SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRISTOPHER HENRIQUEZ, Defendant and Appellant.	No. S089311 (Contra Costa County Superior Ct. No. N. 961902-4)

SUPREME COURT
FILED
MAY 19 2011
Frederick K. Ohlrich Clerk
Deputy

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Contra Costa

Honorable Peter Spinetta

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DEATH PENALTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENTS 2

I. THE TRIAL COURT DENIED APPELLANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY 2

II. THE TRIAL COURT ERRONEOUSLY RULED THAT THE PROSECUTION COULD USE AN UNCHARGED PRIOR MURDER ON CROSS-EXAMINATION OR REBUTTAL WHICH PRECLUDED APPELLANT FROM PUTTING ON CRITICAL EVIDENCE IN HIS OWN DEFENSE 10

III. THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTOR TO INTRODUCE HIGHLY PREJUDICIAL EVIDENCE OF A JAIL ESCAPE ATTEMPT 14

IV. THE TRIAL COURT ERRONEOUSLY ALLOWED THE INTRODUCTION INTO EVIDENCE OF THE VICTIM'S HEARSAY STATEMENT 16

V. THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT OF FIRST DEGREE MURDER 18

VI. THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE .. 19

VII. THE TRIAL COURT'S DENIAL OF APPELLANT'S REQUESTS FOR SEPARATE GUILT AND PENALTY JURIES AND FOR SEQUESTERED VOIR DIRE DEPRIVED

APPELLANT OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS 20

VIII. THE INTRODUCTION OF VICTIM IMPACT EVIDENCE AND THE PROSECUTOR'S CALL FOR VENGEANCE ON BEHALF OF VICTIM'S FAMILY UNDERMINED APPELLANT'S RIGHT TO A RELIABLE SENTENCING DETERMINATION 20

IX. THE INTRODUCTION OF IRRELEVANT BUT EXTREMELY INFLAMMATORY EVIDENCE AT THE PENALTY PHASE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS 26

X. THE INTRODUCTION IN REBUTTAL OF APPELLANT'S CONVERSATION WITH ANOTHER INMATE ABOUT A HYPOTHETICAL ESCAPE ATTEMPT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS 29

XI. THE TRIAL COURT ERRONEOUSLY REFUSED TO PERMIT THE JURY TO CONSIDER MERCY IN DETERMINING APPELLANT'S SENTENCE 32

XII. THE TRIAL COURT MISLED THE JURY REGARDING THE NATURE OF THEIR SENTENCING DETERMINATION . . 40

XIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION 43

XIV. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS 43

CONCLUSION 44

TABLE OF AUTHORITIES

FEDERAL CASES

Berghuis v. Smith (2010) 130 S.Ct. 1382 . . . . 3, 4, 7

Caldwell v. Mississippi (1985) 472 U.S. 320 35

California v. Brown (1987) 479 U.S. 538 26

Chapman v. California (1967) 386 U.S. 18 . . . . 13, 32

Duren v. Missouri (1979) 439 U.S. 357 . . . . 2, 6

Foster v. Sparks (5th Cir. 1975) 506 F.2d 805 5

Gardner v. Florida (1977) 430 U.S. 349 25

Gregg v. Georgia (1976) 428 U.S. 153 . . . . 21, 34

Maxwell v. Pennsylvania (1984) 469 U.S. 971 35

McCleskey v. Kemp (1987) 481 U.S. 279 35

Moore v. Balkcom (11th Cir. 1983) 716 F.2d 1511 35

Penry v. Lynaugh (1989) 492 U.S. 302 . . . . 21, 26, 28, 39

Randolph v. California (9th Cir. 2004) 380 F.3d 1133 6

Ramseur v. Beyer (3rd Cir. 1992) 983 F.2d 1214 5

Romine v. Head (11th Cir. 2001) 253 F.3d 1349 35

Roper v. Simmons (2005) 543 U.S. 551 32

United States v. Green (D.Mass 2005) 389 F.Supp.2d 29 9

United States v. Jackman (2d Cir. 1995) 46 F.3d 1240 4

United States v. Rogers (8th Cir. 1996) 73 F.3d 774 . . . . 4, 5

Woodson v. North Carolina (1976) 428 U.S. 280 . . . . 29, 35

STATE CASES

People v. Allen (1986) 42 Cal.3d 1222 32

People v. Alvarez (1996) 14 Cal.4th 155 12

People v. Anderson (2001) 25 Cal.4th 543 . . . . 26, 33

People v. Andrews (1989) 49 Cal.3d 200 . . . . 33, 36, 37, 38

People v. Arias (1996) 13 Cal.4th 92 36

People v. Avila (2009) 46 Cal.4th 680 19

People v. Ayala (2000) 23 Cal.4th 225 36

People v. Bell (1989) 49 Cal.3d 502 . . . . 9, 36

People v. Benavides (2005) 35 Cal.4th 69 36

People v. Benson (1991) 52 Cal.3d 754 . . . . 37, 38

People v. Bonillas (1989) 48 Cal.3d 757 36

People v. Box (2000) 23 Cal.4th 1153 27

People v. Brown (1985) 40 Cal.3d 512 32

People v. Brown (1988) 46 Cal.3d 432 36

People v. Brown (2003) 31 Cal.4th 518 37

People v. Burgener (2003) 29 Cal.4th 833 . . . . 7, 9

People v. Burney (2009) 47 Cal.4th 203 18

People v. Carter (2003) 30 Cal.4th 1166 36

People v. Catlin (2001) 26 Cal.4th 81 11

People v. Clark (1992) 3 Cal.4th 41 36

People v. Coddington (2000) 23 Cal.4th 529 29

People v. Currie (2001) 87 Cal.App.4th 225 3

People v. Danielson (1992) 3 Cal.4th 691 6

People v. Duncan (1991) 53 Cal. 3d 955 33

People v. Easley (1983) 34 Cal.3d 858 33

People v. Ervine (2009) 47 Cal.4th 745, ... 38

People v. Ewoldt (1994) 7 Cal.4th 380 10

People v. Gates (1987) 43 Cal.3d 1168 37

People v. Haskett (1982) 30 Cal.3d 841 36

People v Hawthorne (2009) 46 Cal.4th 67 27

People v. Hendricks (1988) 44 Cal.3d 635 36

People v. Heishman (1988) 45 Cal.3d 147 36

People v. Hill (1992) 3 Cal.4th 959 1

People v. Howard (1988) 44 Cal.3d 375 36

People v. Howard (1992) 1 Cal.4th 1132 36

People v. Jackson (1980) 28 Cal.3d 264 37

People v. Kimble (1988) 44 Cal.3d, 480 36

People v. Lewis (2001) 26 Cal.4th 334 . . . . 36, 37, 38

People v. Lewis and Oliver (2006) 39 Cal.4th 970 28

People v. Loker (2008) 44 Cal.4th 691 30

People v. Lucky (1988) 45 Cal.3d 259 36

People v. Martinez (2003) 31 Cal.4th 673 30

People v. Martinez (2009) 47 Cal.4th 399 18

People v. Martinez (2010) 47 Cal.4th 911 . . . . 23, 24

People v. Mayfield (1997) 14 Cal.4th 668 36

People v. McPeters (1992) 2 Cal.4th 1148 37

People v. Mendoza (2002) 42 Cal.4th 686 17

People v. Mincey (1992) 2 Cal.4th 408 36

People v. Moon (2005) 37 Cal.4th 1 . . . . 15, 27

People v. Nicolaus (1991) 54 Cal.3d 551 36

People v. Ochoa (2001) 26 Cal.4th 398 . . . . 7, 36

People v. Osband (1996) 13 Cal.4th 622 . . . . 36, 37

People v. Prieto (2003) 30 Cal.4th 226 19

People v. Ramos (1997) 15 Cal.4th 1133 . . . . 3, 5

People v. Rodrigues (1994) 8 Cal.4th 1060 36

People v. Rodriguez (1986) 42 Cal.3d 730 . . . . 28, 33

People v. Smithey (1999) 20 Cal.4th 936 15

People v. Snow (2003) 30 Cal.4th 43 19

People v. Turner (1990) 50 Cal.3d 668 36

People v. Wallace (2008) 44 Cal.4th 1032 18

People v. Webster (1991) 54 Cal.3d 411 36

People v. Wharton (1991) 53 Cal.3d 522, ... 36

People v. Wright (1990) 52 Cal.3d 367 .... 36, 37

People v. Zambrano (2007) 41 Cal.4th 1082 .... 18, 23, 24

STATE STATUTES

Evid. Code § 352 .... passim

Evid. Code § 1101 .... 10, 11

Evid. Code § 1102 .... 29, 30

Pen. Code § 1259 18

OTHER AUTHORITIES

Cobb, Reviving Mercy in the Structure of Capital Punishment (1989) 99
Yale L.J. 389. 33

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v.	)	
CHRISTOPHER HENRIQUEZ,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

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").

