Moreover, the defense theory also addressed the prosecution's claim of future dangerousness. Defense counsel articulated the theory to the trial court as follows:

> He [Mr. Esten] will tell us what it is about Mr. Martinez's surroundings (e.g., prison) that will operate to make him a safe prisoner, to help him control himself, to help him mature, to help him stay out of trouble, . . .

(RT 3480) (AOB 254). This theory was also supported by and related to the testimony of Dr. Wu who, based on his review and analysis, opined that Appellant Martinez suffered from brain damage to the frontal lobe area which impacted his "executive functions," that is, the ability to have a long-term planning and to defer inappropriate impulses. (RT 3274-3278). Dr. Wu concluded as follows:

> I think that given the appropriate structured environment, I think he would have that ability. But I think he would need to be in a very structured setting. I think if he were in a highly structured setting, a highly structured environment would, in effect, act like an external frontal lobe for him. The right kind of environment could do -- could provide for him the external feedback and the external limit-setting that he might not be able to provide for himself internally because of a defective frontal lobe.

(RT 3292-3293) (AOB 254-255). Dr. Wu concluded further that "given the right type of conditions" that Appellant Martinez "would be able to conform his behavior within the confines of a well structured environment such as a state prison." (RT 3293) (AOB 255).

It was for Mr. Esten to address the details of confinement in prison, but the trial court's ruling precluded this. However, the "details" were relevant to the basis for the opinion of Mr. Esten that Martinez could make a "successful" adjustment to prison life as well as the opinion expressed by Dr. Wu that a "highly structured environment" would act like an external "frontal lobe" for Martinez. Thus, the testimony of Mr. Esten as to the "details" of confinement was clearly relevant to the issue of whether he could make a "successful" adjustment to life in prison as well as to rebut a claim of future dangerousness. Both the opinions of Mr. Esten and Dr. Wu were pillars of the defense theory that Martinez would make a successful adjustment to life in prison without the possibility of parole. They were also central to the defense efforts to rebut the claim of future dangerousness.

The trial court's ruling precluding testimony regarding the "details of the prison system" (RT 3492-3495) (AOB 250) effectively undermined the opinions of Mr. Esten as well as Dr. Wu regarding Martinez being able to make a "successful" adjustment to life in prison without the possibility of parole as well as undermined the defense efforts to rebut the prosecution's claim of future dangerousness.

The decisions of this Court make clear that the opinion of an expert is only as good as the basis for said opinion. This Court has repeatedly noted: "The value of an expert's opinion depends upon the quality of the material on which the opinion is based and the reasoning used to arrive at the conclusion." People v. Marshall (1997) 15 Cal.4th 1; accord Slaten v. State Bar (1988) 46 Cal.3d 48, 55.

CALCRIM also makes the point in the instruction on expert testimony regarding the believability of an expert as follows:

> The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

JUDICIAL COUNCIL OF CALIFORNIA, CRIMINAL JURY INSTRUCTIONS, CALCRIM, FALL 2006 ED., Instruction No. 332 (Thomson West).

CALJIC makes the same point in CALJIC Instruction 2.80 which provides in pertinent part as follows:

> In determining what weight to give to any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion.
>
> An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.

CALJIC, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL FALL 2006 ED., Instruction 2.80 (Thomson West). This was the instruction that was given to the jury at the conclusion of both the penalty and guilt phases. (RT 3948-3949; CT 01531 at 01547 [penalty phase] (emphasis added); see also, RT 2473-2474; CT 1187 at 01211 [guilt phase]) (AOB 268-269).

It follows that the limitations imposed by the trial court which precluded Mr. Esten from addressing the details of confinement both

negatively impacted as well as undermined his opinion as well as the opinion of Dr. Wu regarding Appellant Martinez's adjustment as a life prisoner as well as in rebutting the claim of future dangerousness.

Respondent cites People v. Jones (2003) 29 Cal.4th 1229, 1261 (RB 124) for the proposition that details concerning the conditions of confinement are generally irrelevant to a jury's penalty determination. As this Court noted in Jones, the conditions of confinement do not "relate to defendant's character, culpability or the circumstance of the offense." Id. 1261. However, as set forth at length in Appellant's Opening Brief, the details of confinement in this instance related to Martinez's character with regard to making a "successful" adjustment to life in prison and the mental disorder he suffers from by way of the defective frontal lobe. (AOB 244-258, 264-266, and 270-272).

In People v. Lucero (1988) 44 Cal.3d 1006, 1028 (emphasis added), this Court addressed the issue of mitigation evidence involving a mental disorder and a structured setting as follows:

> Lucero's background, his conduct in custody, and Dr. Conolley's testimony that the murders were a response to a specific mental disorder which could be controlled in a structured setting with therapy, all indicate that defendant would not be a danger in a prison setting. (footnote omitted). Defendant was entitled to establish this point as an important consideration in mitigation.

