IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. HOWARD LARCELL STREETER , Defendant and Appellant.	No. S078027 (San Bernardino County Superior Court No. FVA07519)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of
the State of California for the County of San Bernardino

HONORABLE BOB N. KRUG

MICHAEL J. HERSEK
State Public Defender

ANDREW S. LOVE
State Bar No. 119990
Supervising Deputy State Public Defender
221 Main Street, 10th Floor
San Francisco, California 94105
Telephone: (415) 904-5600
Love@ospd.ca.gov

Attorneys for Appellant

DEATH PENALTY

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INTRODUCTION

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

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

CLAIMS

I.

THE TRIAL COURT REFUSED TO GRANT APPELLANT'S REQUEST FOR NEW COUNSEL DESPITE AN UNDISPUTED IRRECONCILABLE BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP

Respondent initially contends that appellant has forfeited his right to challenge the denial of his *Marsden* motion before the retrial of the penalty phase because he did not renew the motion "before the penalty which resulted in his death judgment." (RB, at p. 43.) This specious argument should be rejected.

On October 15, 1998, the jury was unable to reach a verdict as to penalty, a mistrial was declared and the jury was excused. (I CT 286-288.) At the next court appearance, on November 2, 1998, jury selection procedures commenced, during which prospective jurors were sworn and given questionnaires to complete. (II CT 329-331.) It was on this date that appellant asked that his counsel be relieved as attorney of record. (*Ibid.*) A hearing on the *Marsden* motion was held on November 5, 1998, and the motion was denied. (II CT 337.) Jury selection resumed, but was not concluded on November 9, 1998. (II CT 339-341.) The following day, after appellant filed a motion to disqualify the judge (II CT 345-349), the jury selection proceedings were continued for a week pending resolution of the motion to disqualify. (II CT 342; XVI RT 1589-1595.) On November 25, 1998, after the motion to disqualify the judge was denied, the parties agreed that a continuance was warranted in light of additional discovery that the prosecution was to provide the defense. A continuance was granted until January 1999, and the prospective jurors were discharged. (II CT 367; XVI RT 1610-1616.) The next court date was on January 19, 1999, when

appellant appeared with Mr. Ducre, an attorney whom appellant did not know. (II CT 382.) On this date, jury selection began with a process that ultimately resulted in selection of the jury that heard the penalty phase and reached a death verdict.

Respondent's contention that appellant should be deemed to have abandoned his *Marsden* request because he did not renew the motion when selection of a jury re-commenced in January 1999, is based on a faulty analogy to *People v. Vera* (2004) 122 Cal.App.4th 970, 981. In *Vera*, the defendant's *Marsden* motion was denied without prejudice to allow trial counsel to address the defendant's complaints. (*Id.* at p. 976.) The trial court in *Vera* explicitly offered the defendant the opportunity for a second *Marsden* hearing. The defendant's "failure to take advantage of this offer can only be interpreted as an abandonment of his unstated complaints." (*Id.* at p. 981.)

Appellant's *Marsden* motion was not denied without prejudice with the trial court offering to entertain a further motion. Indeed, given that the irrevocable breakdown in the relationship with counsel was conceded by the parties and the court, but essentially found irrelevant by the court, it is not clear what additional information could have been presented to change the outcome of the motion. Respondent's claim that appellant was nevertheless required to renew his motion when a different panel of jurors was called to try the case is unsupported by any authority.

On the merits, respondent contends that appellant and counsel were not embroiled in an irreconcilable conflict, and therefore the trial court did not err in denying the motion to relieve counsel. (RB, at pp. 44-45.) On the contrary, as explained at length in the Appellant's Opening Brief, after counsel failed to meet with appellant to explain the ramifications of the

penalty jury's deadlock, despite appellant's repeated entreaties to do so, a complete breakdown in the relationship of attorney and client ensued. Appellant sought advice elsewhere in the absence of counsel, and when counsel learned of this, he became offended and sought to withdraw, after which appellant sought to have counsel removed and new counsel appointed. (AOB, at pp. 15-24.) As appellant explained at the hearing, "I lost all faith and confidence in Mr. Amador." (Sealed RT 1444.) He then summarized:

> But I feel like we don't have no kind of communication. I mean, from the beginning we really didn't communicate much anyway. There's no communication there. We don't even see each other, don't talk about the case. We don't talk about my future. We don't talk about anything. There is nothing there and to go through a death penalty case?

(Sealed RT 1445.)

Trial counsel agreed that the "attorney-client relationship has broken down sufficiently enough to have me relieved" (Sealed RT 1446) and believed there was "irreparable harm." (Sealed RT 1447.) Counsel, who never understood the importance of developing a relationship and having meaningful communication with his client, believed that he could still try the case since he previously obtained the information he needed from the prior proceedings. (*Ibid.*)

Chuck Nascin, the attorney appointed for the *Marsden* proceedings, explained that "on both sides of this, the relationship has broken down," that it is clear that counsel did not want to represent appellant and appellant did not want counsel to represent him. (Sealed RT 1450.) Nascin stated that it was imperative that the attorney and his client get along in a capital

case: "Especially if you don't believe your client and [sic] still trying to be professional and your client doesn't like you, it is going to come out and it is going to show." (*Ibid.*) The trial court agreed with Nacscin's assessment (*id.* at p. 1450), but characterized the situation as a "personal relationship" that had broken down. (*Id.* at p. 1455.)

Thus, there was very clearly an irreconcilable breakdown in the relationship between appellant and his lawyer. The trial court – and respondent – erroneously assert that such a breakdown, resulting in complete mistrust and lack of communication would not adversely impact counsel's representation at the penalty phase of a capital trial. This is simply not true, as appellant explained in Appellant's Opening Brief. (AOB, at pp. 32-35.)

Respondent fails to grasp that the irreconcilable breakdown was not due merely to the paltry number of visits counsel had with his client. It is true that trial counsel neglected to meet with his client even a bare minimum of times during the course of his representation and, as a result, failed to establish a relationship of trust. However, the problems between the two were exacerbated by counsel's inexcusable conduct in abandoning his client at a critical time by going to Reno after the first penalty jury deadlocked, leaving appellant completely in the dark as to what would happen next. Then, instead of seeking to repair the relationship, counsel moved to withdraw when he learned that appellant was seeking guidance in his absence.

Thus, the cases cited by respondent are of no assistance. In *People v. Gutierrez* (2009) 45 Cal.4th 789, with regard to counsel's communication with his client, this Court noted that counsel stated he had "accepted defendant's collect telephone calls, and had spoken on numerous occasions

with defendant . . ." (*id.* at p. 803) and that the defendant's objection was "only to the amount of time counsel spent with him prior to the January 15, 1998 pre-trial conference." (*Id.* at p. 804.) Unlike here, there was no suggestion of a breakdown in the relationship causing an irreconcilable conflict. In fact, this Court rejected the suggestion that a conflict arose after the *Marsden* hearing due to an adversarial position taken by counsel at the hearing. (*Id.* at p. 805.)

Respondent quotes *People v. Jones* (2003) 29 Cal.4th 1229, for the proposition that defendants "effectively would have a veto power over any appointment" if their claim of lack of trust or inability to get along with counsel were sufficient grounds for substitution of counsel. (*Id.* at p. 1246, cited in RB, at p. 46.) In *Jones*, unlike appellant's case, trial counsel stated he had visited his client on "numerous occasions" and saw "no reason" he could not continue to represent appellant. (*Id.* at p. 1245.) Here, we do not merely have a defendant's unsupported contention that he was not getting along with his attorney, but uncontroverted evidence in the record of the breakdown in the relationship based in large part on counsel's failure to consult with his client.

Respondent also relies on *People v. Hart* (2009) 20 Cal.4th 546, 604, for the proposition that the number of times an attorney sees his client does not, standing alone, establish counsel's incompetence. (RB, at p. 46.) In *Hart*, there were three *Marsden* motions filed, and it was only in the first of these that Hart's complaint focused on the lack of visits from counsel and the legal team. However, in contrast to this case, counsel was accessible to the client by phone, and counsel did not believe that the attorney-client relationship had deteriorated. (*People v. Hart*, *supra*, 20 Cal.4th at p. 601.)

In affirming the trial court's conclusion in *Hart* that trial counsel was

prepared for trial and therefore did not need to visit his client on a regular basis, the Court relied on the discussion in *People v. Silva*, which stated that "the number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence." (*Id.* at p. 604, quoting *People v. Silva* (1988) 45 Cal.3d 604, 622.) In *Silva*, one of the defendant's reasons for the *Marsden* motion was that "he simply did not relate well to his attorney, who had only seen him once. (*People v. Silva*, *supra,* 45 Cal.3d at 622.) This Court explained that a defendant must show more. (*Ibid.*)

Appellant does not dispute that there is no per se rule about the number of visits an attorney must have with his client, and that the nature of the relationship between counsel and client cannot necessarily be defined by how much communication they have had with each other. On the other hand, when, as in this case, a lawyer has failed to establish a relationship with his client, and the client's subsequent requests to speak to his lawyer following a pivotal turning point in the case are ignored, the resulting breakdown in the relationship cannot be dismissed as merely a personal relationship without relevance to the trial.

Respondent attempts to minimize the problems between appellant and his lawyer by contending that the lack of communication was limited to the two-week period following the hung jury. As discussed at length in Appellant's Opening Brief, counsel's decision to go to Reno for vacation without explaining to his client the consequences of the hung jury at the penalty phase resulted in a complete breakdown in their relationship. This, however, was not an isolated incident. Prior to that, counsel's failure to communicate in any meaningful fashion had already resulted in a failure to establish a relationship with his client. His subsequent abandonment of

appellant at a time when appellant reasonably sought answers to questions he had about the consequences of a mistrial was the final blow. (AOB, at pp. 11-24.)

Contrary to respondent's argument, the evidence does not show that the difficulties in the relationship occurred because of appellant's lack of candor with regard to seeking advice from another attorney when his repeated efforts to reach his own lawyer were unsuccessful. (RB, at p. 49.) Appellant's explanations for this were entirely consistent with the sworn testimony of Mr. Karlson, the attorney from whom he sought help. (XIV RT 1379; Sealed RT 1417-1418.)

Finally, the fact that appellant did not complain further about his attorney after the denial of the *Marsden* motion in no way suggests that there were no further problems between the two as respondent attempts to argue. (RB, at p. 49.) The motion was denied despite the acknowledged breakdown in the attorney-client relationship and the complete lack of communication between attorney and client. Appellant's failure to renew his motion most likely reflected his resignation to being represented by an attorney who – the trial court repeatedly told him – did not have to communicate with him. (See e.g., Sealed RT 361, Sealed RT 1451-1455.)

For the reasons stated in Appellant's Opening Brief, the trial court's failure to grant the *Marsden* motion should be reversed without being subject to harmless error review. In any event, the denial of the motion was prejudicial. (AOB, at pp. 35-37.)

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II.

JURY SELECTION FOR THE PENALTY PHASE RETRIAL BEGAN WITHOUT THE PRESENCE OF COUNSEL IN VIOLATION OF THE RIGHT TO COUNSEL

As with Argument I, above, respondent hopes to foreclose a ruling on the merits by contending that appellant waived the claim. According to respondent, appellant knowingly and voluntarily waived his right to have his attorney present for the first two days of jury voir dire when he agreed to proceed without counsel for nothing more than the handing out of jury questionnaires. (RB, at pp. 50-51.) Indeed, if all the court did in counsel's absence was to provide questionnaires to prospective jurors and order the jurors to return at a later date, which is all the trial court told appellant would occur, there would have been a waiver and there would be no issue. However, as explained at length in Appellant's Opening Brief, the proceedings went far beyond the handing out of questionnaires. The court made statements about the nature of the case that required the input of counsel, and prospective jurors were excused on hardship grounds by the stipulation of a stand-in attorney based on non-statutory criteria. (AOB, at pp. 38-46.)

