SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. PAUL GORDON SMITH, JR., Defendant and Appellant.	Calif. Supreme Court No. S112442 Shasta Co. Super. Ct. No. 98F26452 Automatic Appeal

APPELLANT' S REPLY BRIEF

KATHY MORENO
STATE BAR 121701
P. O. BOX 9006
BERKELEY, CA 94709
(510) 649-8602
katmoreno@comcast.net

Attorney for Appellant
By appointment of the
Supreme Court

DEATH PENALTY

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STATUTES

I. THE TRIAL COURT'S REFUSAL TO GRANT A CHANGE OF VENUE IN ONE OF THE MOST SENSATIONALIZED MURDER CASES IN SHASTA COUNTY VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

(AOB, pp. 151-177; RB, pp. 93-131.)

Appellant contends that the trial court erred by refusing to grant a change of venue at the outset of the trial, and again erred by refusing to grant a venue changed after appellant's highly publicized jail escape attempt which occurred in the middle of jury selection.

A. The Trial Court Erred by Refusing to Grant A Change of Venue at the Outset.

Respondent agrees that the trial court found that the nature and gravity of this case weighed slightly in favor of a change in venue (RB, p. 109) but points out that a capital case, standing alone, does not require a change of venue. (RB, p. 108, citing *People v. Famalaro* (2011) 52 Cal.4th 1.) However, appellant's argument does not rely solely on the fact that the case was a capital one. Elsewhere in his brief, respondent argues various factors ("prolonged beating death," "bludgeoned to death," "brutal and extensive beating") that supposedly render all errors "pale" by comparison. (RB, p. 261. 265, 270, 274-75.) These are the same kinds of inflammatory descriptions used in the media and the reason why the nature of the crime weighed in favor of a change in venue.

The trial court found that the "nature and extent of publicity" in this

case did favor granting a change of venue in that it showed the possibility that a fair trial court not be had. Expert evidence established by a clear and convincing standard that appellant could not get a fair trial in Shasta County. (6RT 1228.)

Respondent argues that it is reasonable to infer that memories of prospective jurors who may have been exposed to media coverage "would have been dimmed by the passage of time," and that even heavy media coverage does not necessarily require a change of venue. (RB, p. 110, citing *Famalaro*, 52 Cal.4th at 22-23.) Appellant submits that this Court should defer to the trial court finding that the publicity weighed in favor of a venue change.

Respondent contends that because appellant has argued that the evidence is insufficient to support the torture allegation (see Arg. VII, below), this claim that the "gruesome" facts "merited a change of venue ring[s] hollow." (RB, p. 110.) This is not true. Firstly, facts of a homicide can be gruesome even if they do not support a torture special circumstance. Secondly, appellant's claim as to the insufficiency of the evidence of the torture special circumstance allegation refers specifically to evidence on an intent to increase suffering, not the absence of gruesome or grisly details relating to the murder itself.

Respondent's own argument presents a paradox. He maintains that

conduct giving rise to a special circumstance is "extreme" by definition, but that "extreme" special-circumstance murder conduct cannot on its own be grounds for a change of venue. (RB, p. 109.) .) Appellant has cited *People v. Hernandez* (1998) 47 Cal.3d 315 and *People v. Edwards* (1991) 54 Cal.3d 787 in support for his argument that the nature and gravity of the offense in this case supports a change of venue. Respondent asserts that these cases are "clearly distinguishable" because the facts here did not include the "aggravating factors" present in those cases, i.e., sexual mutilation and 12-year old victims. (RB, p. 110.)

Yet repeatedly throughout the rest of the brief, respondent argues that constitutional errors should be excused as harmless because the evidence overwhelmingly shows the extremely brutal and aggravating nature of the offense. (See RB, pp. 154, 261, 265, 270, 274-75, 286, 292.) If the offense is so brutal and horrifying as to require a finding of harmlessness as to every other constitutional error, then the nature and gravity of the offense require a change of venue.

The majority of respondent's argument focuses on the trial court's refusal to grant the change of venue motion made after the highly publicized jail incident, which appellant addresses next.

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B. The Trial Court Erred by Refusing to Grant a Change of Venue After the Highly Publicized Jail Escape Attempt and Assault on Deputy Renault.

Assuming arguendo this Court finds that the trial court properly refused to change venue at the outset of the trial, it was error to refuse the requested change of venue after the highly publicized jail escape attempt and assault on Deputy Renault. The trial court again ruled that the nature and gravity of the crime weighed and the nature and extent of the publicity weighed in favor of granting a change in venue, but that weight was lessened by (1) the fact that the publicity was caused by appellant's own alleged criminal acts, i.e., the jail escape attempt and assault; (2) that the circulation of the local newspaper was 35,000 in a county with a population of 70,000; (3) that voir dire had revealed a venire with little knowledge of the facts of the charged murder, and good compliance with the court's orders not to read or talk about the case; and (4) those who had formed a bias because of the jail house incident had been excused. (19CT 1410-12.)

Respondent argues that the trial court was correct in finding that these four facts were sufficient to outweigh the publicity and that a change of venue was therefore not warranted. (RB, p. 113.) Appellant addresses each point in turn.

1. The trial court erred by discounting the prejudicial publicity on the grounds that it resulted from appellant's "willful act."

Appellant contends that the trial court erred in its assessment of the

factors relevant to determining the need for a change of venue when it discounted the prejudicial publicity on the grounds that the publicity resulted from appellant's "wilful conduct" and because the recent publicity "did not concern the facts underlying the charges in the case." (See AOB, p. 168, section 1, and AOB, p. 176, section 7; 19CT 4110-11.)[2]

Respondent's main line of criticism of appellant's claim is that the trial court "did not base its entire ruling on this principle" but stated that publicity resulting from a defendant's actions "may preclude the defendant from using such publicity as justification for a motion to change venue." (19CT 4110; RB, pp. 113-14.) Respondent makes much of the fact that the trial court used optional ("may") language rather than mandatory ("must"). (RB, p. 114.) In fact, the trial court expressly ruled that the weight of the publicity "was moderated [] by the defendant's own allegedly willful conduct [which] was the cause of the most recent pretrial publicity." (19CT 4110, 1st paragraph.) Respondent relies on the introductory portion of the trial court's written ruling, and is blind to the actual ruling that specifically indicated it was discounting the publicity because of appellant's own actions in the jailhouse assault. (19CT 4110 [The extent and nature of the publicity weighs somewhat in favor of a change of venue, however, that weight is moderated by several facts. One, the defendant's own allegedly willful conduct which has resulted in new criminal charges was the cause of

the most recent pretrial publicity concerning the June 22 jail incident."].)

Respondent next states that even if the trial court did base its denial of the venue motion on appellant's conduct in the jailhouse assault, the ruling should be upheld despite the rule of *Fain v. Superior Court* (1970) 2 Cal.3d 46, which holds that publicity due to the defendant's misconduct should not be discounted as invited error. According to respondent, *Fain* is "distinguishable [] in many important ways." (RB, p. 114.)

Respondent then points to procedural differences (*Fain* involved a pretrial appellate review) and factual differences in the crimes charged (*Fain* involved multiple minor victims) and in the defendants (the defendant in was a newcomer or stranger to the community, "unlike" appellant). (RB, pp. 114-15.) As to this latter point, appellant must point out that he also was a newcomer to the community, having lived most of his life in group homes and institutions, and had only recently returned to Shasta County. Respondent also describes the publicity in *Fain* as more "intense" and "substantial."

Finally, according to respondent, "of incredible importance" is the fact that the jail escape attempt in *Fain* was temporarily successful in that the defendant remained at large for two days. (RB, p. 115-16.) Appellant's reliance on *Fain* should thus be "discounted" because of these differences according to respondent. (RB, p. 3.) In fact, appellant's situation was much

more egregious than that in *Fain*. Appellant was already charged with a highly publicized capital murder, so that a strong reason for granting a change of venue already existed; the even more highly publicized escape attempt (whether successful or not) exacerbated the prejudice and need for a venue change.

Of course, no two cases are exactly alike in procedural stance, underlying facts, and facts relevant to the issue at hand. It is easy to point out minor differences. Nonetheless, *Fain* held that a jailhouse escape occurring prior to the trial and causing prejudicial publicity should not be used to discount that publicity in deciding a change of venue motion, even if the publicity was caused by the defendant's own conduct. The invited error doctrine does not apply. (*Fain*, 2 Cal.3d at 53.) As explained in *Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 666-67: "In an attempt to extract legal principles from an opinion that supports a particular point of view, we must not seize upon those facts, the pertinence of which go only to the circumstances of the case but are not material to its holding. The *Palsgraf* rule, for example, is not limited to train stations."

Respondent cites cases holding that the defendant is not allowed to profit from his own misconduct, including *People v. Huggins* (2006) 38 Cal.4th 175, 200 [upholding denial of request to voir dire jurors after the defendant's in-court misconduct], *People v. Hendricks* (1988) 44 Cal.3d

635, 643 [upholding denial of motion for mistrial based on the defendant's own misconduct], and *People v. Hines* (1997) 15 Cal.4th 997,1054 [rejecting jury misconduct claim] – however, none of these is a change of venue case. (RB, pp. 117-18.) Even *People v. Gomez* (1953) 41 Cal.2d 150, a case preceding *Fain* and addressed by this Court in *Fain*, involved a motion to discharge the jury panel, rather than a motion for change of venue. Appellant addressed *Gomez* in his Opening Brief. (See AOB, p. 169.)

In sum, appellant contends that the publicity resulting from the jailhouse escape attempt and assault should not be discounted in reliance on the invited error doctrine, and that it is a factor weighing heavily in favor change of venue.