ARGUMENTS

I.

THE TRIAL COURT DENIED APPELLANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY

In his opening brief, appellant discussed the persistent problem of the underrepresentation of African-Americans on jury panels in Contra Costa County, and argued that he had established a prima facie case of a denial of his right to a jury selected from a fair cross-section of the community. Respondent contends that the judge below properly denied appellant's motion to quash the jury venire on these grounds.

Respondent acknowledges that to establish a prima facie case, the three-pronged test of *Duren v. Missouri* (1979) 439 U.S. 357 must be met: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." (*Id.* at p. 364; RB 38-39.)

There is no dispute that African-Americans are a cognizable group within the community sufficient to meet the first prong of the *Duren* test. Respondent, however, argues that the second and third prongs have not been met. (RB 47.) The second prong of the *Duren* test "requires a constitutionally significant difference between the number of members of the cognizable group appearing for jury duty and the number in the relevant

community." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1155.) It cannot reasonably be disputed that there has been substantial and long-standing underrepresentation of African-Americans on jury panels in Contra Costa County. This fact has not merely been argued by appellant, but was acknowledged by the prosecutors and judge as well. The prosecutor in appellant's case argued that the underrepresentation did not constitute systematic exclusion (i.e., prong three of *Duren*), but conceded that "[n]o one is defending the historic underrepresentation. Even under the best scenario today there's an underrepresentation of African-Americans under the best view of the Jury Commissioner's and the People's evidence." (6/2/99 RT 674.) Furthermore, as appellant noted in his opening brief, the judge below, as well as the judge in *People v. Currie* (2001) 87 Cal.App.4th 225 which provided the evidentiary foundation for this case, found that the second prong was established. (See AOB, at p. 21.)

Nevertheless, respondent contends that appellant cannot meet the second prong. To support this contention, respondent relies on the absolute disparity test, stating that the absolute disparity of 3.5 percent is insufficient to show requisite disparity to meet second prong. (RB, at pp. 47-49.) In *Berghuis v. Smith* (2010) 130 S.Ct. 1382, 1393, the United States Supreme Court ultimately finds that "neither *Duren* nor any other decision of [the] Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." The Court notes that "[e]ven in the absence of AEDPA's constraint...[it] would have no cause to take sides on the method or methods by which underrepresentation is appropriately measured." (In a footnote, the Court notes that the state had asked the Court to adopt the absolute disparity test and to require proof of disparity over 10% to make out a prima facie case; in that footnote it notes

that under the rule proposed by the state, "the Sixth Amendment [would] offer[] no remedy for complete exclusion of distinct groups in communities where the population of the distinct groups falls below the 10 per cent threshold," but it does not reach the issue. (*Id.* at pp. 1393-1394, fn 4.) For reasons discussed in AOB and below, absolute disparity cannot be controlling given the relatively small percentage of African-Americans in the Contra Costa population. (AOB, 37-38.)

In *Duren*, the Supreme Court utilized the absolute disparity test to determine that women were underrepresented by 35 percent in venire panels in the Missouri district at issue. (*Duren, supra,* 439 U.S. at p. 365, fn. 23.) The absolute disparity test compares the members of a distinctive group that are jury eligible with those that appear on the venire. As noted above, the high court, however, has not mandated that a particular method be used to measure underrepresentation in Sixth Amendment challenges. In the Sixth Circuit, for example, absolute disparity is used in cases where the minority group is reasonably large, but comparative disparity is preferred when the underrepresented group forms a small percentage of the population. (See *Smith v. Berghuis* (6th Cir. 2008) 543 F.3d 326, 337-38 [applying comparative disparity where African-Americans formed 7.8% of jury-eligible population], reversed on other grounds, 130 S.Ct. 1382 (2010).; see also *United States v. Rogers* (8th Cir. 1996) 73 F.3d 774, 777 [using comparative disparity where African-Americans comprised 1.87% of jury-eligible population]; *United States v. Jackman* (2d Cir. 1995) 46 F.3d 1240, 1247 (2d Cir.1995) [finding the absolute disparities test to be inappropriate "when applied to an underrepresented group that is a small percentage of the total population."].)

As the Fifth Circuit noted "an intractable use of the absolute measure

may, in certain circumstances . . . produce distorted results. For example, if a district with 10% non-white population has .5% non-whites in the wheel, the 9.5% disparity may not evoke disapproval under an absolute measure but may require it under a comparative measure." (*Foster v. Sparks* (5th Cir. 1975) 506 F.2d 805, 835.) As pointed out in the AOB, it is absolute disparity which is unfair and indeed meaningless when applied to small groups. This is because, for example, a 10 percent cut-off of absolute disparity would automatically vitiate any claim of unconstitutional exclusion from the jury — no matter how blatant or intentional or systematic — for any group which is less than 10 percent of the overall population. Here, since African-Americans composed only constitute 8.4 percent of the Contra Costa County adult population, based on the 1990 census (AOB, p. 18), even if no African American in Contra Costa County was ever called for jury service, the absolute disparity would still fall below the 10 percent figure that courts generally have found to be a threshold indicator of a constitutionally significant disparity. (See, e.g., *People v. Ramos, supra,* 15 Cal.4th at p. 1156.)

Thus, where the distinctive group alleged to have been underrepresented is small, as is the case here, the comparative disparity test is the more appropriate measure of underrepresentation. Indeed, "[w]hile ... both [absolute and comparative disparity] provide a simplified statistical shorthand for a complex issue, the comparative disparity calculation provides a more meaningful measure of systematic impact vis-a-vis the 'distinctive' group," *United States v. Rogers supra,* 73 F.3d at pp. 776-77, inasmuch as it "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." (*Ramseur v. Beyer* (3rd Cir. 1992) 983 F.2d

1214, 1231-1232.)

As discussed in the AOB, a comparative disparity of approximately 43%, as well as the evidence presented by the other studies and data below, is sufficient to meet the requirements of the second prong in *Duren*. (AOB, at p. 18, 35-39.)

Respondent next argues that appellant failed to meet the third prong of *Duren*, which requires establishing the disparity is due to systematic exclusion. (RB 50-53.) The critical question here is what is meant by "systematic exclusion."

As appellant explained in his AOB (at pp. 39-40), the phrase "systematic exclusion" derives from *Duren v. Missouri, supra,* 439 U.S. 357, where the Supreme Court held that petitioner's "demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic – that is, inherent in the particular jury-selection process utilized." (*Id.* at p. 366.) "Systematic exclusion" under *Duren* does not require proof of intentional discrimination. All that *Duren* requires is underrepresentation that is "inherent in the particular jury-selection process utilized." (*Ibid.*) Indeed, as the Ninth Circuit has held, "disproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic." (*Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, 1141.)

This Court has to date maintained that there is no systematic exclusion despite "'[e]vidence that "race/class neutral jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw" [Citation.]'" (*People v. Danielson* (1992) 3 Cal.4th 691,

706.) It has held that appellant must "show the state selected the jury pool in a constitutionally impermissible manner that was the probable cause of the disparity. [Citation.]" (*People v. Ochoa* (2001) 26 Cal.4th 398, 427.) Thus, as respondent notes, this Court has stated: "A defendant does not discharge the burden of demonstrating that the underrepresentation was due to systematic exclusion merely by offering statistical evidence of a disparity. A defendant must show, in addition, that the disparity is the result of an improper feature of the jury selection process. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 857; see RB, at p. 50.)

However, the United States Supreme Court suggests that it is not required to show that the disparity must be the result of an "*improper* feature of the jury selection process." The procedure challenged in *Berghuis*, was referred to as "siphoning," in which the county assigned prospective jurors first to local district courts, and, only after filling local needs, made remaining persons available to the countywide court which heard felony cases such as the petitioner's. The Michigan Supreme Court, rejected Smith's challenge to the Sixth Amendment fair cross section challenge to "siphoning" for lack of proof, *not* because the procedure was "neutral." (*Berghius*, *supra*, 130 S.Ct. at pp. 1388, 1391.) The Supreme Court agreed that the contention that the assignment order created racial disparities was not substantiated by the evidence. (*Id.* at p. 1394.)