Respondent argues that appellant "knew exactly what was going to happen during the time attorney Ducre substituted in for attorney Amador," given that this was a penalty phase retrial, and that he had sat through identical proceedings previously. (RB, at pp. 65-66.) It is true that only two months earlier, prospective jurors were called to be selected for the penalty retrial before the proceedings were halted. In those proceedings, jury questionnaires were handed out, the court explained the nature of the proceedings and jurors were asked if they knew any of the witnesses or parties. (XIV RT 1339-1364; 1385.) However, there were no excusals for

hardship in open court; any information pertaining to hardship was to be filled out on the questionnaire. (XIV RT 1363, 1405-1406.) Subsequently, outside the presence of the court, the prosecutor and defense counsel stipulated to the hardship excusal of prospective jurors after having reviewed their questionnaires. (XV RT 1460-1464.) Thus, it is not true that appellant should have been aware of what was going to occur given the court's representations and his prior experience.

Respondent further argues that given this Court's acknowledgment that pre-screening of jurors for financial hardship does not require the presence of the defendant, it is not a critical stage of the proceedings. (RB, at p. 59, citing *People v. Ervin* (2000) 22 Cal.4th 48, 72; *People v. Basuta* (2001) 94 Cal.App.4th 370.) However, even assuming without conceding that appellant's presence was not necessary, it is certainly not the case that appointed counsel's presence was not required for these proceedings, which included the stipulated excusal of prospective jurors on non-statutory grounds, and explanations about the proceedings to jurors. Indeed, in *Ervin*, *supra*, where the prosecutor and defense counsel met and stipulated to excusing prospective jurors without the defendant, the procedure was found to be appropriate because of defense counsel's presence. Had defendant's appointed counsel in *Ervin* not been present for the pre-screening and stipulation of prospective jurors, the proceedings would have violated the defendant's right to counsel as it did in this case.

As this Court recently noted, "[A] trial court has authority to excuse a person from jury service for undue personal hardship. [Citations.]" (*People v. Tate* (2010) 49 Cal.4th 635, 663, quoting *People v. Mickey* (1991) 54 Cal.3d 612, 665.) In contrast to the strict rules governing the jury commissioner's preliminary screening of hardship claims received in

response to a general jury summons, see, e.g., California Rules of Court, rule 2.1008, trial courts are empowered to resolve hardship issues in the course of jury selection after examining prospective jurors upon the reasonable exercise of discretion. (*People v. Tate*, *supra*, 49 Cal.4th at p. 665.) To ensure, however, that the trial court does not abuse its discretion, it is essential that counsel be present and engaged in the process. Here, appellant was entitled to the active participation of his appointed counsel when the trial court excused prospective jurors based on hardship.

As discussed in Appellant's Opening Brief, the denial of the right to counsel requires reversal without resort to a harmless-error analysis. (AOB, at pp. 55-56.) Respondent, without citing any authority, contends that appellant must satisfy the requirements of an ineffective assistance of counsel claim and prove prejudice based on *Strickland v. Washington* (1984) 466 U.S. 668. Appellant, however, is not arguing that his counsel was ineffective, but that his counsel was not present. At minimum, a *Chapman* prejudice analysis would place the burden on respondent to demonstrate that the violation of appellant's rights was harmless beyond a reasonable doubt. (AOB, at p. 56.)

In arguing the lack of prejudice, respondent states that the replacement attorney protected appellant from having the court conduct proceedings in which advocacy would be required. (RB, at pp. 60, 62.) The proceedings which occurred in counsel's absence, however, did require advocacy. Reviewing juror questionnaires and questioning prospective jurors to determine whether they have legitimate bases for hardship is an important role for counsel to undertake. (See, e.g., *Snyder v. Louisiana* (2008) 552 U.S. 472, 474-475.) Here, replacement counsel's acquiescence to the excusal of several jurors who did not meet the statutory criteria for

hardship excusal had a profound impact on the ultimate composition of the jury. Reversal is required.

III.

THE TRIAL COURT RELIED ON ERRONEOUS GROUNDS TO FIND NO PRIMA FACIE CASE OF DISCRIMINATION WHEN THE PROSECUTOR IMPROPERLY STRUCK THREE AFRICAN AMERICAN JURORS

Respondent contends that appellant's *Wheeler* motion at the penalty phase retrial was properly denied because appellant failed to make a prima facie showing that the prosecutor used peremptory challenges in a racially discriminatory manner. Before looking at the proceedings in which the *Wheeler* motion was made, it is important to review the earlier two voir dire proceedings, which shed light on the prosecutor's actions.

First, at the guilt phase trial, there were no African Americans on the jury, and the prosecutor exercised a peremptory challenge to the only African American called to the box (V RT 415; A-III CT 761-780) and to another woman who identified herself as "black/white." (V RT 370; A-II CT 341-360.)

Voir dire proceedings initially commenced for the penalty phase retrial, but they were suspended and prospective jury panels were discharged after appellant moved to disqualify the trial judge. (II CT 367; XVI RT 1610-1616.) In these proceedings, the prosecutor decided to question only one prospective juror – Juror 5 – about race, after questioning several other jurors about various other issues. This one prospective juror was African American. Her juror questionnaire did not raise any issues pertaining to race and the death penalty. (II Augmented CT 457-465.)

Nevertheless, the prosecutor questioned the juror as follows: "There are a number of scholars and some persons who believe that because our

system is unfair to members of minority races in some ways – their beliefs are that the system sometimes picks on persons of minority color. And you've put some of those kinds of answers in your questionnaire, right? You said the death penalty was given out randomly, and so on." (XV RT 1551.) There was no mention of race, however, in the juror's questionnaire answer. Juror 5 merely responded to a question which asked whether the juror felt the death penalty was imposed too often, too seldom, randomly or about right. She, like other jurors indicated on her questionnaire that the death sentence was imposed "randomly." (See, e.g., Juror 2, II Augmented CT 413; Juror 6, *id.* at p. 473, and Juror 13, *id.* at p. 571.) However, the prosecutor inferred a racial subtext only with Juror 5's response.

Furthermore, Juror 5's elaboration on this response in the questionnaire did not mention race, but stated "it seems to depend on who the victim is or was in a lot of instances as to whether the defendants get the death penalty." (II Augmented CT 461.) Again the prosecutor launched into a discourse race: "I think if you look at throughout the entire nation, there are instances where race is unfairly used as a reason. And for example, you mention in your questionnaire that sometimes it depends on who the victim is as to whether or not the death penalty is sought." (XV RT 1551.) The prosecutor then asked the following question: "Do you feel uncomfortable sitting on a case where you might have to ask for the death penalty or decide the death penalty against a person of color?" (XV RT 1551.)

The prospective juror responded that she was uncomfortable and protested that the prosecutor was picking on her because of her race and that her responses had nothing to do with race: "And I think it's very unfair for . . . my answers to be picked out because I am African American

because it had nothing to do with that." (XV RT 1551.)

Without provocation, the prosecutor then went on to discuss the notion that African Americans are being told to use jury nullification: "[w]e all know that there are people, black people, who are – for example, a professor from Harvard is talking about this, he's talking about a thing called 'jury nullification.' That is the theory he is professing, that we ought not to – he's telling black people you ought not to vote for the death penalty just to teach the system a lesson. When you hear that stuff and it's on BET and all the other things, as a prosecutor I have a duty to find out how you feel about that." (XV RT 1552.)

He then asked Juror 5 directly how she felt about jury nullification – a question he did not ask anyone else. She responded that she had not thought about it and "I haven't listened to any of the people that you've been talking about." (XV RT 1552.)

Appellant submits that this colloquy with Juror 5 reveals the prosecutor's inherent racial bias – his belief that an African American who makes a generic comment that that the death penalty is meted out unfairly or randomly must believe that the system is discriminatory and is likely to believe in jury nullification because that is what black people are being told. Given this view, it is not surprising that he would strike African Americans from jury panels because of their race. Indeed, Juror 5 was the first juror struck by peremptory challenge by the prosecutor. (XV RT 1562.)

As discussed above, the trial court granted a continuance and discharged the jury panel before a jury could be sworn. A new venire was then called and the *Wheeler* motion was brought during these subsequent proceedings. As explained in Appellant's Opening Brief, the trial court found that appellant failed to establish a prima facie case and denied the

motion. (AOB, at pp. 58-62.) However, the totality of the circumstances – including the earlier voir dire proceedings described above – demonstrate at least a prima facie case that the prosecutor used peremptory challenges for racially discriminatory purposes.

Respondent stresses that the prosecutor did not seek to strike "all or most" of the African American prospective jurors. (RB, at p. 75.) However, as discussed in Appellant's Opening Brief, two African Americans who the prosecutor sought to keep on the jury but who were struck by the defense had extremely strong views in favor of the death penalty and/or the crime committed in this case. (AOB, at pp. 66-67.) In *People v. Hartsch*, (2010) 49 Cal.4th 472, 485-490, this Court recently upheld the trial court's finding of no prima facie case of discrimination where the prosecutor left two African American jurors on the on the panel, one of whom was sympathetic to law enforcement (who was employed as a school resource officer in a position "akin to law enforcement") and the other was in favor of the death penalty (and unsuccessfully challenged for cause). This Court reasoned that "[t]his argument, however, tended to show that the prosecutor was motivated by the candidates' individual views instead of their race." (*Id.* at p. 487.) With due respect, this hardly shows that the prosecutor was not motivated by race. It merely shows the prosecutor would even accept African Americans if their pro-law enforcement or pro-death penalty views were extremely strong. Where, as in appellant's case, the prosecutor used peremptory challenges to excuse African Americans from the jury under a different standard than non-African Americans, i.e., unless they exhibit extremely strong views that favor the prosecution, discrimination has been established.

Moreover, "California law makes clear that a constitutional violation

may arise even when only one of several members of a 'cognizable' group was improperly excluded." (*People v. Montiel* (1993) 5 Cal.4th 877, 909.) To base the denial of a *Wheeler/Batson* motion on the ground that some members of a group were not challenged "would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." (*People v. Snow* (1987) 44 Cal.3d 216, 225.) "Although the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a Wheeler objection, it is not a *conclusive factor*." (*Ibid.*, original emphasis.)

In *People v. Motton* (1985) 39 Cal.3d 596, this Court, quoting with approval an earlier Court of Appeal opinion, said:

> The Attorney General argues that the prosecution's acceptance of the jury on three occasions, when there were one or two Blacks on the panel, rebuts defendant's prima facie showing . . . . "[t]his contention ignores the practical realities of jury selection and misses the point in Wheeler. If the presence on the jury of members of the cognizable group in question is evidence of intent not to discriminate, then any attorney can avoid the appearance of systematic exclusion by simply passing the jury while a member of the cognizable group that he wants to exclude is still on the panel. This ignores the fact that other members of the group may have been excluded for improper, racially-motivated reasons. In fact, the offending counsel who is familiar with basic selection and challenge techniques could easily accept a jury panel knowing that his or her opponent will exercise a challenge against a highly undesirable juror. If, for instance, three people on the panel exhibit a prosecution bias, then the

> prosecutor could pass the jury with at least three members of the group which he ultimately wishes to exclude still remaining on the jury – knowing that he will have a later opportunity to strike them. By insisting that the presence of one or two black jurors on the panel is proof of an absence of intent to systematically exclude the several blacks that were excluded, the People exalt form over substance."

(*Id.* at pp. 607-608 [Citations].)

As noted above, the earlier proceedings reveal the prosecutor's bias. In addition, the prosecutor's manner of questioning African Americans in contrast to non-African Americans was far more rigorous, which also demonstrates his discriminatory intent. (AOB, pp. 69-75.)