It follows from Lucero that Martinez, who similarly had a mental disorder, e.g., a defective frontal lobe which according to Dr. Wu could be controlled in a "highly structured environment," was entitled to establish the same point as part of his mitigation defense. (RT 3292-3293) (AOB 257-258).

B. Waiver.

Respondent cites to Evidence Code § 353 as support for its waiver claim regarding Appellant's reliance on Dr. Wu's testimony relative to the testimony of Mr. Esten as to the conditions of prison confinement. Respondent asserts that Appellant "never argued" the issue of Dr. Wu's testimony in connection with the testimony of Mr. Esten, and hence, concludes that the issue has been waived. (RB 125).

Respondent's reliance on Evidence Code § 353 is misplaced. Evidence Code § 353, entitled "Effect of erroneous admission of evidence," addresses the erroneous admission of evidence. Here, we are not dealing with the admission of evidence but with the erroneous "exclusion of evidence" which Evidence Code § 354 expressly addresses. Evidence Code § 354 is entitled "Effect of erroneous exclusion of evidence" and addresses the erroneous exclusion of evidence. The trial court's ruling clearly precluded Mr. Esten from going into "the details of the prison system" but concluded that it would be permissible for Mr. Esten to opine that Martinez needed a "structured environment" and that a Level 4 prison is a "structured environment that would meet that requirement." The trial court explained its ruling excluding the "details" of prison confinement as follows:

> THE COURT: . . . What I'm not going to allow him to do is to testify as to, as in the photographs in your exhibit, the floors are painted this way, the guards look this way, the tables are made out of this, the toilets are made out of that. . . .

(RT 3492-3495; CT 01442) (AOB 250-251).

Thus, we are dealing with error predicated on the exclusion of evidence as opposed to error predicated on the admission of evidence. The

difference is significant when addressing the issue on appeal. Evidence Code § 353 provides in pertinent part as follows:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; . . .

Evidence Code § 354 provides in pertinent part as follows:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by questions asked, an offer of proof, or by any other means; . . .

The test for consideration on appeal is not whether Appellant made an objection on the specific ground tendered on appeal pursuant to Evidence Code § 353(a), but whether the "substance, purpose, and relevance of the excluded evidence was made known to the court" as reflected in Evidence Code § 354(a).

In his proffer in response to the prosecution motion to limit the testimony of Mr. Esten regarding the details of confinement, defense counsel, Mr. Dullea, outlined the theory of the defense case as to the penalty phase being that given the highly structured environment of prison

that Martinez would make a successful adjustment as a life prisoner and that he would not be a danger to others:

> He [Mr. Esten] will tell us what it is about Mr. Martinez's surroundings (e.g., prison) that will operate to make him a safe prisoner, to help him control himself, to help him mature, to help him stay out of trouble, . . .

(RT 3480) (AOB 254). The defense theory as to the penalty phase was made clear to the trial court. The parallel between the opinion of Dr. Wu that given "a highly structured environment" which "would, in effect, act like an external frontal lobe for [Martinez]" that "he would be able to conform his behavior" to the structured environment of a "state prison" (RT 3292-3293) (AOB 254-255) and the proffered opinion of Mr. Esten on the issue is obvious. Dr. Wu provided the medical foundation regarding Martinez's defective frontal lobe and Mr. Esten was to provide the prison foundation regarding the details of the highly structured prison environment which collectively supported the defense theory. That is, Martinez would make a successful adjustment as a life prisoner and that he would not pose a danger to others.

Since the trial court had already heard the testimony of Dr. Wu regarding his opinion that "a highly structured environment" would serve as an "external frontal lobe" for Martinez (RT 3292-3293) and in light of the proffer by defense counsel as to the testimony of Mr. Esten (RT 3480), the court was well aware of the relationship between the medical testimony of Dr. Wu and the proffered testimony of Mr. Esten concerning prison conditions. (RT 3480). It follows that defense counsel made known to the trial court the "substance, purpose, and relevance of the excluded evidence" (Evidence Code § 354(a)), that is, the details of the prison conditions would

establish the structured environment that in effect functioned as a frontal lobe for Martinez, rendering him capable of making a successful adjustment as a life prisoner as well as not posing a danger to others. Thus, the trial court was sufficiently apprised of the impact of the Esten proffered opinion on prison conditions relative to the testimony of Dr. Wu and the defense theory. See People v. McGee (1947) 31 C.2d 229, 243 (questions, together with colloquies with the trial judge, clearly disclosed purpose); Delta Dynamics v. Arioto (1968) 69 C.2d 525, 527-528 n.1 (the substance, purpose and relevance of the offered evidence was made known to the court, and no more complete offer of proof was required). See also, 3 WITKIN, CALIFORNIA EVIDENCE, Presentation at Trial, § 403, pp. 492-493 (West Group).