The United States Court stated, "Evidence that African-Americans were underrepresented on the Circuit Court's venires in significantly higher percentages than on the Grand Rapids District Court's could have indicated that the assignment made a critical difference. But, as the Michigan Supreme Court notes, Smith adduced no evidence to that effect." (The Court noted that, in fact, counsel conceded that the elimination of the

siphoning system had changed the comparative disparity number from 18% to 15.1% and that that was not "a big change." (*Id.* at pp. 1394-1395.)) Thus, the Supreme Court acknowledged that a facially neutral procedure which happens to result in de facto underrepresentation can in fact be the basis for a fair-cross-section claim if there is evidentiary support. Thus, here, even assuming a racially neutral procedure, petitioner has established that the underrepresentation establishes a violation of the fair cross-section requirement.

Moreover, while the high court has never "'clearly decided" whether "the impact of social and economic factors can support a fair-cross-section claim," appellant submits that "the Sixth Amendment is concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel." (*Smith v. Berghuis* (6th Cir. 2008) 543 F.3d 326, 341, overruled *Berghius v. Smith, supra*). As the evidence in appellant's case establishes, social and economic factors – which the county failed to consider despite pervasive underrepresentation certainly played a role here and should be considered in support of appellant's claim.

As discussed in the opening brief (20, 43) a historical pattern of residential and employment segregation of the County's African-American population in the east and west ends of the County persisted at the same time as access to the Superior Court judicial and other county services were restricted and impaired for East and West County residents in comparison to those provided to residents of Central County. The segregation of these communities from government functions was compounded further by the lack of viable public transportation from East and West County to the

courthouse in Martinez. (CT 363, see Exhibits A, D and E.) As the defense argued below, together with other factors, "this collective action by county officials resulted in a systematic exclusion of African-Americans from appellant's jury venire in violation of his federal and state constitutional rights to a jury drawn from a representative cross-section of his community." (CT 364.)

Even assuming without conceding that appellant must show that "the disparity is the result of an improper feature of the jury selection process,". (*People v. Burgener*, 29 Cal.4th *supra at p.* 857) at some point the persistent refusal of the county to correct such a disparity cannot be attributed to neutral reasons. As one expert has remarked: "Metaphorically speaking, there has to be a statute of limitations on how long a District can lament the undesirability of the underrepresentation of minorities in its jury pools without feeling compelled to act with imagination to do better." (*United States v. Green* (D.Mass 2005) 389 F.Supp.2d 29, 40 [quoting Prof. Jeffrey Abramson, Report on Defendant's Challenge to the Racial Composition of Jury Pools in the Eastern Division of the United States District Court for the District of Massachusetts 64-65 (Apr. 22, 2005)].)

As discussed in the AOB, several procedures implemented by county officials were the cause of the underrepresentation of African-American jurors, and remained unchanged despite the persistence of underrepresentation over many years. (AOB, at pp. 42-46.) Thus, unlike *People v. Bell* (1989) 49 Cal.3d 502, appellant did identify aspects of Contra Costa County's jury system which are the "probable cause" of the underrepresentation, and as the trial court found, the Jury Commissioner failed to do all it could to abate the situation. Even though the procedures themselves were facially "race neutral," the County's failure to take any

significant steps, resulting in decades of underrepresentation constitutes systematic exclusion. (AOB, at pp. 42-46.)

For the reasons discussed above and in the AOB, appellant established a prima facie case that the jury selection process in Contra Costa County violated his state and federal constitutional rights.

II.

THE TRIAL COURT ERRONEOUSLY RULED THAT THE PROSECUTION COULD USE AN UNCHARGED PRIOR MURDER ON CROSS-EXAMINATION OR REBUTTAL WHICH PRECLUDED APPELLANT FROM PUTTING ON CRITICAL EVIDENCE IN HIS OWN DEFENSE

In his opening brief, appellant explained that the trial court erred in ruling that testimony from his domestic violence expert that the homicides were consistent with an uncontrollable "rage" killing as opposed to a premeditated and deliberate murder would open the door in rebuttal to evidence of an uncharged homicide. As a result of this ruling, the defense was forced to restrict the expert's testimony to non-specific generalities about spousal homicide to avoid introduction of the prior murder by the prosecution. As argued in the AOB, this undermined the defense and denied appellant a fair trial. (AOB, 48-62.)

The uncharged homicide was inadmissible under Evidence Code section 1101, subdivision (a), which prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101, subdivision (b), provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Under section 1101, subdivision (b), character evidence is admissible only when "relevant to prove some fact

(such as motive, opportunity, intent . . .) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.) As discussed in the AOB, the evidence of appellant's participation in the uncharged murder had no bearing on the expert's opinion about the spousal homicide at issue in the present case. As defense counsel explained, the expert, Dr. Dutton, did not intend to opine that appellant could not premeditate or plan but that in the context of his domestic relationship that is not what occurred; other violent acts outside of this relationship were thus not relevant to his opinion. (XI RT 2622.) Since Dr. Dutton, did not dispute that appellant could commit goal-driven violent acts outside the domestic relationship but that such acts were motivated by a wholly different set of factors, the only relevance of the prior homicide was to demonstrate appellant's propensity for violence.

Respondent rejects appellant's argument that evidence about the homicide was inadmissible under Evidence Code section 1101 because it showed a propensity for violence, arguing that the prosecution did not offer this evidence explicitly for this purpose. According to respondent, the evidence was to be admitted to show the expert's bias. However, even the trial court recognized the prejudicial nature of the evidence, and noted that evidence of the crime would likely lead the jury to consider it more for its propensity value than in determining the expert's credibility. (XI RT 2619, 2723.) It is not reasonable to assume that the jury would have considered another homicide as evidence of appellant's propensity to commit homicides not triggered by rage. This would have been extremely prejudicial and would have undermined the defense case that the charged homicides were the product of impulse and rage rather than pre-planned.

Respondent further contends that the trial court's ruling under

Evidence Code section 352 that the challenged evidence was not unduly prejudicial was not an abuse of discretion because the challenged evidence was not nearly as inflammatory as the capital offense. Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, n. 14.) In assessing whether the evidence of another murder would have been prejudicial, the issue is not – as respondent posits – whether it is more or less inflammatory than the charged crime, but on what impact the admission of the evidence would have had on the jury. The admission of an additional murder – whether or not the facts of that murder are as emotionally-laden as the charged homicides – was extremely prejudicial because it would have gone directly to the crux of the defense case. It would have demonstrated a propensity to commit murder, and thereby would have undermined the defense theory that the charged murders were the product of an uncontrollable rage stemming from a domestic situation.

For the same reasons as argued in the AOB, evidence of other acts of violence allegedly committed by appellant (See RB, at p. 67 & fn. 14) were inadmissible as rebuttal to Dr. Dutton's testimony. Even, however, if such evidence of what respondent describes as appellant's "violent tendencies" were introduced, such evidence pales in comparison to the impact of informing the jury of a prior robbery-murder and would not have rendered admission of the robbery-murder harmless. Moreover, if such other evidence were admitted in the event Dr. Dutton testified, then the jury would have been informed of such "violent tendencies," reducing the probative value of the prior murder while not diminishing its prejudicial effect.

The trial court's error was not in determining there would have been no prejudicial effect if evidence of the earlier homicide were admitted. Rather, the court's abuse of discretion stemmed from its failure to recognize that the evidence was not proper rebuttal or subject of cross-examination and was thus, irrelevant to the expert's opinion on domestic homicides.

For the reasons discussed in the AOB, the trial court's ruling was not harmless. Respondent's formulation of the prejudice analysis is misleading. (RB, at pp. 67-70.) First, because the error violated appellant's constitutional rights, as set forth in the AOB, the burden is on respondent to establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Furthermore, the question is not whether the verdict would have been more favorable to appellant without the admission of the uncharged murder. (RB, at p. 70.) The murder was not introduced by the prosecution in rebuttal. To avoid opening the door to this prejudicial evidence, the defense was forced, in light of the trial court's ruling on the murder's admissibility, to restrict its expert's testimony. So, the question of prejudice is whether the court's ruling, which precluded defense expert testimony was harmless beyond a reasonable doubt – not whether the unintroduced evidence would have been prejudicial.