There were three African Americans struck by the prosecutor: 3, 44 and 46. The prosecutor provided justification for only one of these three – Juror 44. Appellant's Opening Brief mistakenly stated that the prosecutor justified his challenge to Juror 46 by stating she appeared to be a loner, but it appears, as respondent notes, that the prosecutor was referring to Juror 44. (RB, at p. 72, fn. 19.) At least with regard to Juror 44, where the prosecutor did state justifications for excusal, comparative analysis should be used.

This Court has held that comparative juror analysis is not mandated in reviewing first-stage *Wheeler-Batson* claims where, in the absence of justifications for excusal from the prosecutor, "the analysis does not hinge on the prosecution's actual proffered rationales." (*People v. Howard* (2008) 42 Cal.4th 1000, 1019-1020.) Here, the prosecutor did provide reasons for the excusal of one of the jurors. (XVIII RT 1842-1844.) The trial court denied the motion, after reviewing the questionnaires, the answers given, and the prosecutor's reasons for excusal as reflected in the

court's conclusion: "And I again feel that there has been no systematic excusal without some basis for that exercise other than race." (XVIII RT 1844.)

Thus, at least as to the juror for which the prosecutor did provide reasons for excusal, this is a "first stage/third stage *Batson* hybrid." (*People v. Mills* (2010) 48 Cal.4th 158, 175.) In such cases, this Court "express[es] no opinion on whether defense counsel established a prima facie case of discrimination and instead skip[s] to *Batson*'s third stage to evaluate the prosecutor's reasons for dismissing [the] African-American prospective juror[]." (*Ibid.*) And, in such situations, comparative analysis is appropriate. As discussed in Appellant's Opening Brief, it is clear that the prosecutor's distorted interpretation of the juror's answers suggest pretext, particularly when compared with similar answers given by jurors who were not excused. (AOB, pp. 81-84.)[1]

Appellant argued in his opening brief that at the time of the *Wheeler* motion, 28% of the prospective jurors were African American (7 out of 25), with the prosecutor using three of his first five challenges (60%) on African Americans. (AOB, p. 75.) Respondent contends that the venire consisted of seven out of 29 or 24% African Americans, not 28%. It appears that respondent is looking at the total number of jurors called whereas

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[1] Respondent attempts to compare the situation experienced by Juror 3, who was the victim of an attempted rape by an uncle, with that of the victim in this case, stating that Yolanda Buttler was violently raped by appellant in front of her children. (RB, at p. 90.) First, this was not a reason given by the prosecutor. Moreover, this grossly distorts the state of the evidence which did not establish that appellant raped Buttler. Not even Buttler's own statements in her TRO application alleged that she was raped. (VI RT 492-493.)

appellant's calculation is based on the numbers at the time the *Wheeler* motion was made. The difference, however, is inconsequential.

Respondent disputes appellant's contention that the prosecutor's disparate questioning of African Americans reveals his bias. The record speaks for itself. Moreover, when the questioning of Juror 5 in the prior proceedings is added to the analysis, it becomes difficult to dismiss the notion that the prosecutor's preconceived notions of African Americans motivated both his questioning of jurors and his strikes.

For the reasons stated here and in Appellant's Opening Brief, the trial court's rejection of appellant's motion violated his state and federal constitutional rights and requires reversal.

IV.

THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTION TO INTRODUCE PREJUDICIAL EVIDENCE OF THE VICTIM'S PAIN AND SUFFERING

Respondent argues that appellant's claim that the admission of prejudicial evidence violated appellant's federal constitutional rights was waived for failure to object on such grounds in the trial court. Respondent is mistaken. In his motion to limit photographic evidence, appellant argued that introduction of such evidence would violate his rights to a fair trial, due process, and the heightened reliability requirement in capital cases under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. (Aug CT 90.) With regard to expert testimony and the introduction of the ambulance tape, counsel argued that the evidence was cumulative, prejudicial and inflammatory. (VI RT 619, 622; 1 VII RT 646-647, 678.) Given, as respondent concedes, that appellant preserved these claims under Evidence Code 352, his federal due process claim regarding the unduly inflammatory and prejudicial nature of the evidence was similarly preserved. (See *People*

v. Partida (2005) 37 Cal.4th 428, 437-439; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1197, fn. 8 [federal constitutional claims raised for first time on appeal considered on merits].)

Respondent relies on this Court's decision in *People v. Cole*, *supra,* 33 Cal.4th 1158, for the principle that evidence of the victim's pain and suffering is relevant to the torture murder allegations. However, as noted in Appellant's Opening Brief (AOB, at p. 99), *Cole* is distinguishable because it is a pre-Proposition 115 case, in which an element of torture murder was "proof of the infliction of extreme physical pain no matter how long its duration." This element was deleted for cases such as appellant's where the crime was committed after Proposition 115 passed. (*Id.* at p. 1197, fn. 7.) In addition, this Court in *Cole* found that the evidence admitted of the victim's pain and suffering was not "unduly shocking or inflammatory." (*Id.* at pp. 1197, 1199.) As discussed at length in Appellant's Opening Brief, the evidence here, especially the ambulance tape, was unduly gruesome and gratuitous, as well as being unnecessary and cumulative. (AOB, at pp. 97-102.)

Even if evidence is deemed relevant, the trial court still must assess the evidence to determine whether it is cumulative and whether its probative value outweighs its prejudicial effect. Here, the trial court failed to undertake the kind of careful analysis required by Evidence Code section 352. (See *People v. Jackson* (1971) 18 Cal.App.3d 504, 509.) The court simply ruled the evidence admissible after having found it relevant, and failed to consider its prejudicial impact. (V RT 476-477; VII RT 647; VII

RT 690.)[2]

Respondent argues that the fact that Buttler suffered extreme pain is evidence that appellant intended that she suffer extreme pain. While the nature of the killing and condition of the body are arguably relevant to intent, evidence that the victim suffered extreme pain is misleading because "[s]evere pain . . . accompanies most homicides." *People v. Morales* (1989) 48 Cal.3d 527, 559; see also *People v. Steiger* (1976) 16 Cal.3d 539, 546 ["[i]t is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain"].)

Similarly lacking in logic is respondent's statement that there was ample evidence that appellant knew pouring gasoline on Buttler and lighting her on fire would cause her extreme pain, particularly appellant's job as a welder's assistant. (RB, pp. 108-109.) It does not take a welder's assistant to know that igniting someone with gasoline would cause severe burns and extreme pain. The crucial issue for the jury to decide in this case with regard to torture murder was not whether appellant knew the cause-and-effect of lighting someone on fire, but whether he had a premeditated plan to inflict pain or committed a spontaneous act out of anger and frustration. Heart-breaking evidence of the intensity of the pain Buttler suffered does nothing to further this inquiry.

Here, the jury had already heard undisputed testimony to which the defense did not object from the forensic pathologist who performed the

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[2] Respondent acknowledges that the trial court did not explicitly determine whether or not the evidence was unfairly prejudicial, but unconvincingly states – without any support in the record – that the trial court implicitly rejected the claim that the evidence was unduly prejudicial. (RB, at p. 110.)

autopsy regarding the extent of Buttler's injuries, the care that was provided and the severe, extreme pain she suffered. (VII RT 624-640.) The additional evidence from Buttler's treating physician, the photographs, and the ambulance tape portrayed Buttler's pain in more graphic and gruesome detail, but added nothing further on the issue of appellant's intent. In view of the other admissible evidence of Buttler's injuries and pain, this evidence was cumulative, a point respondent concedes in arguing the lack of prejudice, and far more prejudicial than probative. The trial court's failure to carefully undertake the analysis required for making this determination resulted in the jurors being exposed to horrific evidence that had no bearing on their task.

Respondent argues that the evidence was not prejudicial because it was cumulative of the testimony of the witnesses. (RB, at p. 112.) The evidence was cumulative in the sense that the pain suffered by Buttler was explained adequately through other less graphic evidence. This did not, however, render the admission of what respondent concedes was "extremely powerful and emotionally charged" evidence harmless. (RB, at p. 111.)

Respondent argues that the evidence of appellant's guilt was "overwhelming" even in the absence of the inflammatory evidence. (RB, at p. 112.) As is done throughout the brief, respondent here exaggerates appellant's prior conduct with Buttler in order to demonize him and create an inference that this was a well thought out, planned crime. Thus, respondent states that there was "extensive evidence" detailing appellant's violent and abusive relationship with Buttler, "in which he terrorized her, controlled her, alienated her from her family, acted violently in front of her children, raped her, and prevented her from seeking help." (RB, at p. 112.)

The record does not support this characterization.

Respondent cites to an excerpt of Buttler's son Patrick's statement to the police, which was read to the jury. (VIII RT 768-770.) However, these pages mostly discuss the facts of the crime with only a brief reference to the fact that appellant had been calling Buttler after the family left in order to get back together with her. (VIII RT 768.) It should be noted that Patrick goes on to say that they moved away from appellant because appellant "had become mean and thrown things in their apartment; however, he had not hit his mother prior to this incident that he knows of." (VIII RT 771.) Lawanda Buttler, Patrick's sister, describes appellant "throwing stuff around the house and pushing my mom around." (X RT 998.) Respondent also cites the testimony of Quentin Buttler, Yolanda's brother, who testified that Yolanda told him about the one incident for which she subsequently sought a restraining order. He said there were unspecified "beatings" but he could not provide any further information and this statement was at odds with the temporary restraining order application filed by Buttler. (X RT 974-978.) Lawanda also testified regarding the one incident mentioned in the restraining order. (X RT 996-999.) This evidence does not provide any justification for permitting introduction of the evidence of Buttler's pain and suffering.

For the reasons stated above and in Appellant's Opening Brief, the admission of this evidence, particularly without the trial court's careful assessment of whether its probative value was outweighed by its prejudicial impact, violated appellant's state law and state and federal constitutional rights, and was prejudicial.

V.

THE INTRODUCTION OF TESTIMONIAL HEARSAY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AT THE GUILT AND PENALTY PHASES

Respondent concedes that the admission of the temporary restraining order ("TRO") application implicates appellant's confrontation clause rights under *Crawford v. Washington* (2004) 541 U.S. 36, because the statements made in the TRO application by Buttler are testimonial in nature and appellant had no opportunity for cross-examination. Respondent attempts to argue, however, that the rule of forfeiture against wrongdoing precludes appellant from raising this claim.

Respondent acknowledges that the United States Supreme Court has restricted the rule of forfeiture by wrongdoing to where the defendant's wrongful action was designed to make the witness unavailable to testify. (*Giles v. California* (2008) __ U.S. __ [128 S. Ct. 2678].) The prosecutor in the present case never posited the theory that Buttler was killed to prevent her from testifying against appellant in support of obtaining a restraining order. In fact, respondent agrees there was no evidence that appellant was served with the TRO application or was even aware of its existence. (RB, at p. 118.) Moreover, respondent neglects to mention that appellant and Buttler had an initial meeting after the restraining order application was filed that proceeded without incident. (VIII RT 763, 882-885.) Nevertheless, respondent contends that the evidence of an abusive history generally is sufficient to establish that appellant killed Buttler with intent to prevent her from being a witness – even though he did not know that she intended to be a witness. This extension of the doctrine of forfeiture by wrongdoing has no basis in the law and should be rejected.

As discussed in Appellant's Opening Brief, introduction of the TRO application was highly prejudicial at both phases of trial. (AOB, at pp. 110-116.) Respondent argues that admission of the restraining order was harmless because it merely corroborated events that were presented to the jury through other admissible evidence. (RB, at p. 124.) Such corroboration was critical to the prosecution's case, however, because it bolstered what was otherwise vague and contradictory evidence regarding appellant's alleged abusive conduct. As noted above, Buttler's son Patrick testified that appellant had not hit his mother (VIII RT 768), and Buttler's brother could only testify about unspecified beatings. (X RT 974, 978.) The most significant testimony of appellant's behavior towards Buttler came from her daughter Lawanda, whose anger towards appellant rendered her testimony biased and unreliable. She admitted she hated appellant and wished something bad would happen to him. (X RT 1001.) However, the TRO application lent credence to her testimony despite the fact that she went beyond the details in the application itself. (X RT 996-999.)