Furthermore, defense counsel expressly reminded the trial court during the Esten proffer that Dr. Wu's testimony was clearly at issue on the question of future dangerousness as a result of the cross-examination by DA Sneddon regarding the hypothetical assault on a prison guard by Martinez. Defense counsel stated as follows:

> MR. DULLEA [DEFENSE COUNSEL]: [T]he evidence that Mr. Sneddon has adduced as the so-called factors in aggravation under Factor (b) and some of the other - - some of the circumstances of the crime I think are a very strong implied, if not express, case for future dangerousness. And I think he's being a little disingenuous when he suggested he didn't put on any of that evidence.
>
> The evidence that Mr. Martinez possessed illegal knives and was caught on two occasions as a juvenile, that he possessed the item manufactured from a spork in the jail, which is said to be a knife and which was apparently sharpened, together with the fact that on at least three of the crimes of which he's been convicted he used a knife, together

> with the fact that on cross-examination of Dr. Wu yesterday, Mr. Sneddon made a - - asked a question regarding the possibility of assaults on a prison guard, I think is - - is a strong case for future dangerousness.

(RT 3476-3477) (emphasis added). Thus, contrary to the assertion by Respondent, defense counsel expressly raised the issue of Dr. Wu's testimony and its relation to the testimony of Mr. Esten on the question of future dangerousness.

The cross-examination that defense counsel, Mr. Dullea, was referring to took place the day before, on June 15, 1998). (RT 3207 at 3363-3365). The relevant portion of the examination by DA Sneddon as to Dr. Wu which reflected on the question of the prison environment serving as a "frontal lobe" as well as the potential danger to others by Martinez during confinement is as follows:

> Q. [DA SNEDDON] Doctor, you indicated that you thought that, if placed in the correct setting where there was enough restriction, that a jail setting could act as like frontal lobe controls on Mr. Martinez' behavior, correct?
>
> A. [Dr. WU] Yes. Like an external frontal lobe, in effect, setting limits on his behavior.
>
> Q. You know, do you not, Doctor, that Mr. Martinez has been incarcerated in the Santa Barbara County Jail for a year and a half now?
>
> A. I mean, I don't know the specifics. That would be my estimate, based upon, you know, discussions with Jim and other people in the case.
>
> Q. Do you think that a facility like the county jail would be a good indication as to whether or not a controlled setting would control Mr. Martinez's behavior?

A. My understanding is there are some differences between the way county jails and state jails are run. They may have differences in terms of the degree of structure.

Q. Do the differences change your opinion?

A. I think it can, yes.

Q. In this particular case, if, during periods of time Mr. Martinez was placed in isolation, would that change your opinion?

A. Well, I mean, again - -

Q. Is that the kind of structure you're talking about?

A. Yeah. I mean, I think - - yeah, that would be one of the ways of imposing structures would be if someone acts out, to provide them with immediate consequences. So that in some sense, even if their judgment is somewhat impaired, I think that with immediate and significant consequences, that, you know, it would hopefully have some effect.

Q. Oh, I see. So what you're telling us is that what you're looking at in terms of the control is if somebody acts out, that they can then do something to them to discourage them from doing that again?

A. Yes.

Q. Is that it?

A. Yes.

Q. Well, what about the poor person who's the victim of the acting-out incident? I mean, it doesn't do any good if the inmate attacks a correctional officer, does it, or a prison guard, as to how strict the setting is after the fact?

MR. VOYSEY [DEFENSE COUNSEL]: I'm going to object as there's no foundation for this.

THE COURT: It's argumentative. Sustained.

Q. BY MR. SNEDDON: The fact that the person acts out and may injure another person in acting out in the jail setting and be punished afterwards doesn't mean that the setting controls him, does it?

A. Well, I think that over time, a person may learn to modify the behavior with this kind of limit-setting.

Q. Is a year and a half enough time?

A. Again, depends on the specific details of the structuring of the environment. I mean, I - - I mean, I don't know.

(RT 3363-3365).