Furthermore, respondent argues no prejudice from the court's ruling because the evidence introduced to prove premeditated and deliberate murder was overwhelming. (RB, at pp. 67-70.) This, however, is precisely why the ruling which substantially limited Dr. Dutton's proposed testimony was so crucial. It would have specifically addressed much of the evidence the prosecutor relied on to establish premeditation and deliberation, offered a different interpretation of it, and provided the jury with an understanding of the spousal homicide in this case. (See, e.g., AOB, pp.48-54.)

As explained in greater detail in the AOB, the error was not harmless. (AOB, pp. 61-62.)

III.

THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTOR TO INTRODUCE HIGHLY PREJUDICIAL EVIDENCE OF A JAIL ESCAPE ATTEMPT

Appellant argued in his opening brief that the trial court erroneously permitted the admission of highly prejudicial evidence of appellant's jail escape attempt, which occurred two years after the charged offense, for the purpose of proving consciousness of guilt. (AOB, pp. 62-68.)

As argued in the AOB, because evidence of the jail escape is not probative of the only issue contested at trial – the mental state of the defendant – it is not admissible. In other words, the escape may be relevant to consciousness of guilt of murder but has no relevance to degree of murder, which was the issue in dispute. Indeed, the trial court conceded that the escape attempt was consistent not only with first degree murder but also second degree or manslaughter. (3 RT 727-730.)

Respondent's theory for admissibility of the escape attempt as evidence of consciousness of guilt is illogical. Respondent contends that because the indictment charged appellant with first degree murder, the likely inference is that he was aware of his guilt of the most serious of crimes and feared profound consequences of life in prison or death, and that is why he escaped – not showing his awareness of some wrong but that he was guilty of an extraordinarily serious crime. (RB, at p. 75.) Even assuming without conceding that the escape was motivated by the serious nature of the charge, that would only mean that appellant believed he would be found guilty of first degree murder, not that he actually committed that offense.

Respondent contends that even assuming the trial court erred in admitting evidence of appellant's escape to show consciousness of guilt, any error was harmless. As appellant argued in his opening brief (AOB, p. 68), the prosecutor's use of this evidence bolster its case through the presentation of extremely inflammatory evidence that portrayed appellant as a person of bad character. Moreover, the jury was specifically instructed that it could consider the escape as evidence of first degree murder (XIII RT 3233; III CT 1012) when it was not relevant on this point. Thus, the harm, in addition to the jury using the escape as bad character evidence, was that the jury also used it to establish the key issue in the case – whether or not appellant premeditated and deliberated. However, as discussed above and in the AOB, the evidence is not relevant to the degree of murder.

Respondent disputes the remainder of appellant's arguments, relying on this Court's decisions rejecting similar claims. (RB, 75-77.) Appellant acknowledges that this Court has previously held that it is not error to give flight instructions when the primary issue in dispute is not identity, but whether the defendant "premeditated and deliberated his crimes." (RB, at pp. 75-76, citing *People v. Moon* (2005) 37 Cal.4th 1, 27-28; *People v. Smithey* (1999) 20 Cal.4th 936, 983.) The issues are fully joined and preserved, and no further reply is necessary.

IV.

THE TRIAL COURT ERRONEOUSLY ALLOWED THE INTRODUCTION INTO EVIDENCE OF THE VICTIM'S HEARSAY STATEMENT

Appellant argued in his AOB that the trial court erroneously allowed admission of a hearsay statement from his wife three weeks before her death, that appellant was into "heavy stuff."[1]

Respondent contends that the trial court properly admitted the statement as a spontaneous utterance, which is an exception to the hearsay rule. (RB, at p. 84.) According to respondent, the record shows that Carmen was upset and shocked that appellant was going to rob a bank, and therefore she "was in a mental state of extreme stress and excitement when she blurted out that appellant was into 'heavy stuff.'" (RB, at p. 86.)

As argued in the AOB, it was never established that "heavy stuff" referred to the bank robberies or that Carmen learned about the plans sufficiently close in time to the statement for it to qualify as a spontaneous utterance. Contrary to respondent's assertion, there is no way of knowing when Carmen learned from appellant that he planned to rob banks vis-a-vis the statement to her cousin Trenice White, but even under the scenario theorized by respondent, Carmen did not hear about the planned robberies for several days before going to stay with White. (RB, at p. 87.) The prosecutor never clearly identified the alleged "startling" event or when that event was supposed to have occurred. As the trial court later acknowledged, there was not "any evidence as to precisely when Carmen

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[1] Respondent states that defense counsel read to the jury from a police report which quotes the statement in question. (RB, at p. 80.) Respondent is mistaken. (See 7 RT 1765.)

learned about the defendant being into heavy stuff or committing the bank robberies." (XIII RT 3258.) Therefore, it is "hard to tell how that relates to how much time passed between her finding that out and passing on the information to Ms. White that was testified to." (*Ibid.*)

Furthermore, while respondent describes it as Carmen "blurting out" the phrase "heavy stuff," it is more accurately characterized as a statement made in the course of a conversation. (IX RT 2117-2119.)

As discussed in the AOB, the trial court gave a post-hoc rationale for admitting the statement, that it was corroborative of the motive for the killings, ostensibly that appellant killed his wife because she was talking about the robberies to others. However, as respondent acknowledges, the robberies had not taken place at the time Carmen talked to White. (RB, at p. 87.) Nor was there ever any evidence that showed that appellant was aware of the comment Carmen made to White.

Respondent attempts to analogize this case to the facts of *People v. Mendoza* (2002) 42 Cal.4th 686, 697. That case, however, is distinguishable. In *Mendoza*, the defendant was specifically told of his stepdaughter's statements that defendant had molested her – indeed, the statements were admitted "to prove defendant was aware of the accusations and to explain defendant's motive for killing Sandra." Here, there was no evidence that appellant was aware of the statement in question.

Finally, respondent contends that any alleged error was harmless. For the reasons stated in the AOB, the admission of the statement was prejudicial.

V.

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT OF FIRST DEGREE MURDER

Appellant argued in his AOB that three related instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt were misleading and constituted improper pinpoint instructions.

Respondent first argues that appellant's claim that the instructions were duplicative of other instructions was not raised below and is therefore waived. Respondent contends that none of these instructions affected appellant's substantial rights and therefore an objection would have been required to preserve any challenge to the instructions on appeal. (RB, at p. 93.)

This Court has explicitly held that challenges to consciousness of guilt instructions are not waived for failure to object. For example, in *People v. Wallace* (2008) 44 Cal.4th 1032, 1073, the Court discussed appellant's challenge to CALJIC No. 2.52, which was given without objection. The Court rejected respondent's position that the claim was waived: "The Attorney General contends this argument is forfeited because defendant failed to object at trial. Penal Code section 1259, however, permits appellate review of claims of instructional error affecting a defendant's substantial rights. (Citations) Therefore, we may assess this claim on its merits." (*Id.* at fn. 7.) Furthermore, in several cases, this Court has addressed the merits of challenges to the instructions at issue here without indicating whether or not there had been an objection below. (See, e.g., *People v. Martinez* (2009) 47 Cal.4th 399, 449; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1159-1160; *People v. Burney* (2009) 47 Cal.4th

203, 244-245; *People v. Avila* (2009) 46 Cal.4th 680, 710.) Accordingly, the issues raised here are not waived.

With regard to the merits, respondent merely relies on this Court's prior cases which have upheld the instructions. (RB, at pp. 95-99.) The issues are therefore joined and there is no need for further reply by appellant.

VI.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

In his opening brief, appellant argued that the delivery of CALJIC No. 2.51 improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB, at pp. 100-102, citing *People v. Snow* (2003) 30 Cal.4th 43, 97-98 and *People v. Prieto* (2003) 30 Cal.4th 226.) Appellant acknowledges that this Court has rejected appellant's claim in the cases cited by respondent. The issue is raised here for preservation purposes.

VII.

THE TRIAL COURT'S DENIAL OF APPELLANT'S REQUESTS FOR SEPARATE GUILT AND PENALTY JURIES AND FOR SEQUESTERED VOIR DIRE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS

Appellant argued in his AOB that the trial court's denial of his motions to impanel a separate penalty phase jury or, in the alternative, to impanel dual juries, for sequestered, individualized death qualification, and to permit limited voir dire prior to the penalty phase resulted in the deprivation of appellant's constitutional rights. Respondent relies on this Court's prior decisions which have rejected analogous claims. (RB 103-119.) The issues are therefore joined and there is no need for further reply by appellant.[2]

VIII.