2. The local newspaper circulation of 35,000 did not moderate the impact of prejudicial publicity on a jury pool of 70,000.

Respondent agrees with appellant that Shasta County ranks 28 out of 58 in California in terms of the size of counties, as this Court noted in *People v. Proctor* (1992) 4 Cal.4th 499. Appellant cited *Proctor* for the proposition that counties of this size "more frequently have occasioned venue changes that cases involving more populous counties," and that "this factor weighs somewhat in favor of a change of venue." (*Id.* at 525-26; AOB, p. 164.) Respondent accuses appellant of "misreading" *Proctor*, even

though *Proctor* was quoted correctly by appellant in the Opening Brief (and again in this brief). Respondent's accusation is based on the fact that even though the decision stated that the relatively smaller size of the county weighed "somewhat" in favor of a change in venue, it specifically held that the factor was not determinative. (RB, p. 119, citing *Proctor*, 4 Cal.4th at 353.)

Appellant does not contend that the population of Shasta County is so small as to require a change of venue, i.e., appellant has not argued, as respondent implies, that the relatively small county is a determinative factor. Nonetheless, appellant does contend, as in *Proctor*, that the factor weighs somewhat in favor of a change of venue, and is not a "neutral" factor, as the trial court held. Citing *People v. Jennings* (1991) 53 Cal.4th 334, 363, respondent describes the critical factor as whether the county's population is large enough to "dilute" prejudicial publicity. Using the statistics attached to Respondent's Brief, it can be seen that there are 20 counties under 100,000, and eight, including Shasta, under 200,000. Thirty counties have a population over 200,000. Thus, while Shasta is not the smallest of counties, its population is not large enough to dilute the prejudicial publicity, especially since Shasta is one of the larger counties by area.

Moreover, while the circulation of the local newspaper was 35,000,

this number does not reflect the number of readers, which was more than likely two or three times that number. Considering that the population of adults eligible for jury service in Shasta County was only 70,000, educes the 200,000 population by a significant amount, the publicity from the newspaper alone reached a large majority of the jury-eligible population.

3. Most of the actual jurors had knowledge of the charged offense and/or the jailhouse incident.

Respondent first contends that jurors' knowledge of the charged offense and/or the jailhouse incident, "even if true," does not necessitate a change of venue. (RB, p. 12.3) Nonetheless, the jurors' knowledge is an important factor to consider. The trial court denied a change of venue on the grounds that venire members had little knowledge of the facts of the crime and few opinions as to appellant's guilt. However, a juror-by-juror analysis shows that almost half of the jurors had knowledge of the offense and almost three-quarters had knowledge of the jail escape attempt and assault. (See AOB, p. 171.) Respondent does his own detailed juror-by-juror analysis, but – with one exception – his analysis does not refute appellant's. (Appellant mistakenly noted that Juror Number 8 was familiar with the facts of the jail incident. This is incorrect.) The more important point is that the restriction on voir dire on the jail incident (see Arg. II, immediately below) -- and the trial court's own observation that the prospective jurors were reluctant to reveal how much information they had

– makes it impossible to conclude that the jurors were able to lay aside preconceived impressions or opinion and render a verdict based on the evidence, as required for a fair trial under *Irvin v. Dowd* (1961) 366 U.S. 717, 723.

Respondent argues that prior knowledge does not "require" a change of venue, and that the pretrial publicity had no effect on the jurors. This is far from certain. (RB, p. 128.) For example, the trial court asserted that it had excused prospective jurors with a bias formed by publicity and this is correct as to some venire member – yet the trial court refused to allow the kind of inquiry on voir dire that could have and would have exposed a similar bias in other prospective jurors, including the sitting jurors. (See Arg. II, immediately below.) The question of change of venue cannot be determined separately from the issue of the improper restriction on voir dire.

4. The trial court's admonitions were inconsistent and incomplete and thus cannot serve to mitigate the prejudicial pretrial publicity.

Appellant's specific contention is that the trial court failed to admonish three of the sitting jurors as to the inaccuracy of pretrial publicity, despite its stated intention to do so. (AOB, pp. 173-74.)

Respondent maintains that this assertion is incorrect and

unsupported by the evidence – probably because he misapprehends appellant's claim. (RB, p. 130.) Respondent argues that the trial court instructed that the evidence was limited to that presented in court, and provides multiple citations to this effect. However, appellant's point is somewhat different. Appellant agrees that the "trial court did instruct the jurors that media reports were not evidence," as set forth in Appellant's Opening Brief, pages, 173-74. What the trial court did not consistently do despite its stated intention was "to remind the jurors of the incompleteness and inaccuracy of most media reports." (AOB, p. 174.) This is the point appellant makes in this section, and the citations provided by appellant show, as appellant asserted in the Opening Brief, that three of the sitting jurors did not receive the admonition about the inaccuracy of publicity. (See AOB, p. 174 and fn. 9.) Respondent apparently misread appellant's argument. Consequently, his claim that the "appellate record defeats appellant's assertions" is incorrect.

5. The assurances of impartiality made by prospective jurors were incomplete and insufficient to mitigate the prejudicial publicity.

In ruling that the prejudicial pretrial publicity could be discounted, the trial court relied on assurances of prospective jurors themselves that they could be fair and impartial despite exposure to that publicity. Appellant has cited to *People v. Lewis* (2008) 43 Cal.4th 415, 450 and

Murphy v. Florida (1975) 421 U.S. 794, 800, both of which declare that such assurances cannot be dispositive of the defendant's rights.

Respondent ignores this case law and instead makes a related point, citing cases holding that appellate courts should give great weight to a trial judge's finding. Appellant does not disagree but makes a finer point. Because the trial court here relied too heavily on the jurors' own assurances of impartiality, which assurances were made by prospective jurors who had not been sufficiently voir dired (see Arg. II, below) or fully admonished as to the inaccuracy of media reports (see section 4, immediately above), this Court must discount the weight otherwise to be given to a trial court's findings on this issue.

Respondent accuses appellant of inserting "his own skepticism" to make an argument that is both "self-serving and speculative." (RB, pp. 122-23) The accusations are likely due to respondent's failure to understand the particular point appellant makes. Appellant does not argue that an appellate court should never defer to trial court rulings as to a juror's ability to be fair; rather appellant argues that under the particular circumstances here, as set out above, such deference is not warranted.

C. Appellant's Trial Was Unfair Requiring Reversal Of His Convictions and Sentence of Death.

Reversal is required where the refusal to grant a change of venue

results in an unfair trial, which is demonstrated through the voir dire. (*Lewis*, 43 Cal.4th at 447; *Hernandez*, 37 Cal.4th at 336.) However, because the trial court improperly curtailed voir dire after the prejudicial publicity from the jail incident (Arg. II, below), appellant is foreclosed from making that showing. Consequently, appellant contends that this Court must reverse, based on the presumption that, at a minimum, it is reasonably likely that appellant did not have a fair trial, as in *People v. Cash* (2002) 28 Cal.4th 703, 718-23 [reversing death sentence where trial court improperly restricted voir dire].

II. THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO INQUIRE ON VOIR DIRE INTO POTENTIAL BIAS RESULTING FROM PRETRIAL PUBLICITY REGARDING THE JAILHOUSE INCIDENT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY AND TO DUE PROCESS, AND HIS EIGHTH AMENDMENT PROTECTION AGAINST AN UNRELIABLE SENTENCE

In *People v. Cash* (2002) 28 Cal.4th 703, this Court set out the parameters of capital voir dire. *Cash* reversed a death sentence where the trial court prohibited the defense from inquiring in voir dire whether prosecutive jurors would automatically vote for the death penalty if the evidence showed the defendant had committed a prior murder. The restriction was found to violate the defendant's constitutional rights to an impartial penalty jury. (*Id.* at 721-22.) The same is true in this case: the trial court improperly refused to permit defense voir dire on whether

evidence that the defendant had assaulted and gravely injured a jail officer in a thwarted escape attempt would affect prospective jurors' ability to reach a fair penalty determination.

As explained in *Cash*, "either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow [the court's penalty phase instructions." (*Ibid.*) Appellant was not allowed to ask such questions, stating (as did the trial court in *Cash*), that questions as to the escape attempt and assault were "not charged" and thus inquiring as to bias on that point would be "prejudging" the evidence. (22RT 5936-37.)

Appellant maintains that the trial court erred by refusing to allow additional voir dire as to the jail assault on Deputy Renault, given that the assault and escape attempt occurred during jury selection and was highly publicized. As stated in Appellant's Opening Brief, the trial court's only exception to its prohibition on voir dire on this issue was if the juror had close friends or family in law enforcement. Thus, the court asked one prospective juror whose father was a deputy sheriff if the jail assault incident would affect her evaluation of the case. (See AOB, p. 181 & fn. 14.)

Respondent now claims that the fact that the trial court allowed voir

dire in this one instance of a prospective juror with a law enforcement relative, and defense counsel's statement that he "understood" the court's ruling, "contradict" appellant's assertions that defense counsel believed the precluded voir dire to be important and that the court refused to allow voir dire on the requested incident. (RB, p. 139, fn. 29.)

Respondent is wrong. Defense counsel repeatedly requested additional voir dire on this incident, knowing that the evidence of the jail assault would be extremely dramatic and damaging, and that it was the kind of aggravating evidence that many people believe to warrant an automatic death penalty. (See e.g. 22RT 5937, 6074, 6099-6100.) Defense counsel sought a writ on the same issue, something they would not have done if they did not believe that voir dire on this issue was critical. (See 22CT 5126-28 [petition for writ of mandate denied July 15, 2002; 25RT 699798]; see 22CT 5035 [supporting document in petition for writ of mandate setting forth requested voir dire question on the jail assault incident.)