Obviously, in light of this testimony, Mr. Esten was the expert who would address the structure of the environment which was made clear by defense counsel's proffer. DA Sneddon solicited comment as to the issue of the structure of the prison environment as well as the potential dangerousness of Martinez from Dr. Wu. Since only Mr. Esten could address the issue, the parallel and link between the testimony of Dr. Wu and Mr. Esten as it related to the defense theory is clear. The fact that defense counsel raised the issue concerning the cross-examination of Dr. Wu regarding future dangerousness served to remind the court and, make explicit, the link between the Dr. Wu and Mr. Esten as to the defense theory, particularly on the future dangerousness issue but also on the issue that Martinez would make a successful adjustment as a life prisoner. On this record, Respondent's argument regarding waiver as to the reliance on Dr. Wu's opinion testimony is without merit. The testimony of Dr. Wu

serving as a basis for the testimony of Mr. Esten relative to prison conditions was properly presented within the meaning of Evidence Code § 354(a).

C. Meaningful Opportunity to Present a Defense.

Respondent cites to the United States Supreme Court case of Crane v. Kentucky (1986) 476 U.S. 683, to support its position that Appellant was not deprived of "a meaningful opportunity to present a defense." (RB 125). However, the citation to Crane supports Appellant's position that he was deprived based on due process grounds, whether predicated on the Sixth, Eighth, and/or Fourteenth Amendment of the right to present a meaningful defense and obtain a reliable penalty verdict.

The Supreme Court in Crane at the page cited by Respondent, 476 U.S. at 690 (RB 125), addressed the issue of the right to present a meaningful defense based on due process considerations as follows:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi [410 U.S. 284 (1973)], supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23 (1967); Davis v. Alaska, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S., at 485; cf. Strickland v. Washington, 466 U.S. 668, 684-685 (1984) ("The Constitution guarantees a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind

> of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656 (1984). See also Washington v. Texas, supra, at 22-23.

Crane, 476 U.S. at 690-691.

Here, the trial court excluded "competent, reliable evidence," regarding the details of prison confinement which precluded the defense from presenting a meaningful mitigation defense through the expert testimony of Mr. Esten as well as Dr. Wu on the defense theory as to the penalty phase. That is, Martinez would make a successful adjustment to life in prison and would not pose a danger to others in light of the highly structured environment he would encounter in prison which would serve to replace his defective frontal lobe. The trial court's ruling violated the due process rights of Martinez, whether predicated on the Sixth, Eighth and/or Fourteenth Amendments, to present a meaningful defense.

Respondent asserts that the opinion rendered by Mr. Esten was that Martinez would be housed at a "Level 4 maximum security housing on death row [which] is the most restrictive and structured environment available." (RB 125, citing to RT 3510). Again, Respondent mis-cites and misquotes the record. Mr. Esten simply concluded that a life prisoner, such as Martinez, would be housed at a maximum security Level 4 which is the "most restrictive and structured environment available" as reflected in the following:

> Q. [BY MR. DULLEA] How many different classification units or levels are there in the state prison system?

A. [BY MR. ESTEN] There are institutions of four levels. One being the lowest level, or minimum security. Four being the highest level, or maximum security.

Q. And do you know - - based on your training and experience, where a person who is convicted of first-degree murder with special circumstances and sentenced to life in prison without the possibility of parole, do you know what level such a person would be assigned to?

A. He [Martinez] will be assigned to a maximum security Level 4 prison without a question.

. . .

Q. Other than the security housing unit in death row, Level 4 is the most restrictive and structured environment available?

A. Yes. That's correct.

(RT 3509-3510). The reference to "death row" by Respondent simply obfuscates the testimony of Mr. Esten on the point. However, the net effect here is that Mr. Esten was only permitted to give an opinion regarding the housing of Martinez at Level 4 as being "the most restrictive and structured environment" without the details of the actual prison conditions.

As discussed above, ante at 92, the jury was instructed that an expert opinion is only as good as the basis for the opinion (e.g., CALJIC 2.80), but here the jury did not have any of the details which make a Level 4 classification the "most restrictive and structured environment." The details that the trial court Order precluded the jury from considering are in pertinent part reflected in the examples as follows: For example, the details of the physical facilities and armed observation by prison officers who will shoot in the event of assaultive conduct. (RT 3484-3487). Another

example is the modern cell construction depicted in the photographs proffered by the defense reflecting that the toilets, sinks, and beds were stainless steel units of a very heavy gauge which were embedded in concrete and hence, they were incapable of being disassembled for the purpose of creating a weapon. (RT 3485). A further example is that the floors under the bunks were painted with thick paint to discourage knife sharpening and to reveal knife sharpening if someone made such an attempt. A final example are the dining hall and cells depicted in the photographs which were illustrative of the security in prison reflecting the ability of officers to observe and supervise. As noted, prisoners would be directly observed and supervised by officers who would shoot them if they engaged in assaultive conduct. (RT 3484-3488; Exhibits S-1 through S-8 at A/C CT 00764-00776) (AOB 253).