THE INTRODUCTION OF VICTIM IMPACT EVIDENCE AND THE PROSECUTOR'S CALL FOR VENGEANCE ON BEHALF OF VICTIM'S FAMILY UNDERMINED APPELLANT'S RIGHT TO A RELIABLE SENTENCING DETERMINATION

Appellant argued in his opening brief that the trial court erroneously allowed introduction of victim impact evidence which was then used as a platform for the prosecutor to call for vengeance, arguing that since the family was not permitted to kill the defendant themselves, it was the jury's

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[2] In his opening brief, appellant argued that the trial court's inquiry as to the jurors' feelings regarding the death penalty was perfunctory, often limited to asking leading questions which required little more than an affirmative or negative response. (See, e.g., V RT 1077-1080, 1091-1093, 1103-1105, 1120-1121, 1126-1127; VI RT 1386-1389 1401-1402, 1522) or none at all (see, e.g., V RT 1082-1086; VI RT, 1389-1397, 1408-1409, 1516-1519, 1541.) Respondent disputes this characterization. (RB at p. 112). The record speaks for itself.

duty to do so.

Respondent, relying on this Court's prior rulings, contends that the trial court did not improperly fail to limit the scope of the victim impact evidence. (RB, at pp. 130-134.) Appellant urges this Court to reconsider these rulings which have permitted prosecutors with essentially the unfettered ability to refocus the penalty phase on the character of the victim as opposed to the circumstance of the crime and character of the defendant. For a fair and reliable sentencing determination requires the jury to engage in "'a reasoned moral response to the defendant's background, character, and crime.'" *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [Citation].); see also *Gregg v. Georgia* (1976) 428 U.S. 153, 206 [sanctioning procedures that "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant"].)

Respondent also contends that the prosecutor did not commit misconduct by arguing for vengeance on behalf of the family. Respondent does not dispute that a call for vengeance would be improper. Rather, respondent claims that the calls for vengeance in this case were brief and isolated, and did not constitute the principal basis of her argument in favor of the death penalty. (RB, at pp. 136-138.) They were nothing of the sort.

First, the prosecutor's call for vengeance were neither brief nor isolated but indeed was the underlying theme of the prosecution's penalty phase case, and inextricably linked to the victim impact evidence.

. As the prosecutor conceded at the outset of her argument to the jury, this was an "emotional case." (XVII RT 4293.) She argued that the "pain and suffering the defendant inflicted upon the Jones family is relevant for you to consider." (XVII RT 4346.) She then described the victim impact in detail:

> When you think about how much Zuri meant to them. Remember Valen Jones said: "Yeah, the next generation of Joneses. . . . ." When you think of how much Carmen meant to her father, his only child. The one he proudly says: "She never even got a speeding ticket in her life. The first grandchild, the one that would climb into bed with him. He's not going to feel that warm little body I nestled up against him. They are not going to hear Carmen and Zuri singing. And this girl who never even got a speeding ticket, loved her husband . . .

(XVII RT 4346-4347.)

The prosecutor described the testimony of Heidi and Valen Jones, including how the deaths marred the joy they should have felt when their own baby was born:

> And Heidi and Valen Jones, they love Zuri and they love Carmen and the day their first child is born and brought home, the day they should be joyful about, what's Valen doing? He's crying, saying: "How can I protect this little one, when I couldn't protect Carmen and Zuri?

(XVI RT 4347.)

The prosecutor then explicitly called for vengeance, arguing that it was not only a legitimate basis for imposing death but it was "the bottom line":

> One other thing I want to talk about is vengeance. Some of you may think: Well, gee, I was raised to believe that that wasn't very good. But you know vengeance is appropriate. It has a legitimate role in our society. When I stand up here before you and I'm asking you to impose the just verdict in this case based on all the evidence you have, all these factors, the knowledge you have of these crimes, the

> knowledge of the defendant's background as a child, as an adult, that this man's life should be taken in retribution, and yes, I mean retribution, in punishment for the lives he took. The bottom line is that: Yes, there is a lot of vengeance involved.

(XVII RT 4348-4349.)

The prosecutor returned to this theme, stating that while the family is not permitted to lynch or stone the defendant, they deserved to have the state kill him. She concluded by arguing that the "victim's family is entitled to vengeance, plain and simple, from the state because they are not allowed to get it themselves . . And the state owes the victim's families something in return, doesn't it? It owes them what they are not entitled to get on their own." (XVII RT 4354.)

After the defense objected to this line of argument, and the trial court sustained the objection, the prosecutor continued to argue that the purpose of the death penalty is to give the victims a voice. (XVII RT 4355.)

This simply cannot be characterized as brief, isolated or not a central theme of the prosecution's penalty phase presentation.

Recently, this Court explained that the prosecutor does not commit misconduct "'by devoting some remarks to a reasoned argument that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance – i.e., punishment – exacted by the state, under controlled circumstances, and on behalf of all its members, in lieu of the right of personal retaliation'" because "[r]etribution on behalf of the community is an important purpose of all society's punishments, including the death penalty. [Citations.]." (*People v. Martinez* (2010) 47 Cal.4th 911, 965-966, quoting *People v. Zambrano, supra,* 41 Cal.4th at p.

1178.) In *Martinez*, this Court held that the prosecutor did not solicit "untethered passions" nor did he "dissuade jurors from making individual decisions" but instead, properly argued that "the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes." (*Id.* at p. 966, citing *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1179.)

In *Martinez*, the objectionable remarks consisted of one brief comment: "[W]hat the death penalty will do in this case is that it certainly will restore the confidence and the trust in the system's ability to deal with people that transgress it and that do it in situations that are so aggravated and without sufficient justifying or mitigating circumstances that the public can see justice is done. They can see and the families can see that justice means more than sympathy, and mercy, and warehousing, and rehabilitation, and that it takes into account the defendant's conduct and the method and manner of his crimes and the impacts that it's had on the ones who suffered." (*Id.* at p. 965.)

Similarly, *Zambrano*, relied upon by respondent, the prosecutor talked in more theoretical terms about vengeance as a "vital expression of the community's outrage" and the "vigor of society's values" being "nourished by the use of the criminal justice system to impose punishments that reflect the community's 'controlled indignation.'" (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1177.)

In appellant's case, the prosecutor did not merely call for retribution on behalf of the community as a theoretical underpinning of the validity of the death penalty, but repeatedly and emphatically made an emotional plea for the jury to do what the family purportedly wanted to do but could not – kill the defendant. The prosecutor specifically called for vengeance as a

way to express the will of the victim's family – because vigilantism is not permitted. This is inflammatory and sought precisely to invoke passions in the jury, particularly because it was tethered to the emotional victim impact evidence that was presented.

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The danger here is that the repeated calls for vengeance in this case so emotionally inflamed the jury that they were unable to weigh the relevant considerations for and against a sentence of death.

IX.

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

Appellant argued in his AOB, that the trial court erroneously permitted the prosecutor to introduce at the penalty phase photographs of the victims after the killings occurred. The photographs were so gruesome that they were excluded at the guilt phase. Their admission at the penalty phase undoubtedly diverted the jury from its task of determining the appropriate penalty based on the background and character of the defendant.

As respondent notes, the trial court held that although the photographs were gruesome, that the "gruesomeness of the crime" is "exactly why the sort of – that's exactly the sort of thing that juries have to consider in determining whether a death penalty is warranted or not." (XVIII RT 4556.) However, this is not the kind of reasoned moral response to the evidence that is appropriate in capital cases. "Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." *California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.); *Penry v. Lynaugh* (1989) 492 U.S. 302, 319.)

This Court has held that the trial court has narrower discretion under Evidence Code 352 to exclude photographic evidence of capital crimes because unlike at the guilt phase the prosecution is entitled at the penalty phase to show the circumstances of the crime "in a bad moral light, including their viciousness and brutality." (*People v. Anderson* (2001) 25 Cal.4th 543, 591-592.)

Assuming the appropriateness of presenting the jury with evidence to

show the crime in a "morally bad light," *People v. Box* (2000) 23 Cal.4th 1153, 11201, this does not mean that it is permissible to overwhelm the jury with evidence so that it focuses on the graphic gruesomeness of the crime – as the trial court here believed was appropriate.