Defense counsel's statement to the trial court that he understood the court's ruling means just that, i.e., that he understood, and not that he withdrew his objection or agreed with the court. Given that defense counsel continued to request voir dire on the incident and filed a petition for writ of mandate requesting voir dire on the incident refutes respondent's notion that counsel's courtesy in court somehow

"contradicts" the claims counsel repeatedly made in the trial court and the Court of Appeal, and that appellant reiterates before this Court.

As to the merits, respondent makes two arguments, both fallacious. Respondent argues first that there is no indication that the court's refusal to allow the requested voir dire "resulted in an impartial jury" because none of the jurors indicated he or she had a "special relationship with a member of law enforcement," or more specifically, with a "correctional officer." (RB, p. 141.) This is not the proper standard. As set out in *Cash*, each party is "entitled" to voir dire on questions specific enough to determine if the prospective jurors harbor bias as to some fact shown by the trial evidence. The standard is not that each party is entitled to ask voir dire questions only of jurors who first disclose some special relationship to the facts or circumstances shown by the evidence that would trigger their bias.[1] The trial court's ruling, and respondent's argument, wrongly presuppose that only a prospective juror related by friendship or blood to a law enforcement officer (or more particularly a correctional officer) might be biased by

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[1] Respondent also argues that the composition of the jury (i.e., that none had a "special relationship" with a law "demonstrates why [the court] limited voir dire in the way it did." (RB, p. 141.) The argument is specious. For one thing, the court limited voir dire the way it did before the jurors were chosen. Moreover, the limits on voir dire prevented delving into any special relationship or bias a prospective juror might have had on the facts of the jail attempt/assault.

hearing the facts of the jail house assault. This is akin to saying that in a case involving a brutal rape of a child, only someone who has a child would be capable of harboring bias in a penalty trial from hearing such facts.

Respondent's second argument is that defense counsel sought to voir dire on the news of "a police officer being beat up in jail," and that this line of questioning was properly refused because no "police officer" was assaulted, as Deputy Renault was a "correctional officer" who was "responsible for security inside the Shasta County Jail." (RB, pp 142-43.) Respondent thus concludes that the attempted line of questioning was "too broad" and this Court's decision in *People v. Cash* is thus "distinguishable." (RB, p. 143.)

Once again, respondent is wrong. Defense counsel's proposed voir dire questions, filed on June 26, 2002, included this question: "If the victim was a Correctional Officer, Peace Officer or other Law Enforcement personnel how would that change your feeling or thoughts on the case?" Respondent cites defense counsel's argument to the trial court at one point where he said "police officer," but counsel formally and initially posed the argument using the term "correctional officer," arguing that question would be relevant to bias. (22RT 5936 ["If we were starting the beginning of the case and everybody knew about that jailhouse incident, whether [] a correctional officer was the victim would certainly be relevant to bias and

prejudice.") Consequently, respondent's argument that the trial court properly refused to allow the requested voir dire question because the defense wanted to voir dire as to an assault on a "police officer" rather than a "correctional officer" is based on an incorrect premise.

In any case, respondent's hair-splitting semantic argument makes little sense. The purpose of voir dire is to identify jurors whose death penalty views would prevent or substantially impair their duties. Many people might find that an attack on a peace officer while in custody should mandate the death penalty for a convicted murderer. However, it is highly unlikely that any prospective juror would have such a bias only if the victim was identified as a "correctional officer" but not if the victim was identified as a "police officer." The relevant point is that the assault was on a law enforcement officer by a defendant in custody for murder. So it is specious to assert, as respondent does, that the trial court could properly preclude voir dire on this question because defense counsel once made the request in terms of a "police officer" victim (even though the defense request was also posed in terms of a correctional officer or peace officer or law enforcement personnel victim).

Finally, respondent argues that appellant's claim is "speculative" and that no constitutional error has been established because appellant failed to demonstrate "how the limitations on voir dire resulted in an impartial [sic:

partial or biased] jury." (RB, p. 145.) Respondent also argues that this Court should find any error harmless because appellant did not explain "what additional inquiry was necessary for an intelligent exercise of peremptory challenges in light of their responses to questions the trial court did permit." (RB, p. 143.) What additional inquiry was necessary was the question proposed for all prospective jurors and rejected by the trial court, i.e., whether a peace/police/correctional/law enforcement officer victim would trigger bias in a prospective juror.[2]

The test for harmlessness articulated by respondent is not the proper standard in any case. In *Cash*, this Court reversed because the prior murder on which the trial court prohibited voir dire was a general fact or circumstance "likely to be of great significance" which could have caused some jurors invariably to vote for the death penalty regardless of the mitigating evidence. This Court explained that reversal of the judgment of death was required "[b]ecause the trial court's error makes it impossible for

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[2] Respondent's final argument in support of a finding of harmlessness is particularly specious. Respondent points to testimony from appellant that Ben Williams and not he hit the deputy and that the plan was that the deputy not be hurt; respondent then argues that appellant's testimony and other evidence "disassociated appellant from the actual beating." (RB, pp. 144-45.) The prosecutor at trial had a starkly different view of the evidence presented and argued to the jury that despite appellant's testimony "that's not the way it happened." The prosecutor argued the evidence showed that appellant was striking the deputy and that attempted to murder him. (50RT 14243-47.)

us to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the murder charged in this case . . . ." (Id. at 723.) The same result is mandated here.

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III. THE ERRONEOUS ADMISSION OF LAY OPINION TESTIMONY BY AN OFFICER VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

Appellant argues that the trial court erred by allowing Sergeant Clemens to testify to his opinion as to appellant's emotional state during his police interrogation, and to the veracity of the statements by the former co-defendants.

A. Sergeant Clemens' Opinion as to Appellant's Supposed Emotional State During His Statement to the Police Was Irrelevant, Improper and Prejudicial.

After showing appellant's videotaped statement in which appellant Showed emotion (crying and in tears), the prosecutor called Sergeant Clemens to testify to his opinion that appellant in fact did not show the emotion that appeared in the videotape. Respondent agrees that "[g]enerally, a lay witness may not give an opinion about another person's state of mind," but argues that Sergeant Clemens did not give an "opinion." Respondent insists that Clemens only testified to "objective behavior" which he described "as being consistent with [appellant's] state of mind." (RB, p. 14.) *People v. Chatman* (2006) 38 Cal.4th 344, 397 stated that a lay witness may not give an opinion as to another's state of mind, but may testify about objective behavior and describe behavior that is consistent with a particular state of mind.

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According to respondent, appellant's argument that Clemens' testimony was irrelevant is incorrect, because it is based on a misdescription of the challenged testimony as an opinion about appellant's state of mind (which would be irrelevant under *Chatman*); whereas, according to respondent, "close scrutiny" of Clemens' testimony shows it to be "incredibly relevant" testimony as to "objective behavior" tending to prove appellant's intent to torture. (RB, pp. 149-50.)

Appellant disagrees. Close scrutiny shows, first, that the prosecutor intended to rebut the objective evidence of appellant's behavior with Sergeant Clemens' opinion contradicting that objective behavior. Secondly, Clemens did indeed give an opinion. The videotape – the objective evidence – was played to the jury and showed appellant "breaking down and crying." However, the prosecutor argued to the trial court that "anybody can sniff," and stated his intention to have Clemens testify that despite (and contrary to) the objective videotape evidence, appellant actually did not display "emotion" at these moments. Thus, Sergeant Clemens was allowed to testify that "[d]uring those two or three times that the defendant appeared from the videotape to be displaying some emotion," Clemens did not see any indications "that would show that there was some emotion coming through." (33RT 9341-42.)

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This was an opinion: first, as to what the video appeared to display, and second, that what he observed did not "show" any emotion. Appellant would not be arguing this claim had the witness (or the prosecutor) confined the testimony to what Clemens saw, without augmenting his observations with his opinion as to whether what he saw indicated real emotion or not. Clemens testified that despite the objective view of the videotape, in his opinion, appellant was not actually displaying emotion. This was irrelevant and improper lay opinion testimony.

Respondent asserts that Clemens did not give an "opinion over [sic] whether appellant was being genuine in the display of his emotions." (RB, p. 150.) As explained in the preceding paragraph, this is demonstrably incorrect. Clemens gave an opinion, and moreover, it was an opinion that contradicted the objective evidence of the videotape, which, of course, was why the prosecutor was so keep to elicit it.

B. Clemens' Testimony Was Improper Opinion Tending To Invade the Jury's Fact-Finding Function.

Appellant also maintains that Sergeant Clemens' improper opinion testimony tended to invade the jury's fact-finding function. This case is on all fours with *People v. Smith* (1989) 214 Cal.App.3d 34, 39-40, which found error in the admission of testimony by a deputy sheriff that he could tell by the tone of voice of the victim that his dying declaration was sincere. Relying on *People v. Melton* (1988) 44 Cal.3d 713, 714, the *Smith* court

noted that although the deputy's opinion may have been based on his perceptions, it was unnecessary and tended to invade the province of the jury.

Respondent conspicuously chooses to ignore these cases, although his argument contains no case law supporting his position. Respondent argues that Clemens did not state an opinion that he believed or disbelieved appellant. (RB, p. 50.) This is not true. The videotape shows appellant crying and tearful, and Clemens testified that he saw nothing "that would support that emotion." That is, Clemens testified that appellant was faking for the camera, which is indeed an opinion as to appellant's sincerity and veracity, i.e., an opinion that he did not believe appellant's display.