The failure of the trial court to allow the jury to consider the examples reflecting the prison conditions noted above essentially relegated Mr. Esten and Dr. Wu to toothless-tiger experts. That is, they were permitted to give opinions as to the defense theory that Martinez would make a successful adjustment as a life prisoner and would not present a danger to others, but the critical details of prison confinement were omitted. This compelled the defense experts to give opinions and conclusions without the much needed details to establish the basis for said opinions and conclusions. Requiring the defense experts to serve as toothless-tigers deprived the defense of the opportunity to present a meaningful mitigation defense, and hence, deprived Martinez of his due process rights under the federal Constitution.

D. Future Dangerousness.

Respondent asserts that Appellant is mistaken that Esten's testimony was also relevant to rebut express and implied claims by the prosecutor regarding his future dangerousness, because "the prosecutor made no claim of future dangerousness." (RB 125) It is the Respondent who is mistaken on this point as the record clearly demonstrates that the trial court determined that the prosecutor did make a claim of future dangerousness.

In the response to the prosecution's motion to limit the testimony of James Esten, the defense argued at length that his testimony was relevant to rebut the prosecution allegations of future dangerousness. (CT 01419 at 01421 and 01428-1432). After a hearing on the prosecution's motion to limit the testimony of James Esten, the trial court ruled that "Esten may express his opinion of the dangerousness of the defendant." (CT 01442). The trial court set forth its decision on the record after the hearing on June 16, 1998, as follows:

> THE COURT: The Court is going to rule that the expert may express his underlying opinion. I will not allow him to go into the details of the prison system as it relates to how all the prisoners are treated in Classification 4. I think we have to draw the line between the general descriptions of prison life and his specific opinion as to this defendant as to his dangerousness. I would allow his opinion that he wouldn't harm other prisoners, if that's his opinion.

(RT 3420 at 3492-3493).

The ruling by the court clearly demonstrates that the court determined that the prosecution had advanced the claim of future dangerousness. This is particularly true in light of the court's ruling which responded to the defense position on this issue by, at least, allowing Mr. Esten to give an opinion that Martinez would not harm other prisoners.

Moreover, the record is clear that from opening statement in the guilt phase through closing argument in the penalty phase, the prosecution repeatedly asserted both expressly and impliedly a claim of future dangerousness as to Appellant Martinez. (AOB 266-268).

The trial court's determination on this issue is amply supported by the record. Thus, the limitations imposed by the trial court that Esten be permitted to give his opinion that Martinez would not harm other prisoners without addressing the details of prison conditions to support such an opinion as well as the related opinion of Dr. Wu resulted in a deprivation of Appellant's rights to a reliable penalty verdict and due process under the Sixth, Eighth and Fourteenth Amendments.

IX. THE CROSS-EXAMINATION OF DEFENSE EXPERTS AND CLOSING ARGUMENT BY THE PROSECUTION SO APPEALED TO THE PASSION AND PREJUDICE OF THE JURY AS TO DENY APPELLANT DUE PROCESS AND A FAIR AND RELIABLE PENALTY TRIAL.

Respondent asserts that the prosecutor's cross-examination of defense experts as well as his closing argument during the penalty phase did not appeal to the passion and prejudice of the jury so as to deny Appellant due process and a fair and reliable penalty trial. (RB 127-139). Moreover, Respondent asserts that any such claims have been waived by the failures of defense counsel to make a timely objection. (RB 127-128 and 135). These assertions are without merit.

A. Cross-Examination of Defense Experts.

Respondent correctly notes that defense counsel did not object to the prosecutor's conduct during cross-examination of Dr. Wu and Ms. Esten regarding the repeated references to "the jury" in which the prosecutor sought to imply that both experts were liars and further sought to curry the favor of the jury. Moreover, as Respondent notes, defense counsel did not object or seek an admonition regarding the prosecutor's cross-examination of Mr. Esten when he injected the issue of a "killing" being a rite of initiation to a prison gang as well as injected the notion that prison regulations may be changed, resulting in "conjugal visits." (RB 128-132) (See also, AOB 274-280).