In *People v. Moon* (2005) 37 Cal.4th 1, this Court held as follows:

> We have examined the photographs in question and indeed find them bloody and graphic. Nevertheless, the jury had already found defendant guilty of the two murders, so there was no risk the jurors would react so emotionally to the pictures that they might convict an innocent man. Guilt having been established, the jury was left with the decision whether defendant deserved to live or die for his crimes. The photographs demonstrated the real life consequences of defendant's crimes and pointedly made clear the circumstances of the offenses, the only aggravating factor on which the People relied. "As we have previously noted, ' "murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant." ' " (*People v. Roldan* (2005) 35 Cal.4th 646, 713.)"

(*People v. Moon*, *supra,* 37 Cal.4th at p. 35.)

This Court's language in the above-cited cases appears to sanction admission of any and all gruesome photographs and evidence. (See also *People v Hawthorne* (2009) 46 Cal.4th 67, 102 [The 911 tape showed the immediate impact and harm caused by defendant's criminal conduct on the surviving victim and was relevant because it "'could provide legitimate reasons to sway the jury to . . . impose the ultimate sanction.' " (Citations)].)

Appellant urges this Court to place some limits on the evidence

admissible under factor (a). It is simply not true that "the brutal circumstances assist the jury in making its normative [citation] penalty decision." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1055.) On the contrary, because as this Court has described, the jury's role at the penalty phase "is inherently moral and normative, not factual," (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779), steps must be taken to ensure that the jury's process produces a "*reasoned* moral response." (*Penry*, *supra,* 492 at p. 319 [emphasis added].)

All murders are disturbing and will produce physical evidence, photographs, audio or video recordings or other demonstrative facts that are grotesque and likely to evoke a strong emotional response, particularly in lay people sitting as jurors. Because of its normative nature, in which jurors have little guidance as to how to apply the aggravating and mitigating factors, it is reasonable to assume that the sentencing determination will become unfairly skewed towards death by presenting the jury with extremely gruesome photographs and other graphic evidence of the crime – not because the defendant is more deserving of death but because graphic evidence of murder is repulsive.

Here, in conjunction with the prosecutor's call for vengeance on behalf of the victim's family, it is far too likely that the jury's sentencing determination was a product of emotion untethered to the appropriate sentencing factors. Appellant urges this Court to recognize that there must be some limitation on the nature of factor (a) evidence or risk the danger of overwhelming the jury, as in this case, with such graphic evidence and calls for vengeance that there is no reasonable likelihood that the jury can engage in "a reasoned moral response to the defendant's background, character, and crime." (*Penry v. Lynaugh, supra,* 492 U.S. at p. 319.)

Admission of evidence at the penalty phase that is irrelevant, cumulative and unduly gruesome and which is intended to arouse revulsion and anger rather than a reasoned moral response from the jury regarding penalty violates a defendant's rights under the Sixth, Eighth, and Fourteenth Amendments. (See *People v. Coddington* (2000) 23 Cal.4th 529, 632-633; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [the Eighth Amendment requires reliability in the determination that death is the appropriate punishment].)

X.

THE INTRODUCTION IN REBUTTAL OF APPELLANT'S CONVERSATION WITH ANOTHER INMATE ABOUT A HYPOTHETICAL ESCAPE ATTEMPT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argued in his opening brief that the trial court erroneously permitted the prosecution to present evidence of appellant's conversation with another inmate about a hypothetical violent escape attempt in rebuttal at the penalty phase. Both the trial court and respondent, in its brief, mistakenly assert that evidence of violent behavior outside the domestic relationship rebuts expert testimony that appellant had the characteristics of a spousal batterer whose killing of his wife fit the profile of "an unexpected episode of violent, impulsive, acting-out behavior, which is not well thought out, for no obvious purpose or personal advantage." (RB, at 157; XV RT 3828.)

As respondent notes (RB, pp. 152, 156 fn. 30), the trial court ultimately revised its earlier holding that the challenged evidence was admissible under Evidence Code section 1102. The trial court belatedly determined that the evidence was relevant to rebut the expert testimony

presented by the defense at the penalty phase that appellant acted out of a sense of rage and abandonment, but was not admissible under section 1102. (18 RT 4532-4532.) For the reasons discussed in the opening brief (AOB, 129-136) and here, either rationale for admission of the evidence is erroneous.

The defense experts did not testify that in non-domestic situations appellant was non-violent or non-goal oriented in his conduct. Thus, evidence of other acts of violence outside appellant's relationship with his wife was in no way contradictory to the defense evidence, and was therefore improper rebuttal. Respondent notes that the scope of proper rebuttal is determined by the breadth and generality of the direct evidence. (RB, at p. 155, citing *People v. Loker* (2008) 44 Cal.4th 691, 709.) The defense evidence regarding appellant's violent behavior in the context of the relationship with his wife – and not his overall character – was specific and targeted and did not invite the rebuttal that the trial court permitted.

Moreover, as argued in AOB, while characterized as a threat to kill a guard to escape, all the evidence showed was that appellant was having a boastful conversation with another inmate with no direct threat, and no present ability or intention of carrying it out. (See *People v. Martinez* (2003) 31 Cal.4th 673, 694-695.) Respondent argues that the boast about killing a hypothetical guard was not inconclusive or speculative because it was heard first hand by the witness. (RB, at p. 158.) However, the content of the conversation – even if heard by the witness – remains hypothetical and speculative, and should not have been admitted as an actual threat and was too far removed from any possible violent conduct to be admitted for any reason.

As for prejudice, respondent argues that the prosecutor's argument

did not suggest that death penalty is the only means of protecting the public from a defendant who poses a significant escape risk. Rather, according to respondent, the prosecutor merely argued that if given life without possibility of parole, he would still live in society, albeit a prison community, but still have hopes and dreams. (XVII RT 4351-53; RB, at p. 159.)

In context, it is absolutely clear that the prosecutor urged the jury to impose the death penalty because of the danger of escape. The prosecutor argued that one purpose of the death penalty is "to prevent others from being harmed by that individual." (XVII RT 4302.) The prosecutor emphasized to the jury that it had a responsibility to "society," and that it was the "conscience of the community." (XVII RT 4305.) Immediately after mentioning the rebuttal evidence – appellant's statement about his willingness to kill a deputy (XVII RT 4350) – the prosecutor reminded the jury that "prison is a part of society" and urged a verdict of death in order to protect those in the prison from appellant's future violence:

> Many of us don't see it, but there are people who work there: Jail nurses, inmates, inmates who are there for less than what the defendant has done. It's a part of our culture. And they get visitation, and those nurses and doctors expect some sense of security when they are doing their jobs . . . . People who are in prison for life without parole, some of them we know have hope of escape.

(XVII RT 4351.)

After the defense objection to the prosecutor's argument of future dangerousness was overruled, XVII RT 4351-4352, the prosecutor continued, that "for some," life without parole "is the chance to sit and dream and hope of escape." (XVII RT 4353.)

Given the inflammatory nature of the evidence and the prosecutor's future dangerous argument, the improper admission of the evidence in rebuttal that appellant had a conversation with another inmate in which he discussed the idea of killing a guard in order to escape from jail was not harmless beyond a reasonable doubt. (*Chapman v. California, supra* 386 U.S. at 24.)

XI.

THE TRIAL COURT ERRONEOUSLY REFUSED TO PERMIT THE JURY TO CONSIDER MERCY IN DETERMINING APPELLANT'S SENTENCE

Appellant argued in his AOB that the trial court erroneously refused to instruct the jury that it could consider mercy in determining sentence and precluded the defense from arguing mercy to the jury.

As appellant previously argued, the role of mercy has long been acknowledged to be an important consideration in any capital sentencing decision. The Eighth Amendment requires that capital sentencing "reflect a reasoned moral response to the defendant's background, character, and crime." (*Roper v. Simmons* (2005) 543 U.S. 551, 602–603, quoting *California v. Brown, supra*, 479 U.S. at p. 545 (conc. opn. of O'Connor, J.).) The life and death determination "is not simply a finding of facts which resolves the penalty decision" (*People v. Brown* (1985) 40 Cal.3d 512, 540), but instead a "moral assessment of those facts as they reflect on whether defendant should be put to death . . . ." (*Ibid.*) In exercising this task, the jurors "may apply their own moral standards to the . . . evidence" and "may reject death if persuaded to do so on the basis of any constitutionally relevant evidence or observation." (*People v. Allen* (1986) 42 Cal.3d 1222, 1287, internal citations and quotation marks omitted.)