Of particular interest is respondent's argument that the objected-to testimony should be deemed harmless with respect to the torture-murder special circumstance finding because "multiple witnesses [] substantiated the special circumstances allegation of torture [and] none of this evidence

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came from Sgt. Clemens." (RB, p. 154.) Yet in arguing the relevancy of Clemens' testimony, respondent argued that it was "incredibly relevant" precisely because Clemens' testimony proved that appellant "intended" to torture. (RB, p. 149.) This Court cannot do as respondent has done, i.e., argue that the testimony was "relevant" to show intent to torture, but harmless because it did not show intent to torture.

Respondent also argues that Clemens' testimony was harmless because it "allowed appellant to present mitigating evidence as to his reason for killing [] without actually testifying." (RB, p.154.) The argument makes no sense and is wrong on all scores. First, appellant did not present Clemens' testimony: Sergeant Clemens' testimony was presented by the prosecution. (See 33RT 9329 [direct examination of Ron Clemens by the prosecutor]; 9337-42 [objectionable testimony on further direct examination by prosecutor].) Secondly, the testimony was not "mitigating" because it was presented at guilt phase by the prosecution, and evidence that in Clemens' opinion any apparent remorse shown by appellant on the videotape was in fact not true is hardly "mitigating." And third, at penalty phase, appellant did "actually testify" on his own behalf. (See 46RT 12989 et seq.)

In sum, Sergeant Clemens' testimony as to appellant's videotaped police statement was prejudicial because it made appellant look like a liar,

particularly with respect to the torture-murder special circumstance. The prosecutor's position was that appellant took sadistic pleasure in killing the victim, and appellant's videotaped statement, in which he was reduced to tears, would have rebutted that position, except for Clemens' testimony. In this sense, Clemens' testimony operated as an admission or confession on appellant's behalf as to the torture special circumstance. (Cf. *Arizona v. Fulminante* (1991) 499 U.S. 279, 331 [a defendant's confession acts as an "evidentiary bombshell" leaving an "indelible impact" on the jury (See also Part D., below.)

C. Sergeant Clemens' Testimony Regarding Statements Made by Former Co-defendants Was Improper Opinion Testimony as to Their Veracity.

Appellant also argues that Sergeant Clemens' testimony (that the law enforcement officials told the former co-defendants to "tell the truth" in their police statements and that the "overriding premise" in these directives was to get these witnesses to tell the truth) was improper opinion testimony as to other witnesses' veracity. (34RT 9631-32.) Respondent contends that Clemens never testified to his opinion that a particular witness was telling the truth. (RB, p. 153.) Appellant does not disagree: in Appellant's Opening Brief, he argued: "Although Clemens did not directly state [his opinion] that the co-defendants' police statements were truthful, the implication in his testimony as elicited by the prosecutor was to that effect."

(AOB, p. 195.) Jurors are people and would understand Clemens' testimony as an assertion by him that the co-defendants were in fact telling the truth, as the police had urged them to. Indeed, what other purpose would Clemens' testimony on this point serve? And the prejudicial impact of this implied opinion as to the truthfulness of the co-defendants' statements (and testimony to the same effect) was exacerbated by Clemens' previous testimony that appellant's seemingly remorseful statement to the police was in his view faked.

Finally, in a footnote, respondent complains that appellant cites no authority in support of the argument that testimony from a police officer would likely be given heightened importance by a jury. (RB, p. 152.) No citation is necessary for the proposition that police officers are viewed as powerful symbols of authority. Jury questionnaires and voir dire routinely include questions to prospective jurors as to whether they would consider police officer testimony as more credible than other witnesses. Nonetheless, appellant provides the following authorities for the proposition that jurors often consider police officers to have an aura of special reliability and trustworthiness, which increases the risk of prejudice from improperly admitted police officer testimony: *United States v. Young* (2d Cir. 1984) 745 F.2d 733, 765-66; Mahoney, 31 Hastings Const.L.Q. 385, 408 (2004) Houses Built on Sand: Police Expert Testimony in California Gang

Prosecutions; see also *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1162 [observing that a uniformed police officer is surrounded by an aura of authority].

D. The Erroneously Admitted Testimony Was Prejudicial.

Respondent argues that any error from Sergeant Clemens' testimony was harmless, since appellant admitted killing Sinner and testimony by other witnesses substantiated the torture special circumstance. (RB, p. 154.) But the "other witnesses" were precisely those witnesses whose testimony Sergeant Clemens verified as being truthful. Testimony by these former co-defendants and accomplices with a strong motive to testify against appellant in as aggravating a manner as possible would have been much weaker and subject to attack without the imprimatur of Sergeant Clemens' testimony. That Amy, Lori and Eric testified against appellant cannot be used to argue that Clemens' testimony, effectively stating that their testimony was truthful, should be deemed harmless.

IV. THE ERRONEOUS ADMISSION OF IRRELEVANT AND PREJUDUCIAL STATEMENTS MADE BY APPELLANT AND THE CO-DEFENDANTS VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. The Trial Court Erred in Admitting Statements Whose Only Relevance Was to Show the Prohibited Inference of Criminal Disposition.

Appellant argues that the trial court erred in admitting various statements appellant made to the police about reasons he had for killing people, how killing some person else would not bother him, and about guns he had had in the past: the statements amounted to improper evidence of criminal disposition and were of the type that prompt an emotional reaction against the defendant causing the jury to decide the case on an improper basis. None of the statements had any relevance to appellant's state of mind at the time of the charged offenses. (See AOB, pp. 198-201.)

Respondent does not address appellant's arguments that the statements showed criminal disposition. Instead, he asserts that the statements showed appellant's intent to kill the victim and his "indifference to life" in that "killing someone else did not [bother him]." (RB, p. 16061.) Respondent also maintains that appellant's statement that it was the first time he didn't have a gun when he needed one "demonstrated a sadistic purpose as required by the torture special circumstance allegation," and was "incredibly probative in revealing [his] intent." (RB, p. 161.)

Respondent's arguments prove too much.[3] If appellant's statements as to reasons he might have for killing other people show his intent to kill the victim in this case, and his indifference to life and thus his malice aforethought (as respondent suggests), that proof is reached only through the circumstantial but prohibited link of criminal disposition, i.e., appellant would kill other people, thus he intended kill the victim, and appellant was indifferent to life in general, and thus he harbored malice when killing the victim.

B. The Trial Court Erroneously Admitted Improper Opinion Testimony in the Former Co-Defendants' Statements that Appellant Had Tortured the Victim.

Appellant argues that the trial court erred in admitting statements by the co-defendants that he "tortured" the victim, because this testimony was improper lay opinion as to the ultimate question, i.e., the torture special circumstance allegation. (*People v. Miron* (1989) 210 Cal.App.3d 580, 583 [upholding trial court exclusion of defense-proffered testimony that an eyewitness aid the victim "was trying to kill us" on the grounds it was improper lay opinion testimony].)

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[3] Respondent repeatedly describes the objectionable statements as "extremely probative," "incredibly probative," and "incredibly relevant." (See RB, pp. 160-61.) Vehemence or hyperbole on the part of respondent does not, however, translate into a theory of relevancy nor does it refute appellant's claim that the statements showed only criminal disposition.

Respondent complains that appellant cited the trial court's rulings but not the "actual testimony at issue," and thus "has failed to object to specific testimony" at trial. (RB, p. 162.) Appellant did object to the specific testimony by the former co-defendants that appellant tortured and was torturing the victim, and the trial court overruled those objections. Appellant cited the portion of the record in which trial counsel objected to the references to torture in the witnesses' statements to the police. (See AOB, p. 202, citing 7RT 1661, 1698 and 8RT 1725-40.) The citation to 7RT 1661 is a typo and should be 7RT 1662: at that page defense counsel argued that Lori's use of the word "torture" went to the ultimate issue in the case. At 8RT 1725-26, defense counsel objected "to the word torture throughout this section" of the witness's statement, on the ground that it was improper opinion testimony on the ultimate issue.

Respondent argues that the court redacted the co-defendants' statements as to the torture issue, citing 7RT 1737 and 1740. The trial court did grant a few of appellant's objections to the torture testimony: for example, at 7RT 1739-40, trial counsel made additional objections and the court granted the request as to three lines on page 15 but allowed another sentence in which the witness agreed that appellant "tortured." (7CT 1126-236.) Respondent says that "it does appear that at least part of the issue was settled by all parties agreeing that portions of co-defendants' testimony be

redacted." (RB, p. 162, citing 7RT 1740.) The matter certainly was not "settled" by "agreement" of the defense. As noted above, and in a citation provided in the Opening Brief, defense counsel objected "to the word torture throughout this section" of the witness's statement, on the ground that it was improper opinion testimony on the ultimate issue. (8RT 1725-26.)

In sum, appellant's objections were overruled and tape recordings of the statements, including the objected-to opinions about "torture" were then played for the jury, and the transcripts were admitted into evidence as well:

- Lori Smith's taped stated to the police was played for the jury. (33RT 9376-78, 9387 [see Exh. T-M, T-M-A and T-M-B at 40CT 10086 et seq. for contents of interview]. In this statement Lori said that appellant "started torturing" the victim. (40CT 10116.)

- Eric Rubio at 7CT 1146-306 told the police that appellant was "basically torturing" the victim. A tape recording of this statement was played to the jury at 33RT 9400. (See Exh. O-A at CT 10233.)

Respondent also quotes a portion of the cross-examination of Lori Smith as to her own actions in which counsel asked if she considered what she had done to be torture, and argues that the defense was able to cross-

examine as to what she meant by torture. (RB, p. 163.) Trial counsel's attempts to defuse the prejudicial impact of the objectionable portions of her testimony through cross-examination neither forfeit the issue nor cure the harm. As set forth in *People v. Calio* (1986) 42 Cal.3d 639, 643 "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."