The exceptions to the requirement of an objection based on futility as well as when the objection might well serve to reinforce the damaging force of the challenged assertion are applicable as to the "jury" references as set forth in Appellant's Opening Brief. (AOB 276). Moreover, as to the gang initiation rite being a "killing" and the potential changes in the prison

regulations resulting in "conjugal visits," this misconduct constituted plain error involving a serious miscarriage of justice. (AOB 277-279). Additionally, both the references to a "killing" and to "conjugal visits" were outside the scope of direct examination by defense counsel. (Evidence Code §§ 761 and 773) (AOB 276). Further, the exploitation of the "details" of prison life by the prosecutor relative to a "killing" being an initiation rite and potential "conjugal visits" resulted in a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment in light of the unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (AOB 279-280). Finally, as this Court has noted, "fairness and good appellate practice" mandate consideration of Appellant's federal claims on the merits rather than denying the claims based on waiver. People v. Cole (2004) 33 Cal.4th 1158, 1195 n.6. This Court has stated:

> We believe that to consider defendant's federal claims on the merits is "more consistent with fairness and good appellate practice than to deny the claim as waived. As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (People v. Yeoman, supra, 31 Cal.4th 93, 117; see also id. at p. 133.) . . .

Id. Thus, Appellant's claims should be decided on the merits.

As to Respondent's contention that the repeated references by the prosecutor to the "jury" were simply efforts at being "polite" (RB 129), the record does not support this contention. (AOB 275). The repeated references to the "jury" in relation to "misimpression," "confused," and

making it "clear" reflect an effort by the prosecutor to imply that the experts were, in effect, liars as well as being efforts to curry the favor of the jury. (AOB 275).

As to Respondent's assertion that the prosecutor acted properly when he injected a "killing" into the testimony of Esten as being a well-documented rite of initiation for gang membership in prisons as somehow being related to or responsive to Esten's testimony on direct is ludicrous. The thrust of Esten's opinion testimony was that Martinez could make a successful adjustment as a life prisoner. (RT 3536) (AOB 277). While Esten addressed the issue of prison gangs which included the pressures to join such gangs within a prison as well as the fact that Martinez expressed no interest in joining one (RT 3530-3532), this was part of the background and basis for his opinion that Martinez could make a "successful" adjustment to life in prison. (RT 3536).

Whether or not a killing is a rite of initiation for gang membership in prison was wholly unrelated to the issue of whether Martinez could make a successful adjustment as a life prisoner. The injection of a "killing" as a rite of passage to prison gang membership was simply part of the prosecution's implied and express claim of future dangerousness as to Martinez. As noted, the trial court determined that the prosecutor had made such a claim in connection with its ruling on Esten's testimony which allowed him to opine that Martinez could make a successful adjustment as a life prisoner. (See ante, 105-106). The prosecution clearly intended to inject the notion of "killing" as a rite of passage to gang membership in prison as part of its claim of future dangerousness, and further, by implication to associate Martinez with such a killing. In doing so, the prosecution was clearly appealing to the passion and prejudice of the jury.

As to Respondent's assertion that the prosecutor acted properly by asserting through the testimony of Esten that the regulations regarding marriage and conjugal visits for prisoners serving life sentences without possibility of parole could change, and hence, Martinez could enjoy conjugal visits (RT 3562-3564) (AOB 278), this assertion is without merit. Respondent notes that "conjugal visits" were just an example "of things appellant deprived Sophia Torres of by killing her." (RB 132). Apparently, now Respondent asserts that the potential for Martinez to have conjugal visits and the fact that the deceased victim, Sophia Torres, will no longer have sexual relations, is some form of victim-impact evidence to justify the prosecutor's actions. However, this Court in People v. Pollock (2004) 32 Cal.4th 1153, 1180, addressed victim-impact evidence as follows:

> In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eight or Fourteenth Amendments to the federal Constitution. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825-827 [115 L.Ed.2d 720, 111 S.Ct. 2597].) Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 444; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

It follows from Pollock that the potential for Martinez to have conjugal visits in the future, while Sophia Torres is dead and will no longer experience sexual relations, is not appropriate victim-impact evidence by any stretch of the imagination. The inflammatory appeal to the jury is obvious: Martinez may have sex in the future if given a life sentence and Sophia Torres will never have sexual relations again as she is dead. Thus,

to equalize things, vote for a death verdict so that Martinez will never have sex again. This is the type of inflammatory evidence that this Court's Pollock decision made clear is inadmissible because it is calculated to "elicit from the jury an irrational or emotional response." Id.

B. Closing Argument.

Respondent asserts that the prosecutor did not circumvent the trial court's order precluding argument on the issue of deterrence and the cost of imprisonment, and hence, there was no misconduct in this regard. (RB 135). Further, Respondent asserts the reference to the change of the "regulations" and having a "wife and family," e.g., conjugal visits, was somehow adopted by the defense as well as argued by the defense, and hence, there was no misconduct. (RB 138-139). Again, Respondent argues that any claim of misconduct in closing argument has been waived based on defense counsel's failure to object. (RB 135 and 138).