Mercy, as a discretionary act of leniency, applies with special force to the life and death decision capital sentencing jurors must make. (See generally Cobb, Reviving Mercy in the Structure of Capital Punishment (1989) 99 Yale L.J. 389.) Mercy does not necessarily spring from sympathy or compassion for its recipient. (*People v. Andrews* (1989) 49 Cal.3d 200, 236 (dis. opn. of Mosk, J.) [mercy "is obviously not synonymous with or reducible to sympathy"].) It was precisely because mercy is something different than sympathy or pity – both of which were expressly approved by this Court in *People v. Easley* (1983) 34 Cal.3d 858, 874–880, as constitutionally required factors in the penalty determination – that the trial court forbade argument thereon. (See XVI RT 4164-4169.)

Mercy is a juror's "moral response" to the evidence, through the imposition of a penalty that is less than what is perceived to be deserved in light of the balance between statutory factors in aggravation and mitigation. (See *People v. Rodriguez, supra*, 42 Cal.3d at p. 779 ["the sentencing function is inherently moral and normative, not factual"].) In this sense, mercy is a consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is the appropriate penalty. Mercy offers a vehicle for the jurors to deliver a life verdict even if they find that the aggravating factors outweigh the mitigating factors, or fail to find any mitigating factors. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 [a juror may determine that the evidence is insufficient to warrant death even in the absence of mitigating circumstances]; cf. *People v. Anderson* (2001) 25 Cal.4th 543, 569 [defense counsel may have wanted to dispense with a prospective juror due to a reasonable fear that she "would not be receptive to untethered defense arguments for mercy and leniency"].)

Again, this is precisely why the trial court believed mercy was an inappropriate consideration: "In other words, a merciful decision – ironic as it may sound – is, in a sense, an unjust decision. You only need to resort to mercy when justice compels you to a different conclusion, and you ignore justice and are acting mercifully." (*Ibid.*) The court concluded that "if [the jury] reach[es] a decision that death is in order, or vice versa, a decision that life is in order, they cannot then ignore it because they believe they're acting mercifully towards him. To the extent that mercy connotes treating someone in a way different than he should be entitled to under the law – rules, regulations, justice, whatever you want to call it – is misleading and it's erroneous." (XVI RT 4167.)

Contrary to the trial court's understanding, mercy is an acceptable part of the guided discretion afforded to jurors in capital cases. In *Gregg v. Georgia*, the United States Supreme Court noted that "[n]othing in any of our cases suggests that the isolated decision of a jury to afford mercy violates the Constitution." (*Gregg v. Georgia* (1976) 428 U.S. 153, 203 (joint opinion of Stewart, Powell, and Stevens, JJ.).) In his concurring opinion in *Gregg*, Justice White noted that the Georgia statute "guide[d] the jury in the exercise of its discretion, while at the same time permitt[ed] the jury to dispense mercy on the basis of factors too intangible to write into a statute." (*Gregg v. Georgia, supra*, 428 U.S. at p. 222 (conc. opn. of White, J.).) While discretion exercised in a guided fashion may be required to single out a particular person for the ultimate penalty, the decision to spare a life need not be so reasoned:

> [D]iscretion to grant mercy -- perhaps capriciously -- is not curtailed. The sentencing authority can assign what it deems the appropriate weight to particular mitigating

> circumstances. Moreover, with unbridled consideration of mitigating circumstances the sentencing authority may consider something to be mitigating that others would consider to be aggravating.

(*Moore v. Balkcom* (11th Cir. 1983) 716 F.2d 1511, 1521.)

That is, though the death penalty may be imposed constitutionally only if based on the evidence adduced during the penalty trial, the decision to vote for life is not so restricted: a juror may extend mercy even if the evidence he or she heard might otherwise weigh heavily for the death penalty.

As a discretionary act of leniency, mercy is not only allowed at capital sentencing proceedings, it may not be forbidden: "a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.'" (*McCleskey v. Kemp* (1987) 481 U.S. 279, 312, citing *Gregg v. Georgia, supra*, 428 U.S., at p. 200, fn. 50; see also *Maxwell v. Pennsylvania* (1984) 469 U.S. 971 (Marshall, J., dissenting from denial of certiorari) ["[m]ercy [is] a necessary component of capital decision making"].) Forbidding a request for mercy is incompatible with the fundamental respect for humanity underlying the Eighth Amendment, and with the capital sentencing requirements imposed by the Eighth and Fourteenth Amendments. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 303–305; *Romine v. Head* (11th Cir. 2001) 253 F.3d 1349, 1367 ["invoking the authority of a court, judge, or legal scholar to persuade the jury that mercy can have no place in a capital sentencing proceeding is undeniably wrong"]; cf. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328–329 ["Arguments [for mercy] were in large part pleas that the jury confront both the gravity and the responsibility of calling

for another's death, even in the context of a capital sentencing proceeding"].)

In the early post-*Gregg* period, this Court acknowledged the role of mercy in the life and death decision made by capital sentencing jurors: "[a trial court] should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*People v. Haskett* (1982), 30 Cal.3d. 841, 864, emphasis added.) In the period since, in case after case, mercy arguments (for and against) and mercy instructions have been a part of the capital proceedings. (See, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 109; *People v. Griffin* (2004) 33 Cal.4th 536, 591; *People v. Carter* (2003) 30 Cal.4th 1166, 1226; *People v. Lewis* (2001) 26 Cal.4th 334, 393; *People v. Ayala* (2000) 23 Cal.4th 225, 298; *People v. Ochoa* (1998) 19 Cal.4th 353, 464–465; *People v. Mayfield* (1997) 14 Cal.4th 668, 803; *People v. Osband* (1996) 13 Cal.4th 622, 722, 736; *People v. Arias* (1996) 13 Cal.4th 92, 177–178; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1185; *People v. Clark* (1992) 3 Cal.4th 41, 163–164; *People v. Mincey* (1992) 2 Cal.4th 408, 472; *People v. Howard* (1992) 1 Cal.4th 1132, 1190; *People v. Nicolaus,*(1991) 54 Cal.3d 551, 589; *People v. Webster* (1991) 54 Cal.3d 411, 450–451; *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23; *People v. Wright* (1990) 52 Cal.3d 367, 443; *People v. Turner* (1990) 50 Cal.3d 668, 711; *People v. Bell supra*, 49 Cal.3d at p. 551; *People v. Andrews, supra*, 49 Cal.3d at pp. 227–228; *People v. Bonillas* (1989) 48 Cal.3d 757, 791, 795; *People v. Brown* (1988) 45 Cal.3d 1247, 1258; *People v. Lucky* (1988) 45 Cal.3d 259, 298–299; *People v. Heishman* (1988) 45 Cal.3d 147, 181; *People v. Hendricks* (1988) 44 Cal.3d 635, 653; *People v. Kimble* (1988) 44 Cal.3d 480, 510; *People v. Howard* (1988) 44

Cal.3d 375, 433–437; *People v. Gates* (1987) 43 Cal.3d 1168, 1200–1201.) In fact, the Court has viewed mercy arguments as so powerful that it has rejected claims of ineffective assistance of counsel where the defense penalty phase argument has relied in significant part on a plea for mercy. (See, e.g., *People v. Osband, supra*, 13 Cal.4th at pp. 736–737; *People v. Jackson* (1980) 28 Cal.3d 264, 295.)

The Court has on occasion referred to mercy as an "essentially godlike power" (*People v. Benson* (1991) 52 Cal.3d 754, 808), or as implying "an arbitrary or capricious exercise of power" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1195), and has stated that capital sentencing jurors do not have the power to "exercise mercy for reasons unrelated to the evidence . . . ." (*People v. Andrews, supra*, 49 Cal.3d at pp. 227–228; *People v. Lewis, supra*, 26 Cal.4th at p. 393.) Yet, the Court has also referred to the jurors' "power to consider mercy" (*People v. Andrews, supra*, 49 Cal.3d at p. 228), and has recognized that "mercy was a permissible response to defendant's mitigating evidence" (*People v. Wright, supra*, 52 Cal.3d at p. 442). (See also *People v. Brown* (2003) 31 Cal.4th 518, 570 ["we must assume the jury already understood it could consider mercy and compassion"].)