As to the merits, respondent argues that the witnesses just "attempted to describe what they saw" in "specific language that they chose," and there "was no indication [that they] were asked for their opinion of what appellant did." (RB, p. 161.) Whether a statement is inadmissible opinion testimony does not depend on whether or not the victim is asked his opinion – rather the question is whether the statement made by the witness and the language used or chosen by the witness amounts to an improper opinion.

For example, if a witness were to testify that the defendant looked like he had premeditated his homicidal act, that would be improper opinion testimony, even if the witness chose the words, was describing what she saw, and was not asked her opinion as to premeditation. Respondent's arguments that the trial court properly

admitted the lay opinion testimony are thus unpersuasive.[4]

C. The Improper Opinion Testimony Prejudiced Appellant.

Respondent argues that any error should be deemed harmless because the trial court instructed the jury on the definition of torture, and also instructed the jury that "some testimony was presented for a limited purpose," and the jury is presumed to understand and follow the court's instructions. (RB, pp. 164-65.)

As to the limited purpose instruction, it certainly cannot be considered as curative in this instance, since the instruction was not given prior to the admission of the tapes and transcripts and the instruction did not specify that any portion of those tapes were admitted for a limited purpose. Thus, even presuming that the jury "followed" this instruction, it would not know that it could not consider the codefendants' statements that appellant "tortured" as proof that the torture special circumstance was true. (See 25CT 5924; 36RT 10291-02. [CALJIC No. 2.09: "Evidence Limited as to Purpose].) Nor can the fact that the trial court correctly defined the torture special circumstance allegation cure the harm. The

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[4] Respondent also maintains that the witnesses' statements were "incredibly relevant and probative." Again, respondent's ipse dixit assertions are not helpful. (See previous footnote 3.) The witnesses could properly describe what they saw, but even if a lay opinion on an ultimate question is "incredibly relevant" it is still inadmissible. (*Miron,* 210 Cal.App.3d at 583.)

witnesses' statements did not misdefine torture – rather they improperly concluded and opined that "torture" (as later defined by the court) had occurred. The statements prejudiced appellant because the codefendants were in effect permitted to tell the jury that the torture special circumstance was true, even though their conclusions were based not on what they saw but on their presumptions as to appellant's intent.[5]

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[5] Respondent also argues the statements should be considered harmless because Lori Smith did not "intend" to give an opinion on the ultimate issue. (RB, p. 163.) However, as set out above, the witness's intent is not the standard for measuring either the error or the magnitude of prejudice.

V. THE PROSECUTORIAL ERROR IN SHOWING TO THE JURY ENLARGED PROJECTED PHOTOGRAPHS OF THE VICTIM'S BODY IN THE GRAVE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. Appellant's Claim Was Preserved and There Was No Forfeiture of the Issue.

Respondent first argues that the claim of prosecutorial error is "forfeited" because defense counsel did not object to the enlarged photographs of the victim's body in the grave until after the prosecutor had (in violation of the court's order) projected them for the jury. (RB, pp. 164-65.) However, the trial court had ruled that no enlarged projections of photographs were to be shown to the jury unless the court had previously previewed the photographs. The prosecutor violated this order. (23RT 6210; see AOB, p. 208 & fn. 25.)

It does not matter whether the prosecutor inadvertently or mistakenly violated the court's order. Bad faith is not a prerequisite to a claim of prosecutorial error. (*People v. Hill* 1998) 17 Cal.4th 800, 822-23 & fn. 1.) Violation of a court order regarding evidence is clearly prosecutorial error. (*People v. Bell* (1989) 49 Cal.3d 502, 532.) The prosecutor has a duty to ensure that the law is obeyed. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649.)

Respondent next argues that the claim is "forfeited" as to prosecutorial error because defense counsel "did not request an assignment

of misconduct [] when the evidence was presented and did not request that the jury be admonished to disregard the alleged impropriety." (RB, p. 165.) Appellant disagrees. Appellant was surprised by the prosecutor's disregard of the court's order and objected immediately after the enlarged photographs were projected, during a recess occasioned by the jurors' "highly emotional state" (as described by the prosecutor). (32RT 9123-24.) At that point the trial court overruled the objections. Consequently, any request by defense counsel for assignment of error and admonition to the jury to disregard would have been futile. (See e.g. *In re Khonsavahn S.* (1998) 67 Cal.App.4th 532, 536-37 [excusing failure to object where defense counsel was surprised]; *People v. Hill*, 17 Cal.4th at 820 [prosecutorial misconduct for appeal despite failure to object or request admonition where either would have been futile].) Such was the case here. Where the visceral impact of the magnified projection was a surprise and the impact could not have been cured.

Respondent does acknowledge that the merits of the claim are properly before this Court on the basis of appellant's subsequent motion for mistrial.

B. The Prosecutor Violated a Court Order.

First, respondent incorrectly states that the court "did not order" that "the prosecution was not able to project those exhibits in front of the jury."

(RB, p. 169.) In fact, the trial court stated clearly that the prosecutor could project only the photographs it had already reviewed and allowed (which did not include Exhibits 17 and 26) and that "a violation of that [] could be grounds for a mistrial." (23RT 6210.)

Respondent next argues that after the prosecutor violated this order, the trial court denied appellant's mistrial motion because the prosecutor's actions were "not intentional," and that the record does not indicate any bad intent on the part of the prosecutor. (RB, p. 169.) However, as set forth immediately above, bad intent is not a prerequisite to a claim of prosecutorial error because the injury to the defendant occurs regardless of whether the prosecutor acted inadvertently or intentionally. (*People v. Hill*, 17 Cal.4th at 822-23 & fn. 1.)

Finally, respondent argues that the challenged exhibits were accurate and relevant, and thus admissible. (RB, p. 170.) This misses the point. Appellant's objection was not to the admissibility of the photographic exhibits per se, but to their display in projected images four-by-six feet large, rather than in an 8" by 12" size. (23RT 6207-11.) Similarly, off the mark is respondent's argument that after the photographs had been improperly projected on the giant screen, the trial court stated that it "would have admitted one of them." (RB, p. 171.) The trial court also found that the other was "cumulative." (41RT 11735.) Thus, at least one of the enlarged

photographs was improperly displayed to the jury even though the trial court deemed it cumulative.

Respondent does not address prejudice. Appellant submits that the prejudicial impact is dramatically established by the prosecutor's own actions in seeking a recess after showing the photographs because several of the jurors were in a "highly emotional state." (32RT 9101.) The trial court had also earlier described the enlarged projections as having a "huge" emotional impact. (23RT 6210-11.) The emotional impact was huge because the projections were larger than life-size, and thus made the reality underlying the photographs worse than the reality itself. Appellant should have been judged on the evidence, not on the magnification of the evidence.

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VI. UNNECESSARILY HARSH AND VISIBLE RESTRAINTS USED ON APPELLANT DURING TRIAL VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND DUE PROCESS, AND HIS EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Appellant does not argue that there was no showing of manifest need in support of the trial court's order to shackle him during trial; rather he contends that the use of a stun gun and visible shackles for nine consecutive hours which resulted in the infliction of pain and scarring violated his federal constitutional rights to due process and a fair trial, and to a reliable sentencing. (*Holbrook v. Flynn* (1986) 475 U.S. 560; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.)

Where the use of shackles injures and pains the defendant, the restraint is not only excessive but prejudicial. (*Rhoden v. Rowland* (9th Cir. 1993) 172 F.3d 633, 637.) This Court has recognized that shackles may affect the defendant's mental state during trial, and may also impair his ability to cooperate or communicate with counsel. (*People v. Hill* (1998) 17 Cal.4th 800, 846.; [physical shackling "inevitably tends to confuse and embarrass" the defendant's mental faculties].)

Respondent argues that appellant's claim that the jury saw the restraints is "an attempt to mislead" this Court. (RB, p. 181.) However, the trial court admonished the jury not to consider restraints. The courts have held that where such an admonition is given, "it is reasonable to infer that

the jury saw [the restraints]" as such advisements are "'given only when shackles are visible.'" (*People v. Miller* (2009) 175 Cal.App.4th 1109, 1115, quoting *People v. McDaniel* (2008) 159 Cal.App.4th 736, 744.)

VII. THE TORTURE-MURDER SPECIAL CIRCUMSTANCE FINDING MUST BE VACATED BECAUSE THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT IN VIOLATION OF APPELLANT'S FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS

The torture special circumstance requires proof that the murder was "intentional and involved the infliction of torture," which is further defined as the intentional infliction of cruel pain and suffering for the purpose of revenge, extortion, persuasion of for any sadistic purpose. (Section 190.2, subd.(a)(18); *People v. Elliot* (2005) 37 Cal.4th 453, 479; CALJIC No. 8.18.18.)

There is no contention or evidence that appellant killed in order to extort, persuade or exact revenge; thus in order to sustain the torture finding, the record must contain substantial evidence that appellant intentionally inflicted cruel pain and suffering for some other (unnamed and undefined) "sadistic purpose." The evidence at trial, and the prosecutor's argument at trial, was that appellant wanted to kill the victim because she "knew too much" or because they were annoyed by or tired of her. (26RT 7039, 27RT 2589, 28RT 7927; 28RT 7851; 37RT 10334, 10352.)