As to the waiver argument, the exceptions to the objection requirement concerning futility and reinforcing the damage from the challenged assertions as well as the constitutional violations, including due process and equal protection, as well as the right to a reliable penalty determination (see ante, 107-108) (AOB 288-289) apply with greater force here. This is particularly true given Appellant's "Motion to Limit Penalty Phase Argument" and the trial court's ruling which precluded the prosecutor from arguing deterrence and the cost of imprisonment. (AOB 280-285). Moreover, in light of Appellant's federal claims, this Court should follow its pronouncement in People v. Cole, 33 Cal.4th at 1195 n.6, that consideration of such claims is "more consistent with fairness and good appellate practice than to deny the claim as waived."

Respondent's argument that it is not "reasonably likely" that the jury understood the prosecutor's statement concerning "the system's ability to deal with people who transgress it" to be addressing the issue of deterrence is without merit. (RB 135-136).

A review of the prosecutor's statement in the context of the requested death verdict reveals that the prosecutor was addressing the issue of deterrence as reflected in the following:

> And I also submit to you, after that same review of everything, that what the death penalty will do in this case is that it certainly will restore the confidence and the trust in the system's ability to deal with people that transgress it and that do it in situations that are so aggravated and without sufficient justifying or mitigating circumstances that the public can see justice is done. They can see and the families can see that justice means more than sympathy, and mercy, and warehousing, and rehabilitation, and that it takes into account the defendant's conduct and the method and manner of his crimes and the impacts that it's had on the ones who suffered.

(RT 4023-4024) (AOB 285). The statement that the death penalty "will restore the confidence and the trust in the system's ability to deal with people that transgress it" and that "the public can see justice is done" by implication involves the sending of a message, and moreover, addresses the issue of deterrence by way of noting "the system's ability to deal with people that transgress it."

By the same token, Respondent's argument that the prosecutor's reference to "warehousing" and "rehabilitation" simply refers to the alternative punishment, e.g., life in prison without the possibility of parole, is without merit. (RB 136). Thus, by Respondent's own admission, warehousing and rehabilitation refers to "life in prison without the possibility of parole." (RB 136). Consequently, the reference to

warehousing and rehabilitation is undoubtedly a reference to the cost of imprisonment, e.g., life in prison. (AOB 285-286). The prosecutor circumvented the trial court's order by addressing both the issues of deterrence and the cost of imprisonment. This was an obvious appeal to passion and prejudice.

Respondent also asserts that the prosecutor's reference to "marriage and conjugal visits" was proper because defense counsel "sought to use the evidence to his advantage." (RB 138). However, the record confirms that defense counsel in closing argument simply rebutted the notion of Martinez having conjugal visits by stating: "There's not going to be any conjugal visits." (RT 4071). Here, the prosecutor was involved in a deceptive tactic by asserting that Martinez would be able to marry and have conjugal visits, provided they change the "regulations." As the prosecutor argued in closing:

> After all, ladies and gentlemen, it is life. It is life with visitations, it's life with friends, it's life with girlfriends, it's life with family, it's life potentially, if they change the regulations, to have a wife and family. It's a life. Everyday life.

(RT 4000-4001) (AOB 286-287). The assertion that Martinez would be able to have conjugal visits could not be more evident, e.g., girlfriends, wife, and family.

The prosecutor's misconduct during closing argument and in cross-examination of the defense experts was not harmless. Moreover, the misconduct violated Appellant's Eighth and Fourteenth Amendment rights to a reliable, individualized capital sentencing determination.

X. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED IN THIS CASE REQUIRES REVERSAL OF THE GUILT VERDICTS AND THE JUDGMENT OF DEATH AND DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHTS TO A FAIR TRIAL AND PENALTY PHASE.

Respondent answers by contending that there are no errors, and that if there are, none of them matter. (RB 140). This is nonresponsive. Appellant Martinez's point here is that should this Court find more than one error, the impact of all errors should be considered cumulatively, and not one by one. (AOB 290-294).

XI. AS APPLIED IN THIS CASE, THE ROBBERY AND RAPE SPECIAL CIRCUMSTANCE ALLEGATIONS VIOLATE THE EIGHTH AMENDMENT BECAUSE THEY PERMITTED THE JURY TO IMPOSE DEATH FOR AN ACCIDENT OR UNFORESEEABLE KILLING.

Appellant Martinez rests on the argument he made in his Opening Brief. (AOB 295-303).

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

The issues raised in Argument XII are adequately briefed. For the reasons set forth in Appellant's Opening Brief at pp. 304-368, Appellant Martinez respectfully requests that the Court reconsider its prior rulings on these issues. One issue, however is now stronger.