Respondent contends that admission of the TRO application was harmless because of the overwhelming evidence against appellant. While there was overwhelming – indeed, undisputed – evidence that appellant caused the acts which caused Buttler's death, as discussed in Appellant's Opening Brief and below with regard to Arguments VI, VIII and XI, evidence of appellant's intent was far from conclusive. For the reasons stated above and in Appellant's Opening Brief, the violation of appellant's Sixth Amendment rights was prejudicial and warrants reversal.

VI.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF FIRST DEGREE MURDER

Respondent's contention that there was sufficient evidence for first degree murder is based on a gross distortion of the evidence of appellant's pre-crime conduct and the characterization of appellant's ambiguous note as a well thought out, carefully prepared, detail-oriented plan.

Respondent distorts the strength of the evidence in attempting to show a motive of revenge. As evidence of motive, respondent focuses on the allegedly abusive behavior Buttler endured during the marriage and appellant's attempts to find Buttler after she took the children and left appellant following the incident on December 30. (RB, at pp. 133-135.) It is undisputed, however, that once appellant located Buttler after these incidents, he did not seek revenge or in any way try to harm her. Rather, he made efforts to see her, to arrange visitation with his son, Little Howie, and to win her back. Indeed, an initial meeting occurred without any problems. (VIII RT 763-764, IX RT 884-886.) Respondent's repeated efforts to stress incidents that have no bearing on motive merely obscure the issue.

Ultimately, respondent's argument comes down to the note appellant wrote which, according to respondent, constitutes overwhelming evidence of detailed planning. (RB, at pp. 135-136.) However, as discussed in Appellant's Opening Brief, the note makes little sense, is at best ambiguous, and is a far cry from the detailed plan of a methodical murder. (AOB, at pp. 125-127.)

The note, which was addressed to Streeter's parents, focused primarily on Streeter's own death and reads like a suicide note. (CT 532, 536, 538.) In it, Streeter stated that his life was over and that he had

nothing to live for anymore. He apologized for putting his parents through this and was sorry that it would cost a lot to bury him. The note said, "I know what I did to Yolanda is wrong but she don't deserve to live like me" (*ibid.*), but contains no further explanation. In the note, Streeter asked his parents to try to raise his son, Howie, and to tell Howie that his father "is sorry for what he did." (*Ibid.*)

The note consists of the rambling thoughts of a barely literate and highly distraught man. The note states, in the past tense, that "I know what I *did* to Yolanda is wrong . . . ." (CT 532, italics added.) Thus, it is not reasonable to assume it refers to actions that appellant intended to take after writing the note, i.e., Buttler's murder. Morever, while the note refers repeatedly to Streeter's death, the reference to Buttler was not that she does not deserve to live, but that she does not deserve to "live like me." Respondent does not clarify, if Streeter planned to kill Buttler and then have himself killed, what he meant by "live like me." It is this kind of internal inconsistency that renders the note of little help in establishing planning activity.

Respondent seeks to infer that appellant's request of his parents to raise his son foreshadows his knowledge that Buttler would be killed. A far more plausible explanation is that he wanted his parents to raise their son because he was no longer going to be able to do so. While all reasonable inferences must be drawn in support of the judgment, the reviewing "court may not 'go beyond inference into the realm of speculation in order to find support for a judgment. A [conviction] which is merely the product of conjecture and surmise may not be affirmed.'" (*People v. Memro* (1985) 38 Cal.3d 658, 695, quoting *People v. Rowland* (1982) 134 Cal.App.3d 1, 8.) In other words, "[m]ere conjecture, surmise, or suspicion is not the

equivalent of reasonable inference and does not constitute proof." (*People v. Terry* (1962) 57 Cal.2d 538, 566.)

With regard to the manner of killing, respondent details the evidence of the killing, and argues that there were several intervals at which appellant could have stopped, considered and reflected on his actions and abandoned his plan. (RB, at pp. 137-139.) This begs the question. There was no plan. As detailed by respondent and by appellant in Appellant's Opening Brief (AOB, at pp. 118-121), appellant grabbed his son and walked away from Buttler, placing his son in his car. It was only after Buttler followed him and they began arguing that things spun out of control. Appellant then chased Buttler, beat her, went back to his car for gasoline, chased her again, went back to his car for a lighter, and ultimately set her on fire. All of the evidence points to the fact that appellant was in an uncontrollable rage. (See AOB, at pp. 118-122.) This is hardly the kind of methodical killing that would support a finding of premeditated and deliberate murder.

In addition, respondent fails to mention the evidence that undermines a methodical killing. Respondent states that the note was placed in the glove compartment before the killing. However, the note was written on the back of the DMV registration (VI RT 617-618), which logically belongs in the glove compartment. And while the gas cap was found on the bumper of the car, which the prosecutor argued led to an inference that the gas had been siphoned immediately prior to the killing, there were no witnesses to siphoning and no equipment found at the scene. Streeter testified without contradiction that he kept gasoline in his car to put in his carburetor. (IX RT 896.) Moreover, appellant did not have the container with gasoline with him during the initial assault, and did not have any means to light it even after he went to retrieve the gas. While respondent

argues that this shows evidence of premeditation and deliberation because appellant had time to stop and think about what he was doing, it is, on the contrary, evidence that there was no plan at all.

Respondent next argues that there was substantial evidence of lying-in-wait murder. As explained in Appellant's Opening Brief (AOB, at pp. 129-130), for there to be sufficient evidence of lying in wait, the watchful waiting and concealment of purpose must done in order to attack the victim by surprise from a position of advantage. (*People v. Morales*, *supra*, 48 Cal.3d at pp. 554-555, quoting *People v. Sassounian* (1986) 182 Cal.App.3d 361, 406-407; see also *People v. Webster, supra,* 54 Cal.3d at p. 448; *People v. Moon* (2005) 37 Cal.4th 1, 24.)

Respondent, however, concedes that the surprise attack did not occur immediately after the period of watchful waiting. Relying on the same flawed inferences as were argued in support of finding premeditation and deliberation, respondent asserts that the surprise attack from a position of advantage occurred *after* appellant took his son and placed him in his car, and *after* he beat Buttler and rendered her helpless. (RB, at p. 141.) Respondent cites no cases and appellant is aware of none in which a lying-in-wait murder (or special circumstance finding) has been sustained based on a murder following a prolonged beating. These facts simply do not fit the lying-in-wait scenario.

Finally, respondent argues that there was sufficient evidence of first degree torture murder, contending that this case is "almost identical" to *People v. Cole*, 33 Cal.4th at p. 1214, in which this Court found sufficient evidence for torture murder. Appellant explained in his opening brief why *Cole* is distinguishable. (AOB, at pp. 143-146.) The facts in *Cole* show a far more methodical killing and far more careful use of gasoline. Rather

than using gas as the culmination of a fight that spun out of control, the victim was in her bed asleep when the defendant poured gasoline on her. He poured it on two distinct places, and when he ignited the fire, he said to the victim that he hoped she burned in hell, and made statements thereafter that he was angry at her and wanted to kill her. (*Id.* at p. 1172, 1214.) The Court discussed the prior relationship between the defendant and the victim, which – unlike here – included prior references to burning the house down if the victim ever left him. (*Id.* at p. 1214.) According to the victim's statements made before she died, she and the defendant had argued earlier in the evening, and he had followed her around all day because he thought she was cheating on him. (*Id.* at p. 1172.) Cole also did not flee, as did appellant, but brought the victim out of the house after she was burned. (*Id.* at p. 1174.)

More recently, in *People v. D'Arcy* (2010) 48 Cal.4th 257, this Court found substantial evidence to support a first degree murder conviction based on torture murder. *D'Arcy*, like *Cole*, is distinguishable from appellant's case in several key respects. In *D'Arcy*, unlike this case, the defendant "repeatedly and openly expressed an intent to hurt, burn, and kill [the victim]." (*Id.* at p. 294.) There was clear evidence that the defendant threatened to "hurt" the victim (*id.* at p. 266), and was planning on burning her, to "light her on fire," and purchased the gasoline specifically for the purpose of burning her. (*Id.* at p. 267.) Defendant was "calm and relaxed" prior to committing the crime, and poured gasoline on the victim immediately upon approaching her, evidencing the overarching desire to burn her. (*Ibid.*) Finally, after lighting the victim on fire he prevented her struggle to put out the flames by shoving her. (*Id.* at pp. 267, 294.) Such evidence, together with the condition of the body "permitted an inference

that defendant set [the victim] on fire with the intent to inflict extreme pain for the purpose of revenge." (*Id.* at p. 294.) This scenario is far different from the spontaneous outburst of rage that distinguishes appellant's case.

Respondent attempts to argue that "the callousness of Streeter's prior acts of violence against Yolanda" provides evidence of his intent to cause "tremendous pain and suffering." (RB, at p. 145.) As argued in Appellant's Opening Brief, and above, the evidence of prior acts undoubtedly described a troubled domestic situation but is a far cry from establishing a tortuous intent. (AOB, at pp. 143-146.)

There is insufficient evidence of any theory of first degree murder. Reversal is therefore required.

VII.

THE TRIAL COURT FAILED TO REQUIRE THE JURY TO REACH A UNANIMOUS AGREEMENT AS TO THE THEORY OF FIRST DEGREE MURDER OF WHICH APPELLANT WAS GUILTY

Appellant contends that the trial court failed to require the jury to agree unanimously on a theory of murder in violation of appellant's constitutional rights. Appellant concedes that this Court has previously rejected this argument. (See *People v. Cole*, *supra*, 33 Cal.4th at p. 1221.) For the reasons stated in Appellant's Opening Brief (AOB, at pp. 148-155), appellant urges this Court to reconsider this ruling.

VIII.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURY'S FINDING OF THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

Respondent argues in challenging appellant's claim of insufficient evidence for lying-in-wait murder that the period of watchful waiting occurred when appellant waited for Buttler to arrive at the scene, and the

lethal attack began after appellant beat her and rendered her immobilized. As respondent states, "Streeter launched a surprise attack from a position of advantage, after rendering Yolanda helpless by beating her and holding her young child in his car." (RB, at pp. 141; see also pp. 155-164.) However, the lying-in-wait special circumstance requires that the lethal act follow immediately from the period of watchful waiting, or a continuous flow of events from the time of waiting to the acts resulting in death. As this Court stated in *People v. Lewis* (2008) 43 Cal.4th 415, "the concealment must be contemporaneous with a substantial period of watching and waiting for an opportune time to act, and followed by a surprise attack on an unsuspecting victim from a position of advantage." (*Id.* at pp. 514-515.)

Under respondent's theory, there was no surprise attack and the lethal acts occurred after the watchful and waiting period ended. Thus, watchful waiting ended when appellant took his son, went back to his own car and placed him in it. Buttler then followed, an argument ensued, and the two began a physical altercation. According to respondent, it was after this that the lethal acts commenced, but by this time, Buttler was certainly aware that she was in danger; i.e., there was no surprise. Moreover, the period of watchful waiting had already ended. Indeed, appellant is not aware of any case and respondent has not cited any in which the lying-in-wait special circumstance was upheld in which the lethal acts came as no surprise and were preceded by a physical beating.

The cases cited by respondent underscore the dissimilarities with appellant's case. (RB, at pp. 155-160.) These cases all encompass critical facts not present here: A surprise attack which occurs contemporaneously with or immediately after the concealed purpose is revealed.

In *People v. Cruz* (2008) 44 Cal.4th 636, 679-680, the defendant was

in the back of a patrol car, and waited with the officer's gun until the car reached a secluded spot at which time he shot the officer in the back of the head.