Respondent also refers to testimony by Lori Smith that appellant placed a garbage bag over the victim's head not to suffocate her but to muffle her screams of pain, thus showing an intent to torture beyond the intent to kill. (RB, p. 187, citing 28RT 7918 ["she was crying and screaming so we put a bag over her head"].) However, Lori herself contradicted this testimony in

her statement to the police in which – in which she said appellant put the bags around her head and suffocated her. (2CT 152.) Amy Stephens testified that she saw appellant put the bags on the victim's head and turned away; what she heard was a blow. She did not mention any screaming, or that the bags were put on to muffle screams. (27RT 7397-99.) Eric Rubio testified that the garbage bags were meant to suffocate the victim so she would die more quickly. (30RT 8427.) Respondent's argument is thus based on the statement of one out of three eyewitnesses, a statement not corroborated by anyone or anything else, and contradicted by the other witnesses and by Lori herself in her statement to the police.

In arguing the evidence is sufficient to support appellant's supposed intent to inflict cruel pain and suffering for any sadistic purpose, respondent cites as the "most notable" evidence of appellant's "sadistic purpose" his "decision to pour alcohol over [the victim's] deeply cut wrists." (RB, p. 187.) The argument fails in the first place because it misstates the testimony: the victim's wrists were not "deeply cut." To the contrary, the forensic pathologist testified that the wrist cuts were "superficial." (See RT 9221.)

Respondent also argues that evidence that appellant hit the victim in her hands "could only have been for the purpose of causing pain since such blows would not have caused her death." (RB, p. 198.) However, the

expert testimony was that the bruises on the hands were not as significant as the other bruises, and that no hands were broken. (33RT 9222, 9226.) Moreover, this ignores the reason why appellant was hitting the victim on her hands: he was trying to get her to kill herself by slashing her own wrists. Thus the hitting of her hands was an integral part of the homicidal act, i.e., a means of killing, and not an act separate from the homicide intended by appellant to inflict cruel pain and suffering for a sadistic purpose.

Whatever sadistic purpose means (see Arg. VIII, immediately below) it has to mean something other than or beyond the homicidal act. As to the pouring of alcohol over the wounds, although it might have caused pain to the victim, there is no evidence that appellant poured alcohol over the victim with a sadistic purpose, rather than to diminish the pain.[6]

Appellant begins with this point because respondent considers it the "most notable," and also because it shows the speculative nature of the "evidence" respondent claims shows appellant's intent to inflict "cruel pain and suffering for any sadistic purpose." (Pen. Code, § 190.2, subd.(a)(18).)

Nonetheless, respondent argues that appellant's tortuous sadistic

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[6] Respondent relies on Eric R.'s self-serving testimony that he told appellant to stop because he was "going too far" as supposed evidence of appellant's intent. (RB, 188.) The testimony may tend to show co-defendant Eric's desire to extricate himself from the act (as Eric most likely meant it to) but Eric's reaction does not demonstrate appellant's intent to torture.

intent was shown by testimony that he ordered the victim to kill herself by slashing her wrists, asserting that this "demonstrated a sadism that went above and beyond his desire to kill her." (RB, pp. 186-87.) Beyond asserting this as an ipse dixit, respondent does not explain how an attempt to facilitate a suicide amounts to an intentional infliction of cruel pain and suffering for a sadistic purpose.

Similarly, respondent's only explanation for the assertion that ordering/inviting the others to help kill the victim (as indeed Amy and Lori already had done before appellant's involvement) showed a torturous intent is that this sent a message that "the entire group was killing her." (RB, p. 187.) Respondent's arguments gloss over the elements of the special circumstance, which requires showing not just a "tortuous intent" as "demonstrated" by the defendant's words or messages. The prosecution must show that the cruel infliction of pain and suffering was for a tortuous intent. In any case, there is no evidence that appellant's desire that Amy and Lori share responsibility for the homicidal act (as they already did since they initiated it) showed an intent to inflict cruel pain and suffering for a sadistic purpose. If anything, the latter statements shows a desire that Amy and Lori rather than he inflict pain and suffering, for a purpose related to his own interests rather than for a sadistic purpose.

Respondent's arguments that appellant was "angry" or "mad"

during the incident showed a tortuous intent are particularly feeble. Intentional voluntary manslaughter (by definition in heat-of-passion manslaughter) is often committed by an angry defendant, but that anger does not transform manslaughter into torture or even tend to show a tortuous intent. Indeed, anger would tend to negate an intent to inflict torture for a sadistic intent, as sadism implies an act not in anger but for pleasure or gratification.inally, respondent argues that appellant "demonstrated his sadistic intent to inflict extreme pain" by telling the victim she was going to die anyway. (RB, p. 188.) Respondent does not explain how a statement amounts to an element of torture. Respondent argues that appellant's reliance on *People v. Mungia* (2008) 44 Cal.4th 1101 is misplaced because that case "distinguishable." (RB, p. 189.)

According to respondent, the "savage" injuries inflicted in *Mungia* did not suggest an attempt to torture apart from the intent to kill as there was no evidence the defendant in *Mungia* was angry or had a motive to inflict pain in addition to that of death. The same can be said of this case, however. The evidence of the co-defendants was that appellant (and the others) planned to kill the victim because she knew too much. Respondent suggests that appellant's "control" over the victim showed a "level of control and sadism [that] went beyond the killing" described in *Mungia*. (RB, p. 189.)

Appellant contends that respondent has added an element (that of control) to the definition of torture that does not exist in the statute or the case law. The bottom line is that the evidence in this case does not show that appellant deliberately inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering, as does the evidence in cases upholding the torture special circumstance finding. (See *Mungia*, 44 Cal.4th at 1137-38.) In particular there is no evidence that appellant was pleasured or gratified by his acts. A sadistic purpose require at least that.

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VIII. THE TORTURE SPECIAL CIRCUMSTANCE FINDING MUST BE VACATED BECAUSE THE TORTURE SPECIAL CIRCUMSTANCE IS INSUFFICIENTLY NARROW IN VIOLATION OF APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THE FOURTEENTH AMENDMENT GUARANTEE OF DUE PROCESS

Appellant contends that the torture special circumstance fails to perform the constitutionally mandated narrowing function. (*Furman v. Georgia* (1972) 408 U.S. 238; *Godfrey v. Georgia* (1980) 446 U.S. 520, 528.) The special circumstance is defined as an intentional murder intended to inflict extreme cruel physical pain and suffering upon a person for revenge, extortion, persuasion, "or any sadistic purpose." The latter phrase "any sadistic purpose" renders the special circumstance (and jury instructions based on it) unconstitutionally vague and overbroad, establishing a catch-all category into which virtually all murders could fall.[7]

Appellant acknowledges that this Court rejected a similar argument in *People v. Raley* (1992) 2 Cal.4th 870. (See AOB, p. 222.) *Raley* observed that there was no legal definition of the term "any sadistic purpose" that could provide guidance to the jury and the constitutional

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[7] Indeed, this vagueness and broadness is demonstrated by respondent's argument in response to the previous claim in which he argues that evidence that appellant was angry, that his statements to his sister and girlfriend to finish the victim off, and the facts that he encouraged the victim to kill herself, and muffled her screams with a plastic bag all indicated his infliction of cruel pain and suffering with a sadistic purpose.

narrowing function. *Raley* referred to various dictionary definitions of "sadistic" all of which related to sexual pleasure derived from pain: *Raley* involved a sexual assault, and that was the context in which this Court found the phrase constitutional. In this case, however, there was no evidence that appellant acted with any sexual intent, or in revenge, for extortion or persuasion.

With no guideline as to the meaning of sadistic outside the sexual context, on what facts could the jury rely to determine if appellant acted with "any sadistic purpose"? Indeed, how can this Court make the determination in this case, or any other case not involving sexual gratification? The jury instruction given in this case – requiring an undefined element which was left undefined – was thus inadequate to perform the constitutionally-required narrowing function.

Even the prosecutor was hard-pressed to marshall evidence in support of appellant's supposed sadistic intent, contenting himself with saying that "of course" appellant killed "for a sadistic purpose." (37RT 10342.) "Well, we could say revenge or other stuff, I don't know what is revenge if he thinks it's enough, because he doesn't like her, that's enough for revenge. Persuasion. There was some evidence that he was trying to persuade her not to tell on him for all those gas and go . . . . and what not.

She knew too much . . . . so maybe he was trying to persuade her, but clearly sadistic." (37RT 10342-43.) Appellant does not believe that a homicide based on not liking someone amounts to "revenge" sufficient to satisfy the sadistic purpose of the torture special circumstance. And the prosecutor is wrong that there was some evidence appellant was trying to "persuade her not to tell." The evidence was that she would have to be killed because she "knew too much," but not that she would be tortured to persuade her not to tell. The prosecutor's arguments are so broad and vague as to fit any motive to kill into the realm of sadistic purpose, thus supplying graphic proof of the void-for-vagueness constitutional defect of the torture murder special circumstance.

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IX. IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS EXCESSIVE IN VIOLATION OF THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THAT APPELLANT'S VICTIMIZATION BY HIS FATHER, INCLUDING REPETITIVE RAPES OVER A THREE-YEAR PERIOD WHEN APPELLANT WAS TWO TO FIVE YEARS OLD, RESULTED IN A "FIXED" BRAIN CHEMISTRY RENDERING HIM COMPARATIVELY UNABLE TO CONTROL HIS BEHAVIOR AND RESPOND APPROPRIATELY TO HIS CIRCUMSTANCES AND OTHER PEOPLE

(AOB, pp. 225-30; RB, pp. 191-197.)

Appellant maintains that a death sentence imposed on a boy 20 years old at the time of the crime, where that boy was himself the victim of repeated brutal biweekly anal rapes for three years when he was at the most tender and vulnerable ages of two to five, and that appalling sexual abuse resulted in permanent "fixed" brain chemistry that impaired his ability to control his emotions and behavior, is excessive under the Eighth Amendment as in *Roper v. Simmons* (2005) 543 U.S. 551 and *Atkins v. Virginia* (2002) 536 U.S. 304.