Since the filing of his Opening Brief, the U.S. Supreme Court decision of Brown v. Sanders (2006) ___ U.S. ___, 126 S. Ct. 884, as well as the earlier decision of United States v. Booker (2005) 543 U.S. 220, support Appellant's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by the jury unanimously, and beyond a reasonable doubt. (AOB 317-342). This Court's effort to distinguish Ring v. Arizona (2002) 536 U.S. 584 and Blakely v. Washington (2004) 542 U.S. 296, (see People v. Prieto (2003) 30 Cal.4th 226, 271, and People v. Morrison (2004) 34 Cal.4th 698, 741) should be re-examined in light of these cases.

The Blakely Court held that the trial court's finding of an aggravating factor violated the rule of Apprendi v. New Jersey (2000) 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the "maximum" otherwise allowable for the underlying offense. In Blakely, the Court held that, where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to jury determination of those additional facts by proof beyond a reasonable doubt. (Blakely, 542 U.S. at 303-304).

It is true that a California sentencer's findings of aggravating circumstances may involve a mix of factual and normative elements. (See People v. Brown (2004) 32 Cal.4th 382, 401.) But Blakely makes clear that this does not make such findings any less subject to the Sixth and Fourteenth Amendment protections applied in Apprendi v. New Jersey (2000) 530 U.S. 466, and Ring.

In Blakely, the state of Washington argued that Apprendi and Ring should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The High Court rejected the state's contention, finding Ring and Apprendi fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (Blakely, 542 U.S. at 304-305).

In United States v. Booker, the nine justices split into two different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional, because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. Booker reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (Booker, 543 U.S. at 244). [10]

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[10] In Booker, the Court held that the Federal Sentencing Guidelines could be (continued...)

In Brown v. Sanders (2006) 126 S. Ct. 884, the High Court clarified the role of aggravating circumstances in California's death penalty scheme:

> Our cases have frequently employed the terms "aggravating circumstance" or "aggravating factor" to refer to those statutory factors which determine death eligibility in satisfaction of Furman's narrowing requirement. See, e.g., Tuilaepa v. California, 512 U.S., at 972. This terminology becomes confusing when, as in this case, a State employs the term "aggravating circumstance" to refer to factors that play a different role, determining which defendants eligible for the death penalty will actually receive that penalty. See Cal. Penal Code Ann. § 190.3. . . .

(Brown v. Sanders, 126 S.Ct. at 889, n.2) (emphasis in original).

There can now be no question that one or more aggravating circumstances above and beyond any special circumstance findings must be found by a California jury before a defendant is eligible for a death sentence. (See CALJIC 8.88.) As Justice Scalia, the author of Sanders, concluded in Ring: "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (Ring, 536 U.S. at 612.) This Court should re-examine its decisions regarding the applicability of Ring v. Arizona to California's death penalty scheme.

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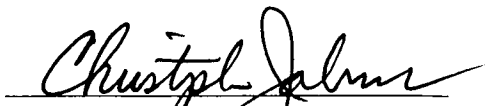
[10](...continued)
construed as advisory only, and that under an advisory sentencing system there is no requirement of a jury verdict on sentencing factors. Under California's death penalty scheme, the jury's penalty phase verdict is not advisory. If the verdict is for life without parole, the trial court has no further sentencing discretion. If the verdict is for the death penalty, the trial court must impose the death penalty unless the jury's implied finding that aggravating circumstances outweighs mitigating circumstances is "contrary to law or the evidence presented." (Penal Code § 190.4(e).)

CONCLUSION

For the reasons stated in this reply brief and his opening brief, Appellant Martinez respectfully requests this Court to reverse the judgment in its entirely and grant him a new trial.

Dated: January 2, 2007

Respectfully submitted,



Christopher Johns
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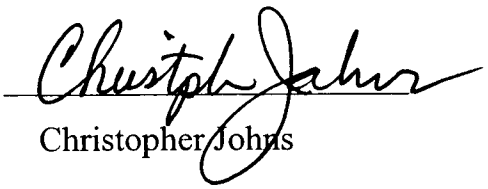
TOMMY JESSE MARTINEZ, JR.

WORD COUNT

I declare that the number of words in Appellant's Reply Brief is 32,905. The font is Times New Roman and the font size is 13 point.



Christopher Johns

CERTIFICATE OF SERVICE

I, Denise M Brown, am over 18 years of age. My business address is 1010 B Street, Suite 350, San Rafael, California 94901. I am not a party to this action.

On January 2, 2007, I served the:

Appellant's Reply Brief

upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Rafael, California, in a sealed envelope, postage prepaid, and addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 2, 2007, in San Rafael, California.

Denise M Brown