As noted above, appellant argued that the trial court erred in two respects: refusing to permit an instruction that the jury could consider mercy and precluding the defense from arguing that the jury had the power to consider mercy. Respondent conflates the two issues into one – or rather ignores the contention that counsel was precluded from arguing mercy to the jury. The cases it cites discuss only the instructional issue; none involved a trial court forbidding a capital defendant from asking for mercy. (See RB 162-166, citing, e.g., *People v. Griffin, supra,* 33 Cal.4th 536;

People v. Lewis, supra, 26 Cal.4th 334, *People v. McPeters, supra,* 2 Cal.4th 1148.)

The two issues are not identical. The Court has repeatedly rejected the instructional issue, most recently in *People v. Ervine* (2009) 47 Cal.4th 745, 801-802; see also *People v. Griffin, supra*, 33 Cal.4th at pp. 590–591; *People v. Lewis, supra,* 26 Cal.4th at p. 393; *People v. Benson, supra*, 52 Cal.3d at pp. 808–809; *People v. Andrews, supra,* 49 Cal.3d at pp. 227–228. Appellant urges this that the Court reconsider its prior decisions.

In *Ervine*, this Court also rejected a claim that the defense was erroneously precluded from arguing mercy to the jury:

> The trial court did not err in directing the parties to refer to sympathy, pity, or compassion instead of mercy in argument. This ruling was not, as defendant asserts, one that prevented him from requesting leniency; it merely guided the language he was to use in requesting leniency, replacing the word "mercy" with a synonym that did not connote an emotional response to the mitigating evidence instead of a reasoned moral response. (*People v. Avila* (2009) 46 Cal.4th 680, 722-723; *People v. McPeters* (1992) 2 Cal.4th 1148, 1195 ["The unadorned use of the word 'mercy' implies an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances"]; cf. *People v. Ochoa* (1998) 19 Cal.4th 353, 459 [omission of "pity" was not error where "sympathy" was "essentially synonymous"]; see generally *Saffle v. Parks* (1990) 494 U.S. 484, 492-493.)

(*People v. Ervine, supra,* 47 Cal.4th 745, 801-802.)

As detailed above and in the opening brief, neither the parties nor the trial court believed that the term mercy was synonymous with sympathy,

pity or compassion. Indeed, the trial court ruled as follows:

> But to my mind, using the word "mercy" creates more problems than it serves. Because if the People were to argue, or [the defense] were to argue to the jury, "Ladies and gentlemen of the jury, even if you do the weighing that's called upon by the statute, even if you find that the aggravating circumstances outweigh the mitigating circumstances, I am asking you to be merciful. Give him life anyhow. Be merciful," that's what mercy means. To disregard. To accord to someone some sort of punishment other than the one that he or she is entitled to under the law.
>
> And if you are using the word in the sense, I would stop that argument. That's erroneous.

(XVI RT 4169.)

The trial court prohibition on defense counsel from arguing mercy was consistent with its incorrect view, as discussed with regard to Argument XII, that the jury must impose death if it determines that aggravation outweighs mitigation. As explained above, and in appellant's opening brief, the trial court was incorrect in stating that a juror cannot vote for life without possibility of parole if he or she believes that this is the appropriate sentence even after reaching the conclusion that aggravating circumstances outweigh mitigating circumstances. (AOB, pp. 147-156; p. 39, *ante.*) To preclude the jury from considering mercy "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." (*Penry v. Lynaugh, supra*, 492 U.S. 302, 328.) Particularly when combined with the court's misleading comments about the sentencing process, discussed below in Argument XII, and the prosecutor's improper reference to the potential for

escape if not given death (Argument X) and her call for vengeance (Argument VIII), the erroneous restrictions referred to herein are prejudicial.

XII.

THE TRIAL COURT MISLED THE JURY REGARDING THE NATURE OF THEIR SENTENCING DETERMINATION

In his opening brief, appellant set forth in detail the trial court's comments to prospective jurors during voir dire, which together with the court's instructions and prosecution argument misled the jury as to the how to determine the appropriate sentence. Essentially, the jury was led to believe that it must vote for death if they found that aggravation outweighed mitigation, and could only vote for life without parole if mitigation outweighed aggravation. (AOB, 152-153.)

Respondent does not dispute that such a characterization of the sentencing process would indeed be erroneous. Rather, respondent insists that appellant has taken the court's language out of context – and that the trial court adequately informed the jury as to their role and the prosecutor did not capitalize on the court's comments. (RB, at pp. 172-173.)

The record, however, clearly shows that the trial court's remarks and the prosecutor's argument about the sentencing process, in combination, caused the jurors to believe that they must impose the death penalty if, it determined that aggravation was weightier than mitigation, even if they believed that death was not the appropriate penalty under the circumstances.

The trial court repeatedly stated – both to counsel and in front of the jury – that the jury could only reach a life verdict if mitigation outweighed aggravation, and must reach a death verdict if it found that aggravation

outweighed mitigation. (See AOB, pp. 147-150.) For example, the court explicitly told the jury during voir dire that in order to impose life without possibility of parole, they "must find that the mitigating circumstances outweigh the aggravating factors or circumstances," and that there is "no situation" in which they can impose life without possibility of parole where they do not first find that mitigating circumstances outweigh the aggravating circumstances." (V RT 1078.) After counsel objected that the court was imposing a mandatory penalty, the court explained to counsel – outside the jury's presence – its belief that the jury would be required to vote for death "if they conclude that the aggravating circumstances outweigh the mitigating factors, then the law requires that they impose the death penalty." (V RT 1081.) The court continued: "essentially, the bottom line is, as the statute provides, and the statute provides that they are to impose the death penalty -- if they follow the law they will impose the death penalty when the aggravated circumstances outweigh the mitigating circumstances." (*Ibid;* see also VI RT 1338, 1454.)

In its remarks to counsel regarding the permissible parameters of their penalty phase closing argument (XVI RT 4182), the trial court persisted in its view that "the aggravating circumstances, when compared to the mitigating circumstances, are of sufficient import that they warrant death. Just like mitigating circumstances, when compared to the aggravating circumstances, are of sufficient import , that they warrant life without possibility of parole." (XVI RT 4177.) As the court explained: "[t]he jury has to be persuaded that the aggravating circumstances outweigh the mitigating circumstances, before they can vote for death, and vice versa. They have to be persuaded that the mitigating circumstances outweigh the aggravating factors, before they can find for life without possibility of

parole." (XVI RT 4180.) The court also believed that if the aggravating and mitigating circumstances were in equipoise, a hung jury would result. (*Ibid.*)

The jury that sentenced appellant to death did not understand its role in determining the appropriate sentence. The trial court's comments and instructions, together with the prosecutor's argument and the prohibitions on defense counsel's arguments led them to believe that if they found aggravation outweighed mitigation they had to vote for death; that they could not vote for life if they determined that it was the appropriate penalty despite the fact that aggravation outweighed mitigation; and that they could only vote for life if they found mitigation outweighed aggravation. Given that counsel was also prohibited from informing the jury that mercy was an appropriate consideration in determining the appropriateness of the death penalty (Argument XI), it is reasonably likely that the jury was misled in violation of appellant's constitutional rights.

XIII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, 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 pp.) Respondent relies on the Court's previous precedents without any substantive new arguments. (RB 177-184.) Accordingly, no reply is necessary to respondent's argument.

XIV.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Respondent argues that since there are no "serious flaws" in appellant's trial he cannot establish cumulative error. For the reasons stated in AOB, appellant disagrees.

CONCLUSION.

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

DATED: May 17, 2011

Respectfully submitted,

LYNNE S. COFFIN

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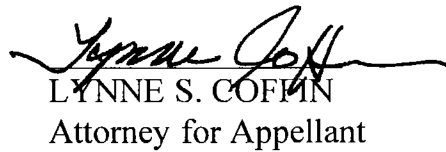
CHRISTOPHER HENRIQUEZ

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Lynne S. Coffin, am a attorney at law, appointed to represent appellant Christopher Henriquez 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 the brief is 11,598 words in length.

Dated: May 17, 2011



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Proof of Service By Mail

I, Lynne S. Coffin, the undersigned, declare:

That I am a citizen of the United States of America, over the age of eighteen years,

and not a party to the within cause.

On this date I caused to be served on the interested parties hereto, a copy of

REQUEST FOR EXTENSION OF TIME

by placing a true copy thereof enclosed with postage thereon fully prepaid, in the United states Mail at Mill Valley, California, addressed as set forth below:

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

Executed this 18th day of May, 2011 in Mill Valley, California.

LYNNE S. COFFIN