Respondent argues that the decision in *Roper v. Simmons*, 543 U.S. at 571 "is immaterial" because appellant was 20 years old at the time of the crime. (RB, p. 192.) Respondent misses the point. Appellant does not claim that his death sentence is unconstitutional because he was under the age of 18 at the time of the crime.

Rather, appellant maintains that appellant's death sentence is excessive under the rationale expressed in both *Atkins v. Virginia* (2002) 536 U.S. 304, 313-16 [execution of mentally retarded offenders prohibited by the Eighth Amendment because such offenders are less culpable due to their disability] and *Roper v. Simmons* (2005) 543 U.S. 551, 568-73 [juveniles' susceptibility to immature and irresponsible behavior renders them not as morally reprehensible as adults and their comparative lack of control gives them a greater claim to be forgiven for failing to escape negative influences]. *Roper v. Simmons* reiterates that the death penalty is to be confined to offenders whose extreme culpability make them "'the most deserving of execution.'" (543 U.S. at 553.)

Appellant is not the "most deserving of execution." As in *Atkins* and *Roper v. Simmons*, the death penalty is excessive punishment because appellant's culpability is substantially diminished by the horrific sexual abuse and neglect he suffered as a small child, which resulted in a fixed brain chemistry characterized by an impaired ability to control his emotions and behavior, which in turn gives him a greater claim to be forgiven for failing to escape the negative influences he suffered. (*Roper v. Simmons*, 534 U.S. at 553; *Atkins*, 536 U.S. at 319.)

Respondent argues that appellant presented insufficient evidence to support his claim that he was unable to control his behavior. (RB, p. 194.) Respondent cites testimony (1) by Dr. Washington that appellant

knew the difference between right and wrong, and had no major mental disorder or organic brain damage; and (2) by Dr. Shale that appellant did not suffer from depression, cognitive disabilities, or brain trauma. (RB, pp. 194-96.).

However, testimony on the particular claim here at issue was undisputed: that appellant was raised as a "feral child," and that as a very small child he was repeatedly brutally raped by his father over a three-year period; and that even though a traumatized adult may "get over" such abuse, a chronically traumatized child is different, because the chemical changes caused by his abuse occurred during the critical developmental period, so that his brain chemistry became "fixed." (47RT 13315-21.)

Respondent points out in a footnote that appellant "only remembered one incident of being sodomized by his father," when he testified at the penalty phase. (RB, p. 192, fn. 32.) That appellant may have blocked out his horrifying memories is hardly the point. Appellant's failure to remember the details of being anally raped by his father every two weeks for three years from the ages of two to five, while simultaneously being physically and emotionally neglected and abandoned by his mother, in no way refutes the evidence upon which appellant relies or his claim before this Court. Regardless of the vividness of appellant's memory of the abuse he suffered, that abuse changed the physiology and chemistry of that part of

his developing brain that controls emotions and his ability to control and modulate his emotions: the inability of his medulla to stop production of neurotransmitters was responsible for his irrational and aggressive behavior. (45RT 12765-66, 12771-78; 47RT 13293.)

Relying on *People v. Poggi* (1988) 45 Cal.3d 306, 348, respondent contends that even if appellant did have brain damage, his death sentence would not violate the Eighth Amendment.[8] *Poggi* predates the United States Supreme Court opinions in *Atkins v. Virginia* and *Roper v. Simmons* upon which appellant's argument relies, and is thus not dispositive.

Respondent points out that Dr. Woods, although he testified that appellant's mental disorder impaired his ability to conform his behavior to the law, did not testify that appellant was not legally responsible for his actions. (RB, p. 194.) Dr. Woods did not so testify; if he had, it would have been evidence of insanity. But Dr. Woods is a psychiatrist specializing in trauma issues, not an expert in Eighth Amendment jurisprudence and the recent cases of *Atkins* and *Roper v. Simmons*. The fact that Dr. Woods did not testify that appellant was legally insane does not refute appellant's argument here.

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[8] *Poggi* held that the defendant's death sentence was not disproportionate to his culpability despite his mental illness at the time of the crime, given that the defense psychiatrist had testified that his mental illness was not of such a nature and degree as to negate his criminal culpability. (*Ibid.*)

Respondent claims that appellant's citation to *Kennedy v. Louisiana* (2008) 554 U.S. 407 is "confusing" since the question in that case was whether the death penalty could be imposed for rape of a 12-year-old child. (RB, p. 192, fn. 32.) Again, respondent has missed the point although it was expressly made in Appellant's Opening Brief.

The point bears repeating: *Kennedy v. Louisiana* is informative on the claim raised here because it recognizes that even a single rape of a 12-year-old child "has a permanent psychological, emotional, and sometimes physical impact on the child." (*Id.* at 435.) The dissent (which would have upheld the death penalty for a single act of rape against a child) emphasized that sexual abuse is "'grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development in ways which no just or humane society can tolerate.'" (*Kennedy*, 554 U.S. at 468 [Alito, J., dissenting].)

We as a society should not have tolerated the abuse and neglect suffered by appellant as a child, but we did. We as a society should not now tolerate putting him to death for conduct that can be directly attributable to the traumatic sexual abuse he suffered as child.

X. APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR SWIFT BASED ONHER VIEWS ON THE DEATH PENATLY, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Respondent's Forfeiture Argument Is Based On an Inaccurate Reporting of the Record Facts.

Respondent argues first that appellant has forfeited this claim because "there is no indication in the record that appellant objected to the excusal of Ms. Swift for cause." (RB, pp. 199-200.) Respondent suggests that "defense counsel's agreement to stipulate to her removal could be implied from her responses to her questionnaire." (RB, p. 203.) Respondent's argument is apparently based on a problem with the computerized record. (See Request to Include 30 Missing Pages in the Computer-Readable Copies of Volume 19, filed simultaneously with this brief.)

As set out in the Opening Brief, when the trial court stated its intention to excuse Ms. Swift, defense counsel expressly refused to stipulate (even though he had stipulated to other excusals) to her excusal, and argued that she said she could try to follow the law and set aside her scruples about the death penalty. (19RT 5232.)

> "THE COURT: I have another one I was looking at, counsel. That's Ms. Swift. . . . Let's start with Ms. Swift.
>
> [DEFENSE COUNSEL]: **The reason I would not stipulate** is

because of question 110, asks if she could set aside and follow the law and she answers, yes, I would try." (19RT 5232; emphasis provided.)

Defense counsel reiterated that she should not be excused because she "left the door open that she c[ould] do her duty as a juror." (19RT 5233.).

The claim is not forfeited. Defense counsel explicitly refused to stipulate to Ms. Swift's excusal for cause and repeatedly argued that she could be a fair and impartial juror. (See *People v. Scott* (1978) 21 Cal.3d 284, 290 [an objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide; despite inadequate phrasing, an objection is deemed preserved if the record shows that the court understood the issue presented].)[9]

Respondent argues at some length as to why defense counsel "stipulated to Swift's excusal as a potential juror in this case." (RB, p. 203.) However, the record shows that defense counsel did not stipulate to Swift's excusal but explicitly refused to stipulate and argued to the court why she should not be excused for cause. Respondent's forfeiture argument is based on an error in the computer-readable record of Volume 19 which is missing the last 30 pages. (See Request to Include Missing 30 Pages in Computer-

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[9] Moreover, a lack of objection does not preclude the defendant from raising on appeal the deprivation of a fundamental constitutional right. (*People v. Vera* (1997) 15 Cal.4th 269, 276-77.)

Readable Copy of Record, filed simultaneously with this brief.)

B. Respondent Speculates That the Prospective Juror Could Have Been Excused for Hardship.

Respondent also argues that since Ms. Swift complained of hardship in her questionnaire, she could have been excused on that basis. (RB, p. 200.) But surely the point is that she was not excused for hardship. Wrongful excusal of a fair and impartial juror for cause is not assessed like a question of evidence. Respondent's argument is speculative. Ms. Swift was not excused for hardship and was improperly excused as biased. The question before this Court is whether the trial court erred in excusing her and not whether the trial court might have properly excused her for hardship had that claim been made.

C. Prospective Juror Swift Was Wrongfully Excluded as a Juror.

Respondent notes that a prospective juror can be disqualified on the basis of her responses on the jury questionnaire alone "if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (RB, pp. 200-201, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424, *People v. McKinnon* (2011) 52 Cal.4th 610, 646, and *People v. Avila* (2006) 38 Cal.4th 491, 531.)

Appellant does not disagree with the general proposition but does

contend that Ms. Swift's responses on the questionnaire did not make it clear that she was unwilling to follow the law. Respondent provides selective quotations from the responses in Ms. Swift's questionnaire in his attempt to shoe horn her into such a framework but ignores her questionnaire responses (1) that she was willing to deliberate with other jurors about the evidence; (2) that although she would be "uncomfortable" with jury instructions that might differ from her own beliefs, she would be able to set aside any opinions she might have had before the trial and could make a decision based solely on the evidence presented; (3) that she denied having any biases or prejudices or preconceived ideas that might affect her judgment in the case; (4) that she agreed to limit her decision as to death or life without possibility of parole to the specific factors on which she would be instructed; (5) that she answered "Yes" and "I will try" to whether she could set aside her personal feelings about the death penalty and follow the law regardless of whether she agreed or not; (6) that although she did state that she would always vote for life, she also answered "yes" when asked if she could change her vote if she became honestly convinced she was wrong; and (7) that despite that she felt uncomfortable judging the case as a juror, and complained about pain in her wrist and childcare, she reiterated that she would serve as a juror, although given a choice, she would "rather not." (57 CT 15013-14, 15016;

5021-23.)