In *People v. Gutierrez* (2002) 28 Cal.4th 1083, there was a substantial period of watching and waiting, followed by the perpetrators entering the victim's residence by a ruse. "Once inside, defendant wasted no time in subduing Rose V., directing Joseph to hold a gun to her head, and proceeding straight to the master bathroom where he broke down the locked door and fatally shot Stopher, who was in the shower, with several shotgun blasts to the head and torso." (*Id.* at p. 1150.) Unlike appellant's case, where there was a break in events between the watchful waiting period and the lethal act, in *Gutierrez*, as soon as the defendant revealed his true intention, he immediately proceeded to shoot the victim. Thus, there was "a substantial period of watching and waiting for an opportune time to act, and, immediately thereafter, a surprise attack on his unsuspecting victims from a position of advantage." (*Ibid.*)

In *People v. Sims* (1993) 5 Cal.4th 405, "there was substantial evidence that defendant and Padgett purchased a clothesline and knife, then rented a motel room, telephoned the Domino's Pizza parlor, and lured Harrigan to the motel room on the pretext of ordering a pizza, concealing their true intent to rob and murder him. They waited for Harrigan in the motel room, overpowered him upon his arrival, carefully bound him with the clothesline, gagged him, and left him either dead or to drown in a bathtub full of water." (*Id.* at p. 433.) Respondent attempts to analogize *Sims* to appellant's case, by arguing that after luring Buttler to meet him under a pretext, he "prepared the instruments of her killing prior to her arrival, waited for her to show up, and immediately overpowered her,

maximizing his position of advantage and committing the lethal act." (RB, at p. 156.)

This neat scenario described by respondent bears little resemblance to the evidence presented at trial. While respondent contends that appellant prepared the instruments for the killing while waiting for Buttler to arrive, what actually occurred was that Buttler followed appellant to his car after he took their son, and only after an initial altercation between the two did appellant return to his car and open the car trunk to retrieve a container of gasoline, which he poured on Buttler. At this point, appellant did not have anything to light the gasoline so he had to return to his car once again. This is a far cry from the facts in *Sims*, where the defendant was fully prepared to commit the lethal acts once the victim arrived at the scene.

Respondent contends that appellant similarly maximized his position of advantage when he overpowered Buttler. (RB, at p. 156.) At other points in the brief, respondent refers to "immobilizing her," which appear nowhere in the record. (RB, at pp. 155, 161, 164.) In any event, as the cases cited in Appellant's Opening Brief as well as by respondent discuss, the maximized position of advantage from which the surprise attack is launched stems from the period of watchful waiting. (AOB, at pp. 130-137.) It is not the attack itself that is supposed to maximize the position of advantage.

Respondent's discussion of this Court's rulings on the sufficiency of the lying-in-wait special circumstance in *People v. Lewis* is misleading. Respondent discusses two of the five murders in *Lewis* where the victims were taken by surprise after the defendant watched and waited for an opportune time to act. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 510.) With victim Agustine, the defendant "surprised him by quickly riding up in a car

and confronting him," and then shooting him three seconds later, and thus, there was sufficient evidence of lying in wait. (*Ibid.*)

Respondent discusses the murder of another victim in the *Lewis* case, Nisbet, where defendant watched and waited while the victim entered her car, and then took her by surprise, forcing his way into the car and driving away, but neglects to mention that while this Court found sufficient evidence of watchful waiting, it held as to this murder and the murder of two other victims – Sams and Denogean – that there was insufficient evidence to support the lying in wait special circumstance because the lethal acts did not occur "during the period of concealment and watchful waiting." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 510.) As to these three killings, the victims were kidnapped while the defendants were lying in wait, but they were driven around in their cars, and the defendants withdrew money from their bank accounts before they were killed. (*Id.* at pp. 513-514.)[3]

A critical fact in finding insufficient evidence of lying in wait was that these victims were not surprised. "Indeed, the evidence suggests each victim must have been aware of being in grave danger long before getting killed." (*Id.* at p. 515.) One pleaded for his life before being shot, one tried to escape, and the third stated that she knew the defendant was going to kill her. (*Id.* at p. 515.) This is also the critical factor disqualifying the murder in appellant's case as a murder committed while lying in wait. By the time of the commission of the lethal act, there was no surprise. Buttler had tried to run away and was screaming for help before she was killed. (VI RT 522,

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[3] Respondent discusses Agustine and Nesbit, and also refers to the murder of Avina, in which this Court found insufficient evidence to establish lying in wait, but fails to note the Sams and Denogean murders. (RB, at pp. 159-160.)

525-526.)

Thus, in *Lewis*, the Court stated that in each of the cases in which it held there was insufficient evidence of lying in wait, there was a period of watchful waiting culminating in a surprise kidnapping, followed by a series of nonlethal events and then an "unsurprising dispatch of each victim." (*Id.* at p. 515.) Again, in appellant's case there may have been watchful waiting, and the taking of appellant's son from the car may have been surprising, but then there were a series of nonlethal events – including the victim following after appellant – before the acts which resulted in the killing occurred. There was therefore insufficient evidence of the lying-in-wait special circumstance.

Respondent attempts to establish the requisite elements of the special circumstance by garbling and then compressing the events. First, respondent states that there was substantial evidence to support the inference that Streeter launched a surprise attack from a position of advantage immediately after the period of watching and waiting. (RB, at p. 160.) Then respondent states that after the watching and waiting period, Streeter maximized his advantage before launching a surprise attack, but does not state what part of the incident could be described as a "surprise attack." (RB, at p. 161.)

The problem for respondent is that there was no surprise attack. Respondent describes appellant taking his son and putting him in his car and then beating Buttler to the ground before dousing her with gasoline and lighting her on fire. (*Ibid.*) Respondent neglects to mention the undisputed evidence that when appellant took his son and started to walk to his own car, Buttler followed him and the two began to argue. (VIII RT 768- 772.) According to Patrick, Buttler's son, Buttler tried to take Little Howie out of

appellant's car, and appellant pushed her away. Buttler and Streeter were pushing each other back and forth. (VIII RT 769.) It was only after the verbal argument turned into a physical one that appellant began beating Buttler. (VIII RT 772.) Another witness, Anzerita Chonnay, first saw appellant and Buttler yelling at each other before appellant began hitting and kicking Buttler. (VI RT 551, 553.) It is then that appellant returned to his car to get the gasoline, but at this point Buttler could not be described as surprised. As Patrick explained, when Buttler saw this she began to run away toward her own car. Appellant chased her and poured gasoline on her car and eventually caught up to her and poured gasoline on her as well. (VIII RT 769.) After appellant poured gas on Buttler and on her car, he tried to drag her back to his car to get something to light her with. (VI RT 529, 543.) Appellant let her go, and she began running around in circles. (VI RT 528-529, 542.) She appeared dazed and was walking toward the Chuck E. Cheese, while appellant returned to his car to get the lighter. (VI RT 580, 582, 587.) He then chased her again, and after another man tried to grab him, he lit her on fire. (VI RT 589-591.)

While, as argued in Appellant's Opening Brief, there were several breaks in the flow of events, the clearest one occurred when appellant took his son from Buttler and went to his own car with him. (AOB, at pp. 160-161.) Respondent repeatedly states that appellant took steps to "immobilize Yolanda immediately upon her arrival." (RB, at p. 164; see also p. 155 ["immediately following the period of watchful waiting, Streeter commenced a continuous chain of activities, which started with Streeter immobilizing Yolanda . . ."]; p. 156 [. . . waited for her to show up, and immediately overpowered her . . ."]; p. 161 ["He immobilized Yolanda both by taking her young son and placing him in his car, and then beating

Yolanda to the ground in order to physically restrain her . . ."].) The facts, as described above, are otherwise. No matter how respondent attempts to characterize the events, there is not substantial evidence of the lying-in-wait special circumstance. This special circumstance finding must therefore be vacated.

IX.

THE LYING-IN-WAIT INSTRUCTIONS OMITTED KEY ELEMENTS OF THE SPECIAL CIRCUMSTANCE, AND WERE ERRONEOUS, INTERNALLY INCONSISTENT AND CONFUSING

Appellant argued in his opening brief that the lying-in-wait special circumstance instructions were not only confusing and contradictory, but failed to explain to the jury that the key elements of the special circumstance – concealment of purpose and watchful waiting for a time to act – referred to a concealed intent to kill and waiting for a time to launch a lethal attack. Respondent disagrees. (RB, at p. 165.) While respondent acknowledges that the special circumstance requires that the concealed purpose must be an intent to kill and that the watchful waiting had to be for a time to launch a lethal attack, it contends that CALJIC 8.81.15 conveys this adequately to the jury. (RB, at pp. 168-169.)

To support its contention that the instruction is adequate in this regard, respondent cites to several cases in which this Court upheld the validity of the instructions. (RB, at pp. 169-170.) However, in none of these cases in which the instructions were challenged was there an issue as to whether the instructions actually conveyed the lethal aspect of the concealed purpose and watchful waiting.

While respondent contends that this Court rejected this very issue in *People v. Bonilla* (2007) 41 Cal.4th 313, that case did not involve the question of whether the concealed purpose was a lethal one or whether the

watchful waiting period was for a time to launch a lethal versus non-lethal attack, but rather, whether Bonilla, as an accomplice could be liable as an aider and abettor. (*Id.* at p. 331.) Indeed, according to this Court, *Bonilla* was a classic lying-in-wait special circumstance murder in which the murder was accomplished by ambush. (*Id.* at p. 332, fn. 6.) While the Court upheld the instruction, the issues raised here regarding the failure to inform the jury of the lethal aspects of concealment and watchful waiting were not raised. (*Id.* at pp. 332-333.)

In *People v. Stevens* (2007) 41 Cal.4th 182, this Court upheld the instruction at issue but again, in a case where there was no dispute as to whether the concealed purpose was a lethal one, the Court did not address the issue raised here. (*Id.* at pp. 203-204.) *People v. Cruz* (2008) 44 Cal.4th 636, 678, rejected an unspecified claim that the instruction is "impossible to understand and apply" by noting such a claim has been repeatedly rejected. (*Id.* at p. 678 [Citations].)

Respondent also mischaracterizes the holding in *People v. Carpenter* (1997) 15 Cal.4th 312. Contrary to respondent's contention, the defendant did not argue that the lying-in-wait special circumstance instructions failed to require a concealed intent to kill. The defendant in *Carpenter* complained about an additional instruction given in that case but not given here: "If you find that defendant merely intended to rape during a period of watchful waiting and concealment, then you may not find the lying in wait special circumstance to be true." (*Id.* at p. 390.) The Court rejected Carpenter's claim that this instruction rendered the lying in wait *murder* instructions erroneous. In fact, such an instruction in *Carpenter* would have signaled to the jury, unlike in appellant's case, that intent to kill – rather than to rape – was required for the special circumstance. In any event, in

Carpenter, the challenge to the special circumstance instructions was to the language which stated "that the duration of the lying in wait must be 'such as to show a state of mind equivalent to premeditation or deliberation,'" which the Court rejected as it has done in other cases. (*Id.* at pp. 390-391, [Citations].)

Finally, respondent cites to *People v. Sims*, *supra,* 5 Cal.4th at p. 434, as support for the contention that this Court has previously upheld the special circumstance instruction against a challenge that the jury was not informed that the concealed intent must be concealed intent to kill rather than some other purpose. In *Sims* there was no dispute that the concealed purpose was to kill; the issue was whether the instruction meaningfully distinguished "the special circumstance from a first degree murder perpetrated by means of lying in wait or based upon premeditation and deliberation." (*Id.* at p. 434.) Thus, neither *Sims*, nor any of the cases cited by respondent address the issue raised by appellant.

Appellant also argued that the standard instruction, together with the prosecutor's special instructions, was flawed and eliminated the element of immediacy. (AOB, pp. 169-174.) Respondent argues that this claim was squarely rejected in *People v. Michaels* (2002) 28 Cal.4th 486, 516. But *Michaels* did not involve the special instructions that were given to the jury in this case, nor was there any issue in the case that the concealed purpose and culpable mental state was anything other than intent to kill. (*Id.* at p. 516.)

Respondent states summarily that considered as a whole, "this instruction made it clear that the concealed purpose had to be a murderous one, the watching and waiting had to be for a time to launch a lethal attack, and the killing had to occur immediately." (RB, at p. 170.) Respondent

never explains, however, how the jury was to understand these elements, and never explains why the failure to explicitly inform the jury that the culpable mental state must be intent to kill does not render the instructions fatally flawed.

Instead respondent looks to the arguments of counsel. However, the prosecutor, contrary to respondent's assertion, did not clearly explain the relevant principles of the lying in wait special circumstance, but simply recited the instructions to the jury. (11 RT 1075-1083.) Neither the prosecutor nor defense counsel ever explained to the jury that for the special circumstance of lying in wait to apply the concealed intent must be intent to kill, that the watchful waiting must be undertaken for that purpose, and that the culpable mental state that must be maintained during the continuous flow of events must be a murderous one.

For the reasons stated in Appellant's Opening Brief, the instructional errors violated appellant's constitutional rights and were prejudicial.

X.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO NARROW THE CLASS OF DEATH-ELIGIBLE DEFENDANTS OR ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED AND THOSE IT IS NOT

Appellant argued in his opening brief that the lying in wait special circumstance is unconstitutional, and urged this Court to revisit its prior holding to the contrary. (AOB, at pp. 178-187.) Respondent simply relies on this Court's prior decisions without adding new arguments. (RB, at pp. 175-177.) Accordingly, the issues are joined and no reply is necessary.

XI.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURY'S FINDING OF THE TORTURE-MURDER SPECIAL CIRCUMSTANCE

In Appellant's Opening Brief, appellant argued that the evidence was insufficient to support the torture-murder special circumstance for the same reasons previously presented in support of the claim of insufficiency of evidence of torture murder. (AOB, at pp. 188-189.) Respondent's contentions regarding the sufficiency of evidence should therefore be rejected for the same reasons discussed above.

XII.

THE TORTURE-MURDER SPECIAL CIRCUMSTANCE IS VAGUE AND OVERBROAD AND THE INSTRUCTIONS FAILED TO INFORM THE JURY ADEQUATELY OF THE ELEMENTS OF THE SPECIAL CIRCUMSTANCE

Appellant argued in his opening brief that the torture-murder special circumstance is unconstitutional and that the instructions failed to inform the jury adequately of the elements of the special circumstance. Appellant noted that these challenges have been rejected previously by this Court. (AOB, at pp. 190-191.) Respondent simply relies on this Court's prior decisions without adding new arguments. (RB, at pp. 180-184.) Accordingly, the issues are joined and no reply is necessary.

XIII.

THE TORTURE-MURDER SPECIAL CIRCUMSTANCE FAILS TO NARROW THE CLASS OF DEATH-ELIGIBLE DEFENDANTS OR ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED AND THOSE IT IS NOT

Appellant argued in his opening brief that the torture-murder special circumstance fails to perform the narrowing function required by the Eighth

Amendment and fails to ensure that there is a meaningful basis for distinguishing those cases in which the death penalty is imposed from those in which it is not. (AOB, pp. 196-201.) Respondent does not dispute the fact that a jury could reject a first degree torture-murder conviction but find true a torture-murder special circumstance. Respondent, contends, however, that this misses the point because the requirement of intent to kill narrows the class of persons eligible for the death penalty. (RB, at p. 186.) It is hard to see how the special circumstance performs a narrowing function when it is broader and more easily attained than the underlying murder. The problem, as discussed in the opening brief, is that the additional requirement of intent to kill as a narrowing factor is almost universally only theoretical. "A special circumstance which requires only an intentional killing in which the victim suffered extreme pain would be capable of application to virtually any intentional, first degree murder with the possible exception of those occasions on which the victim's death was instantaneous." (*People v. Davenport* (1986) 41 Cal.3d 247, 265.)

XIV.

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant argued in his opening brief that the guilt phase instructions impermissibly undermined and diluted the requirement of proof beyond a reasonable doubt. (AOB, pp. 201-218.) These challenges have been rejected previously by this Court, and respondent simply relies on this Court's prior decisions without adding new arguments. (RB, at pp. 186-190.) Accordingly, the issues are joined and no reply is necessary.

XV.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY TO FOCUS ON APPELLANT'S FLIGHT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

Respondent initially argues that appellant's claim that the court erroneously instructed the jury to focus on appellant's flight as evidence of consciousness of guilt is waived for failure to object. (RB, at p. 190.) There was certainly no clearly established rule at the time of appellant's trial that an objection to the flight instruction was necessary to preserve the claim of error. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 982, fn. 12 [claim that there was insufficient evidence to warrant flight instruction not waived by failure to object].) In *People v. Loker* (2008) 44 Cal.4th 691, 705, cited by respondent, this Court found waiver because the trial court had offered to modify the instruction and defense counsel failed to object when the court failed to do so.

The cases cited by respondent are all distinguishable. (RB, at p. 191.) In *People v. Farnam* (2002) 28 Cal.4th 107, 165, the Court held the issue was waived for a failure to object to the proposed wording of the instruction, citing *People v. Bolin* (1998) 18 Cal.4th 297, 326. However, in *Bolin*, waiver was found because defense counsel agreed that there was sufficient evidence to warrant the instruction and did not object to the court's proposed wording. As does respondent, *Bolin* cites to *People v. Jackson* (1996) 13 Cal.4th 1164, 1223. In *Jackson*, the defendant joined in requesting three of the consciousness-of-guilt instructions and the claims of error were found waived. *Jackson* relied on *People v. Hardy* (1992) 2 Cal.4th 86, 152, as authority. However, in *Hardy*, the waiver was to a claim regarding the erroneous admission of evidence, and the failure to object was found to have waived that claim pursuant to Evidence Code section 353.

This section does not apply to instructions.

Indeed, this Court may review "any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code § 1259; see *People v. Jones* (1998) 17 Cal.4th 279.) Appellant's claim is therefore not waived.

On the merits, as argued in Appellant's Opening Brief, the erroneous instruction deprived appellant of his constitutional rights. (AOB, at pp. 218-228.) Respondent disputes this argument, relying on this Court's decisions rejecting similar claims. (RB, at pp. 192-195.) The issues are fully joined, and no further reply is necessary.

One additional argument by respondent requires a response, however. Respondent contends that the instruction was appropriately given with regard to torture-murder and the torture-murder special circumstance. Respondent states that appellant's flight while Buttler was on fire, screaming in fear and pain while others were trying to put out the flames, has a tendency in reason to establish that he acted with an intent to torture. (RB, p. 194.) This makes no sense. Evidence of flight demonstrates that appellant took no enjoyment or sadistic pleasure from the crime. Rather than wait around and watch Buttler burn or witness the aftermath of his actions, he ran from the scene immediately after committing the act. (VI RT 514-515, 548, 592-594.) Contrary to respondent's contention, to the extent appellant's flight provides insight into his state of mind it suggests he did not intend to torture. Therefore, the jury should not have been permitted to draw irrational inferences from the undisputed evidence that appellant fled the scene that he not only killed Buttler but did so while harboring the intent or mental state required for first degree murder.

XVI.

THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE FUNDAMENTAL PRINCIPLES NECESSARY FOR DETERMINING THE APPROPRIATE PENALTY

Unable to dispute that the jurors were not instructed by the trial court as to how they should consider the aggravating and mitigating evidence they heard in order to determine the appropriate sentence, respondent attempts to obscure this gross violation of appellant's rights. As explained below, these efforts are unavailing and appellant's death sentence must be vacated.

Respondent contends that CALJIC 8.88 is merely a prophylactic instruction designed to clarify any confusion which might result from giving an instruction in the unadorned language of Penal Code section 190.3. (RB, at p. 196.) Respondent has the temerity to argue that there was no need for such clarification because appellant's jury was not given the potentially misleading unadorned instruction either. The fact that the jury received *neither* instruction, and thus, no instruction at all with regard to the nature of the sentencing determination and each juror's responsibility to individually determine the appropriate penalty is of no concern. According to respondent, the jury was fully informed of the process by counsel's argument and the court's response to a jury note in which the jury expressed its lack of understanding of the process. As will be explained, neither counsel's argument nor the court's cryptic and legally incorrect response to the jury – which could have been resolved by giving CALJIC 8.88 – did anything to cure the lack of instruction. The jury was entitled as a matter of law and fundamental constitutional principles to instructions which explained the sentencing process and in this case they failed to get it!

Respondent next interprets the trial record as demonstrating that the

instruction was not intentionally stricken but was inadvertently omitted. (RB, at pp. 197-198.) While such a characterization of the record appears reasonable, whether or not the court purposely failed to give the instruction has no bearing on the issue. Either way, the jury was never instructed on the critical aspects of their decision-making. Indeed, the fact that it appears, according to respondent, that the parties expected that the jury would be given this instruction and never noticed its omission (RB, at p. 198) does not aid respondent's argument that the instruction was unnecessary.[4]

Respondent disputes that the instruction was omitted in its entirety, first stating that the trial court read portions of the instruction. (RB, at p. 198.) The instruction that should have been given reads in its entirety as follows:

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on [the] defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds

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[4] The fact that defense counsel failed to notice that the instruction was not given, even after the juror note revealed that the jury had no understanding of the sentencing process, is further evidence – as argued with regard to Claim I – that counsel was far less than a zealous advocate for his client.

to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to the courtroom.

(CALJIC No. 8.88.)

Respondent notes that the instruction was not completely omitted because the last two of these paragraphs were given. (RB, at p. 196; see II CT 461.) Obviously, these two paragraphs pertaining to the selection of a foreperson and the signing of verdicts are not relevant to the manner in which the jury should decide penalty. In fact, reading the one statement in these paragraphs regarding the requirement for unanimity ("[i]n order to make a determination as to penalty, all twelve jurors must agree") would likely misinform jurors as to the nature of their task in the absence of the remaining paragraphs which attempt to clarify the individualized nature of the sentencing determination.

Respondent then states that other portions of the instructions were summarized by the court at various points of the proceedings. Respondent points to the truncated version of the instruction given to the jury at the conclusion of the voir dire process. (RB, at pp. 207-208.) Preliminarily, it should be noted that this pre-instruction merely defined aggravating and mitigating factors, and with regard to the weighing process, merely noted that the weighing is "not quantitatively [sic], but qualitative" and that the "jury must be persuaded that the aggravating factors are substantial in comparison to the mitigating factors that death is warranted instead of life imprisonment without parole." (XVIII RT 1724-1725.) This is hardly a complete and clear explication of the weighing process. Indeed, the trial court specifically stated after giving this brief – and inadequate – summary of the process that "[w]hen it comes around for you to make a decision, you will be weighing those factor [sic] in making this determination which I have just read to you and you will be instructed about this later on. So you need not be overly concerned if you don't remember everything that I read."

(XVIII RT 1725.)

Thus, the court gave an abbreviated version of CALJIC 8.88 prior to the start of the penalty phase and told the jury not to worry if they did not remember it because they would be given instructions later. The court's statements acknowledge the obvious: The jurors would not remember what they had heard by the end of the trial. The court, however, never gave the instruction later, and respondent's argument that this provided the jury with a full understanding of the process must be rejected.

Respondent also contends that CALJIC 8.85, which told the jury to "consider, take into account, and be guided by the relevant factors," is somehow an adequate substitute for an instruction about how to apply these factors to determining the appropriate sentence. This is simply not true. A listing of the factors does not obviate the need for an instruction that explains how the jury should consider those factors.

Respondent also points to CALJIC 8.84, which told the jury that there were two possible sentences, death or life without possibility of parole, and that "you must determine which of these penalties shall be imposed. The law expressly states that it voices no opinion as to which penalty is preferred." (RB, at pp. 212-213.) According to respondent, this instruction emphasized the duty of each juror to individually assess the appropriateness of the death penalty under all the circumstances. Appellant does not see how an individual juror would have been so informed by this instruction, which makes no mention of "appropriateness," and there is no reason why the juror would have thought that the "you" referred to each individual juror as opposed to the collective jury.

Finally, respondent relies on the arguments of both counsel to fill the gap left by the failure to instruct. Respondent contends that both counsel

made it "abundantly clear the weighing process was not a mechanical, quantitative process, but involved the assignment of moral or sympathetic value to each of the factors." (RB, at p. 209.) Even assuming without conceding that counsel's arguments could ever be an adequate substitute for the lack of an instruction, this is a gross overstatement of the effectiveness of the arguments, which in this case fall far short.

The prosecutor asked the jury to find death by "engag[ing] in a weighing process." (XXIV RT 2580.) Then, he told the jury that "[t]he judge is going to instruct you that what you need to do is to weigh all these various aggravating and mitigating factors that we kind of touched upon in the first part of the trial. And the notion is that you must weigh all of this together. And if the aggravating factors, aggravating evidence pertaining to the factors, particularly A, B and C, which I'll get to in a second, if they substantially outweigh the mitigating factors and you believe that's the proper verdict, then you should vote for the death penalty. And that's what we're asking you to do here." (*Ibid.*)

As previously noted, the judge did not instruct the jury in this regard, and simply telling the jury that they should "weigh all this together" hardly suffices as an adequate explanation. Moreover, while the prosecutor at first mentioned the weighing process, he also used the phrase "should vote for death" if aggravation outweighs mitigation, and with each reference moved progressively closer to arguing for mandating death if aggravating circumstances outweighed mitigation circumstances. (See AOB, p. 244, fn. 33.)

Thus, the prosecutor next argued: "The law says we give the death penalty where the aggravating factors substantially outweigh the mitigating factors in a given case. That means there's like a line, a line you just don't

cross. And if you cross that line, if you go over that line, you go too far, then you've done a crime that *requires* the death penalty." (XXIV RT 2581, emphasis added.) The prosecutor stated that even if the jury felt some sympathy for appellant, "your job is to act as the conscience of the community and to exercise your own conscience and say, 'I'm sorry, Mr. Streeter. I might feel sorry for you for this reason or that, but you crossed the line, you went too far. You committed this most heinous of murders." (*Ibid.*)

The prosecutor then discussed the various aggravating and mitigating factors (XXIV RT 2582-2604), and concluded that "the aggravating factors clearly and substantially outweigh 'sympathy' for appellant." (XXIV RT 2604-2605.) Then, the prosecutor stated most forcefully that if aggravation outweighs mitigation the jury must vote for death:

> And none of you, in your jury questionnaires, said "Well, you know, I don't care what a guy's done or how bad it is, as long as he says he's sorry. If he says he's sorry, then I'll give him a pass. I'll let him have LWOP." None of you said that. And you shouldn't, of course. I mean, you take it into account, but you're supposed to weigh it. If the aggravating outweighs the mitigating, that's what you do. His soul may belong to God, but under our law, his life belongs to the State because of our system of justice, which requires that you weigh and consider both. And if the aggravating substantially outweighs the mitigating, death penalty. That's the way our law is. And that's what you must follow.

(XXVI RT 2605.)

Respondent's assertion that the prosecutor adequately explained the weighing process in argument obviating the need for any instruction is

simply belied by the record.

As for defense counsel, he did tell the jury fleetingly that "you are free to assign your own sympathetic or moral value to each one of these factors. The law doesn't – doesn't require you to set certain values. You do this on your own your own values." (XXIV RT 2615.) However, this statement was made after he quoted a different instruction, CALJIC 8.85, and never indicated that this was also required; that it is from an instruction to which they must adhere, rather than mere argument from counsel. In the absence of an instruction by the court, there was no reason for the jury to believe they were to follow what the defense lawyer suggested in his closing argument.

Defense counsel concluded by saying: "the law will tell you that to return a judgment of death, each of you must be persuaded that the aggravated circumstances, 8.85, that instruction on the board, are so substantial in comparison to the mitigating circumstances it warrants the death instead of life without possibility of parole. So the factors in aggravation have to be so substantial in your mind in comparison to the mitigating factors that you are going to kill this man." (XXIV RT 2621.) Unfortunately, the law, as set forth in the instructions, never did inform the jury of this fact, even after the jury note raised this precise question by asking whether they could vote for life without possibility of parole if aggravating factors significantly outweigh mitigating factors, and what they should do if they believed the case did not meet the minimum standard for a death sentence. (II CT 465.)

Respondent asserts that the jury was "immersed in two themes; that they have responsibility to assign moral and sympathetic value to each factor, which was a qualitative (not a quantitative) assessment, and that they

were individually responsible for determining which penalty was appropriate under all the circumstances." Respondent's contention that these themes "were pervasive throughout the trial" is preposterous. The trial court failed to instruct the jury on these matters, which respondent concedes are necessary, the closing arguments of counsel were brief, untethered to instructions actually given, and, in the case of the prosecutor's argument, misleading.

More significantly, what the trial court said during voir dire or what the attorneys said in their closing arguments cannot cure the failure to instruct the jury on such a central aspect of the case. Unlike cases where the Court looks to the totality of the circumstances to determine whether the jury was misled by a potentially confusing instruction, such an inquiry is inappropriate where no instruction was given. As this Court has held, "The failure to instruct is . . . not cured by other directions given to the jury." (*People v. Vann* (1974) 12 Cal.3d 220, 227, fn. 6.)

In *Vann*, the trial court had inadvertently failed to specifically instruct the jury on the presumption of innocence and that the prosecution had the burden of proving guilt beyond a reasonable doubt. (*Id.* at p. 225) This Court rejected the state's argument that the error was harmless because the point was otherwise covered. As in appellant's case, in *Vann* there was some reference to the instruction in question during jury selection as well as a statement by the judge that the jury would receive instructions at the conclusion of the case. (*Id.* at p. 227, fn. 6.) Also, as here, when the final instructions were given, there was no reference back to the preliminary remarks and the jury was told, in accordance with CALJIC 1.00, that the jury "must accept the law as I state it to you." (*Ibid.*; see III CT 431.) In *Vann*, the trial court concluded, "You have been instructed on all the rules

of law that may be necessary for you to reach a verdict." (*Ibid.*) Similarly, in appellant's case, the jury was told that they were being "instructed as to all of the law that applies to the penalty phase of this trial" and, again, that they "must accept and follow the law that I shall state to you." (III CT 447.)

Thus, "[i]n net effect the jurors were given to understand that they had received a self-contained, complete statement of the law they were to follow." (*People v. Vann, supra*, 12 Cal.3d at p. 227, fn. 6.) And in *Vann*, as here, defense counsel's arguments, which advised the jury in the language of the omitted instruction, "likewise did not cure the error of the court's omission." (*Ibid.*, citing *Parker v. Atchison, T. & S. F. Ry. Co.* (1968) 263 Cal.App.2d 675, 680.) As this Court said, "In its final charge the court made it clear that the jurors were to follow the law as explained by the court, and were not to follow rules of law stated in argument but omitted from the instructions." (*People v. Vann, supra*, 12 Cal.3d at p. 227, fn. 6; see also *People v. Flores* (2007) 147 Cal.App.4th 199 [reasonable doubt defined during jury selection and mentioned during prosecutor's closing argument; burden of proof discussed in instructions on elements of crimes]; *People v. Phillips* (1997) 59 Cal.App.4th 952 [burden of proof discussed during jury selection and in instructions on elements of crime and counsel gave partial definitions of reasonable doubt in closing argument]; *People v. Crawford* (1997) 58 Cal.App.4th 815 [reasonable doubt defined during jury selection; burden of proof referred to in other instructions]; *People v. Elguera* (1992) 8 Cal.App.4th 1214 [reasonable doubt defined during jury selection; burden of proof referred to in closing arguments].)

The jury note sent out during deliberations removes any doubt that the jury was inadequately instructed as to the nature of the sentencing process. The note demonstrated that one or more jurors were struggling

with whether or not death was the appropriate penalty but could not figure out how such a determination fit into the process of weighing aggravation against mitigation. The note asked: (1) whether the jury may select life without possibility of parole even if they find that aggravating factors "significantly" outweigh mitigating factors; and (2) whether a determination that the circumstances in the case "do not meet the minimum standards for the sentence of death allowed as a mitigating circumstance." (2 CT 465.)

It should have been obvious from this note that the jury lacked understanding of the process. It is remarkable that neither the court nor either counsel realized from the question that the key instruction was lacking or that such an instruction would have provided the answer to the jury's concerns. As discussed in Appellant's Opening Brief, the court's response that "under the law you are permitted to reach any verdict you wish as to the appropriate penalty" was of absolutely no help in the absence of an instruction which actually explained how to reach the appropriate penalty. In a most telling concession, respondent agrees that the jurors' confusion could have been cured by the giving of CALJIC 8.88. (RB, at p. 217.)

For the reasons discussed in Appellant's Opening Brief, the failure to give CALJIC 8.88 was erroneous, violated appellant's constitutional rights, and requires reversal.

XVII.

THE INTRODUCTION OF IRRELEVANT BUT EXTREMELY PREJUDICIAL EVIDENCE AT THE PENALTY PHASE RETRIAL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argued in his opening brief that the unduly gruesome hospital and autopsy photographs and the tape recording of the victim's screams in the ambulance were erroneously and prejudicially admitted at

the penalty phase retrial. (AOB, at pp. 256-271.)

Respondent first asserts that appellant did not object on federal constitutional grounds and therefore such claims are waived on appeal. (RB, at pp. 219-220.) Appellant's motion at trial to exclude this evidence did challenge the admission of the evidence on federal constitutional grounds, including "defendant's rights to a fair trial, due process of law, and evidence of heightened reliability as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (I CT 310-311.) In any event, as respondent has conceded, appellant did raise an objection pursuant to Evidence Code 352, and thus his federal due process claim regarding the unduly inflammatory and prejudicial nature of the evidence was similarly preserved. (See *People v. Partida, supra,* 37 Cal.4th at pp. 437-439.)

Respondent argues here, as with regard to Argument IV, that the evidence is highly relevant to circumstances of the crime and the special circumstance of torture because it gives the jury a comprehensive picture through images and sounds. As discussed in Appellant's Opening Brief as well as above with regard to admission of this evidence at the guilt phase, evidence of the victim's screams in pain in the ambulance as well as photographs of her body after suffering the fatal burns had little, if any, relevance to any disputed issue at the penalty phase, and was certainly more prejudicial than probative given its inflammatory nature. (AOB, at p. 263.)

Nor was the evidence properly admitted as victim impact evidence. As argued in Appellant's Opening Brief, it was particularly inappropriate for the trial court to find the tape admissible as victim impact evidence on the ground that its playing by the prosecution at the first trial adversely affected the victim's family. (AOB, at pp. 264-267.) The trial court should

not have permitted admission on such grounds which were far too "remote from any act by defendant to be relevant to his moral culpability." (*People v. Harris* (2005) 37 Cal.4th 310, 352.)

This Court has recognized that there must be outer limits to the admission of victim impact evidence. (See *People v. Robinson* (2005) 37 Cal.4th 592, 644-652; *People v. Harris, supra,* 37 Cal.4th at p. 352.) It has cautioned that "the prosecution may not introduce irrelevant or inflammatory material that 'diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1288, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 836.)

More recently in *People v. Hawthorne* (2009) 46 Cal.4th 67, 101-102, cited by respondent, the prosecution introduced a tape of a 16-year old girl's 911 call, after she had been shot and then discovered her mother, who had also been shot in another room. The girl's screaming can be heard on the tape in the background, after she gave the phone to her mother's friend who had entered the house. *Hawthorne* is distinguishable. First, in *Hawthorne*, the jury was cautioned about having an emotional reaction to this evidence and instructed that such a reaction could not outweigh other factors. (*Id.* at p. 101.) In contrast, the jurors in appellant's case were specifically told they could consider the impact of the defendant's crime on the victim and her family without any cautionary language. (II CT 450.)

In *Hawthorne*, the Court found that although the young woman on the tape became hysterical, and the 911 tape "'would naturally have tended to arouse emotion and evoke strong feelings of sympathy for [the young woman's] condition, it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response.'" (*Id.*

at p. 102, quoting *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.) By contrast, it is hard to imagine a case with more inflammatory evidence than the ambulance tape in this case, and if, as noted above, this Court has acknowledged that some limits on the quantity and quality of victim impact evidence is necessary, this is surely a case where the Court should draw that line.

The prosecutor conceded the impact the evidence would have on the jury by arguing that its admission was critical to his ability to obtain a death sentence – that his case would be put in "great jeopardy in terms of letting them understand what they really should do in terms of punishment" if such evidence were excluded. (XVIII RT 1897; see also p. 1904 ["I just feel it's very important to be able to use both the tape and the photographs . . ."].) And the trial court agreed that the evidence was inflammatory. Speaking to the prosecutor during the motion to exclude the evidence, the court stated "Then you made a statement, 'well, the jury really needs to really hear that to know what the victim went through,' or something to that effect. That disturbs me because then what I get is this feeling, 'Well, what we're going to do is introduce this tape and let the jury hear this woman screaming in pain, and boy, are they going to get mad at Mr. Streeter.' That is, while they're hearing that." (XVIII RT 1902.) The court stated its concern about "some degree of inflaming the jury," but ultimately found the relevance of the evidence exceeded the prejudice. (XVIII RT 1905.)

Respondent argues this evidence is relevant because it provided images and sounds that more accurately showed the events than would have come from testimony of witnesses. The danger, however, is that such an intense presentation of the crime and its aftermath will overwhelm the jury and skew the sentencing determination. This completely subverts the high

court's rationale for permitting admission of victim impact evidence in the first place.

Concern over the imbalance caused by the defendant's right to present humanizing, mitigating evidence and the state's inability to present comparable evidence about the victim was at the heart of the Supreme Court's decision in *Payne v. Tennessee* (1991) 501 U.S. 808, overruling the Court's earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805, which barred the admission of victim impact evidence. Writing for the majority in *Payne*, Chief Justice Rehnquist referred to the Court's previous decisions as having misread precedent and thus, "unfairly weighted the scales in a capital trial," against the state. (*Payne v. Tennessee, supra*, 501 U.S. at p. 809.) The majority opinion recognized the state's

> legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. [Citation.]

(*Id.* at p. 825, emphasis added; see also, *id.* at p. 839 (conc. opn. of Souter, J.) ["given a defendant's option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process" [Citations].)

This Court in *People v. Edwards, supra*, 54 Cal.3d 787, held

> "[A]t the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only

> appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's against those that may offend the conscience. [Citation.]"

(*Id.* at p. 834, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 863-864, emphasis added.)

Similar language from *Payne* was cited by this Court in *People v. Pollock* (2004) 32 Cal.4th 1153, in upholding the admission of victim impact testimony by the victim's son. This Court noted, "'there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant.'" (*Id.* at p. 1182, quoting *Payne v. Tennessee, supra*, 501 U.S. at p. 826.)

Concern about parity between the prosecution and defense in the presentation of evidence to the sentencer was also paramount in this Court's decision in *People v. Brown* (2004) 33 Cal.4th 382. Following a discussion of *Payne* and *Edwards*, which included the same quotations from both opinions as set forth above, this Court addressed the defendant's argument that admission of victim impact evidence at his trial was error noting that "just as the defendant is entitled to be humanized, so too is the victim," and quoted Justice Cardozo in *Snyder v. Massachusetts* (1934) 291 U.S. 97, 122: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*People v. Brown, supra,* 33 Cal.4th at p. 398.)

The concerns that motivated the court in *Payne* to permit states to present victim impact evidence, and which this Court has relied upon in upholding admission of such evidence under factor (a), are not present in appellant's case. In his concurring opinion in *Payne*, Justice Souter wrote:

"Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles." (Payne v. Tennessee, supra, 501 U.S. at p. 838 (conc. opn. of Souter, J).)

There was no danger – given the extent of victim impact evidence in this penalty phase retrial, including testimony from several family members as well as extensive evidence of the circumstances of the crime – that the victim would not be considered as a valuable individual. On the contrary, the evidence of photographs from the hospital and autopsy, and in particular, the screams of pain on the ambulance tape, tipped the balance unfairly in the other direction. To allow the prosecutor to present a massive amount of highly charged victim impact evidence at the penalty phase of trial impermissibly skewed the balance and resulted in an arbitrary and unconstitutional death sentence.

XVIII.

THE TRIAL COURT ERRED IN REMOVING THE CONCEPT OF LINGERING DOUBT FROM THE JURY'S CONSIDERATION

Respondent contends that appellant's arguments regarding the court's rejection of appellant's instructions on lingering doubt and the giving of an instruction that foreclosed consideration of lingering doubt are waived. (RB, at pp. 228-229.) As noted above, this Court may review "any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code § 1259; see *People v. Jones* (1998) 17 Cal.4th 279.) Appellant's claim is therefore not waived.

Respondent agrees that appellant's state of mind at the time he committed the crime was a "disputed issue" and "the only issue open to lingering doubt." (RB, at P. 230.) While respondent contends that nothing

prevented appellant from presenting evidence on this issue, it paradoxically contends that the trial court did not err by refusing to permit the jury to consider counsel's argument on the issue. (XXV RT 2616-2617.) The trial court rejected appellant's request for an instruction that would have informed the jury that it could consider lingering doubt on this disputed issue, and instead told the jury prior to trial that the guilt phase verdicts were conclusive and must be accepted (see, e.g., XIV RT 1349-1350, XVII RT 1625, 1649, 1688-89) and in instructions at the close of the case that they "must accept the previous jury's verdicts as having been proved beyond a reasonable doubt." (CT 466.) This left the jury without the ability to consider lingering doubt as a mitigating factor.

For the reasons discussed in Appellant's Opening Brief, this was prejudicial error requiring reversal. (AOB, at pp. 274-283.)

XIX.

THE TRIAL COURT IMPROPERLY DIRECTED THE JURY TO PRESUME THAT APPELLANT'S CONDUCT WHEN HE WAS TRYING TO LOCATE HIS FAMILY CONSTITUTED THE USE OR THREAT TO USE FORCE OR VIOLENCE

In Appellant's Opening Brief, appellant challenged the giving of CALJIC 8.87 as creating a mandatory presumption that his conduct in trying to learn from Buttler's family the whereabouts of his family constituted criminal acts involving violence or the threat of violence, and impermissibly increased the weight of the evidence by escalating the defined level of force by giving an instruction which altered the statutory language. (AOB, at pp. 284-290.) Again, respondent contends appellant's claims are waived for failure to object, notwithstanding Penal Code section 1259, discussed above. As for the merits, respondent notes that appellant's arguments were previously rejected by this Court. (RB, at p, 235, citing

People v. Nakahara (2003) 30 Cal.4th 705, 720.) Appellant requests that this Court reconsider its prior holdings in light of the facts of this case.

XX.

THE JURY WAS IMPROPERLY INFORMED THAT IT COULD CONSIDER A MISDEMEANOR CONVICTION IN AGGRAVATION AS A PRIOR CONVICTION UNDER FACTOR (C)

Respondent concedes that the trial court erred by instructing the jury that it could consider his prior misdemeanor conviction for shooting at an inhabited dwelling under aggravating factor (c).[5] (RB, at p. 238.) Respondent argues, however, that the error was harmless. For the reasons discussed in Appellant's Opening Brief, the error was prejudicial. (AOB, at pp. 293-294.)

XXI.

INSTRUCTING THE JURORS THAT THEY SHOULD REACH A VERDICT "REGARDLESS OF THE CONSEQUENCES" DIMINISHED THEIR SENSE OF RESPONSIBILITY

Respondent also concedes that the trial court committed error when it repeated CALJIC 1.00 at the penalty retrial, which told the jury to reach a verdict regardless of the consequences. Respondent argues that this error, too, was harmless. (RB, at p. 240.)

In his opening brief, appellant explained how this instruction, when combined with other comments by the court undermined the jury's sense of

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[5] In his opening brief, appellant asserted that it was the prosecutor who supplied the court with the jury instruction which included the misdemeanor under factor (c). (AOB, p. 292.) Respondent states that the record supports the inference that it was the court which modified the instruction during a conversation with counsel. (RB, at 238, fn. 31.) It does appear that the trial court filled in the misdemeanor conviction on the instruction after the prosecutor noted that it was a misdemeanor conviction. Appellant's counsel said nothing. (XXIV RT 2575-2576.)

responsibility. (AOB, at pp. 294-297.) This included the court's explanation that this was a penalty retrial in which the defendant's guilt had already been decided, that they must accept the prior jury's guilt phase verdicts. (See Claim XVIII; CT 446.) In addition, the court told the jurors that this would not be a long, complicated case, but will be "really rather short." (XVII RT 1626, 1650, 1689.) The court also explained to one set of prospective jurors that "The evidence is straightforward. And it is for you to interpret that evidence and [it's] not going to take long to do it." (XVII RT 1689.) The jury was also informed that there had been a prior penalty trial (XVII RT 1629, 1650, 1689), which also was likely to lessen the jurors' sense of responsibility.

Respondent attempts to argue that the gravity of the jury's responsibility was made clear by the instructions as a whole. Unfortunately, as argued above, the jurors were not given the full panoply of instructions, particularly CALJIC 8.88, which would have emphasized the nature and scope of their sentencing responsibilities. For the further reasons stated in Appellant's Opening Brief, erroneously informing the jurors that they must reach a verdict regardless of the consequences requires reversal of appellant's sentence.

XXII.

CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES CONSTITUTION

Appellant argued in his opening brief that California's death penalty scheme is unconstitutional, and acknowledged that this Court has previously rejected these arguments, but urged the Court to reconsider them. (See AOB, at pp. 297-312.) Respondent relies on the Court's previous precedents without any substantive new arguments. (RB, at pp.

243-249.) Accordingly, no reply is necessary to respondent's argument.

XXIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Appellant argued in his opening brief that the cumulative effect of the errors in this case were not harmless beyond a reasonable doubt. (AOB, at pp. 312-315.) Respondent did not address appellant's cumulative error argument. No reply is necessary.

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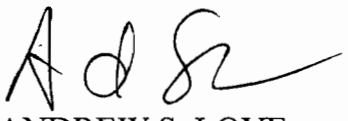
CONCLUSION

For all the aforementioned reasons, appellant's conviction, special circumstance findings and sentence of death must be vacated.

DATED: 9/9/10

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



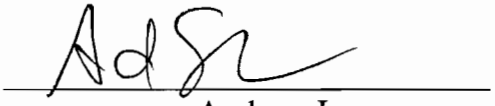
ANDREW S. LOVE
Supervising Deputy State Public Defender

Attorneys for Appellant

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

I, Andrew Love, am the Supervising Deputy State Public Defender assigned to represent appellant, Howard Streeter, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 18,833 words in length excluding the tables and certificates.

Dated: September 9, 2010



Andrew Love

DECLARATION OF SERVICE

Re: PEOPLE v. HOWARD LARCELL STREETER S078027

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

APPELLANT'S REPLY BRIEF

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

MELISSA MANDEL
Deputy Attorney General
Office of the Attorney General
110 W. A Street 14th Floor
San Diego, CA 92101

SAN BERNARDINO SUPERIOR COURT
Attn: Clerk of the Court
401 North Arrowhead Ave
San Bernardino, CA 92415-0063

BETHANY O'NEILL
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

HOWARD STREETER
P.O. Box P-36000
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on September 9, 2010, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on September 9, 2010, at San Francisco, California.

DECLARANT