Thus, under the case law cited by respondent it cannot be said that "it is clear from the answers that [prospective juror Swift was] unwilling to temporarily set aside [] her own beliefs and follow the law." Consequently it was error to excuse Ms. Swift on the basis of her questionnaire alone, and the constitutional error requires reversal of appellant's death sentence.

D. Appellant's Death Sentence Must Be Reversed.

As set out in the Opening Brief, wrongful dismissal of a prospective juror in violation of Witherspoon requires reversal of appellant's sentence of death. (See AOB, pp. 241-42.) Respondent argues only the false "forfeiture" of this claim, and (incorrectly) that the prospective juror could have been excused on her questionnaire answers alone, and does not address the standard for reversal. Appellant contends that his failure to do so is a concession that Witherspoon error requires reversal of the death sentence. (Compare *People v. Adams* (1983) 143 Cal.App.3d 970, 992 [prosecution's failure to address prejudice is deemed a concession that if error occurred, it was prejudicial].)

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XI. THE TRIAL JUDGE COMMITTED JUDICIAL MISCONDUCT AND THEN COMPOUNDED THE ERROR BY HOLDING A HEARING INTO HIS OWN CONDUCT, REFUSING TO INQUIRE OF THE JURORS, AND REFUSING THE DEFENSE REQUEST FOR A HEARING BEFORE AN IMPARTIAL JUDGE, THEREBY VIOLATING APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND DUE PROCESS AND HIS EIGHTH AMENDMENT GUARANTEE OF A RELIABLE SENTENCING

A. Judicial Misconduct Can Be Shown Through Wordless Conduct, Including Gestures and Expressions.

Respondent argues first that no judicial misconduct occurred because the judge made no "comments that discredited the defense," and because the allegations consist "entirely of supposed facial expressions" and "body movements," conduct which "was susceptible to a multitude of interpretation." (RB, p. 219.) Respondent cites no authority for his implied assertion that judicial misconduct occurs only with comments and not with gestures or expressions. Appellant, on the other hand, provided specific authority holding that facial expressions, gestures and other wordless conduct can constitute improper judicial bias. (See AOB, pp. 251-53 and cases cited therein, including *People v. Harmon* (1992) 7 Cal.App.4th 845, *People v. Franklin* (1976) 56 Cal.App.3d 18, and *People v. Walker* (1957) 150 Cal.App.2d 594.)

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B. The Trial Judge's Refusal to Permit an Impartial Hearing and to Inquire of the Jurors Violated Appellant's Federal Due Process Rights.

Respondent argues that no evidentiary hearing was required on the allegations of judicial misconduct, and that an impartial adjudicator was not required to determine the matter. Appellant addresses each in turn.

1. An impartial adjudicator is fundamental to a fair hearing.

Respondent complains that appellant cites no authority "that mandates that a judge have another judge sit in his or her place when the issue of impartiality is still contested." (RB, 226.) However, Appellant's Opening Brief cited *Haas v. County of San Bernadino* (2002 27 Cal.4th 1017, 1025, for the proposition that when due process requires a hearing, the adjudicator must be impartial." [10] Moreover, both appellant and respondent cite *Bracy v. Gramley* (1977) 520 U.S. 899 which holds that due process requires a fair trial by a fair tribunal before a judge with no actual or interest in the outcome. (See AOB, pp. 253-54, RB, p. 218.) An adjudicator who sits on the question of his own credibility is, by definition, not impartial and has an interest in the outcome. [11]

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[10] Appellant also cited Code of Civil Procedure, section 170.3, subd. (5) which provides that a judge "who refuses to recuse himself [] shall not pass upon his or her own disqualification," and that the question "shall be heard and determined by another judge." (AOB, p. 253.)

[11] See also *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 178, fn. 13, discussed in AOB at pp. 253-54, fn. 14.

Respondent addresses the procedural aspects of recusal motions under Code of Civil Procedure, section 170.3. (RB, p. 226.) However, the claim before this Court is not recusal but judicial misconduct and the trial court's refusal to permit a hearing before another judge as to the disputed facts regarding the judge's own misconduct. Appellant considers respondent's argument pro forma only, for certainly he cannot be arguing that due process permits a trial judge to impartially determine facts involving his own credibility, and dismissing facts that he had no reason to doubt on the basis, at least in part, on his own statements and descriptions of his conduct and intentions, which is what happened here.

2. A hearing is required, where, as here, there was substantial evidence refuting the judge's own account of the challenged conduct and there were discrepancies to be resolved.

Respondent cites *People v. Chatman* (2006) 38 Cal.4th 344, 364 for the proposition that an evidentiary hearing wasn't required in this case. (RB, p. 227.) The decision requires closer scrutiny. In the first place, the motions to disqualify the trial judge in *Chatman* (the first for bias because the judge's daughter had been a robbery victim year earlier, and the second because the victim's father and the judge had a discussion after the conclusion of the penalty phase trial) were heard by different judges – and

not like here, the same judge whose misconduct was questioned. (*Id.* at 360.)

Chatman involved conduct that occurred after the penalty phase verdict, and thus, as pointed out by this Court, "[n]o reasonable person would doubt that a judge could remain impartial merely because of a brief encounter that the murder victim's father initiated after the penalty verdict." (*Id.* at 365.) Here, the conduct occurred in the middle of mitigating testimony by an important defense expert. Moreover, the misconduct alleged involved the judge personally and not an encounter initiated by another. Reasonable people in these circumstances could and did doubt that the judge was impartial.

The procedure followed in *Chatman* was correct: the challenged judge did not consider his own credibility. Unfortunately, that procedure did not occur in this case. Consequently, appellant maintains that the trial judge's refusal to permit a hearing by an impartial adjudicator (even though he had initially ruled that another judge should hear the motion), and the trial judge's decision to make a credibility determination as to his own credibility, violated appellant's federal due process right. (See AOB, pp. 253-56.)

Although respondent tries to align the facts of this case with those in *Chatman*, in which this Court held that no evidentiary hearing was

required, a closer look reveals that *Chatman* is inapposite. In *Chatman,* the defense claimed judicial misconduct because (after the penalty verdict) the trial judge had a conversation with the victim's father (who had testified) in which the judge said he "knew how hard it was for [the victim's father]." This allegation was supported by a declaration from a man who had been in the courtroom which stated that the man could not recall whether the victim's father or the judge spoke first, and did not "remember what was said verbatim or what else was said" in the 40-second encounter. On the other hand, the judge stated that the victim's father had "accosted him" to apologize for his wife's conduct (she had lost her composure during her testimony; for his part, the judge acknowledged the father's concern, but cut the conversation short. (*Id.* at 361-62.) This Court rejected the defense contention that the judge who heard the matter (who was not the trial judge whose conduct was at issue) needed to conduct an evidentiary hearing to "resolve discrepancies" because there were no discrepancies. Rather, the two accounts were "not inconsistent," in that Aaron's observations were fragmentary but "contained nothing to cast doubt" on the judge's more complete account. (*Id.* at 361-62.)

Here by contrast, the evidence casting doubt on the trial judge's account was ample. Even the judge made contradictory statements, first

saying he "certainly wouldn't know" if he had made the gestures the others saw as he wasn't "looking in a mirror." (47RT 13346.) The next day, the judge acknowledged that he had made some "normal" facial expressions, such as pursing his lips to mask a reaction, and furrowing his brows. However, witness Masterson, investigator Wooden, and attorneys Jen and Swartz all saw him rolling his eyes, showing disbelief or a negative expression, and Swartz testified that he saw the jurors looking at the judge while he made such grimaces. The prosecutor, and the judge's bailiff (who testified at the judge's suggestion) did not testify that the judge did not make such gestures, only that they did not notice them. The evidence showed a clear factual dispute -- with three witnesses having seen negative facial expressions, two not noticing anything unusual, and the judge stating he had just acted normally – that could only be resolved by an evidentiary hearing. Here, the judge whose misconduct was at issue simply decided to believe himself, without holding a hearing by an impartial adjudicator. (48RT 13652-54.)

In other words, in this case, the same judge whose conduct was required because there was no threshold showing that the judge made gestures outside of his "normal" range of expressions even though (1) witnesses had testified that he did, (and the judge stated he had no basis for discrediting their testimony); and (2) only the judge himself had stated that

whatever he did was "normal" for him. The judge, sitting in judgment on himself, finessed the matter by holding that despite the credible testimony regarding his in-court expressions of disbelief, these expressions were, in his own opinion of himself, "normal" for him.

The reasoning is questionable at best. In the first place, the judge did not see his own expressions. All of those who did see his expressions described them the same: he was rolling his eyes and expressing disbelief or a negative reaction. Secondly, the judge's intentions are not at issue: the judge distinguished his own actions from the cases of prejudicial judicial misconduct, on the basis that they involved "clear signals" from the judge rather than his own "normal body language." (48RT 13653.) Appellant contends that as with prosecutorial misconduct or error, the crux of the matter is not whether the judge acted intentionally, since the jury would be affected whether intentional or inadvertent. (*People v. Hill*, 17 Cal.4th at 822-23 & fn. 1.)

Of course, it was only the judge himself who claimed that his gestures were "normal," and the claim – when viewed against the array of witnesses who testified under oath – is difficult to accept. Some of the witnesses had sat through many days of testimony, including testimony by defense witnesses and experts, with the judge. If the judge had been making only his "normal" gestures during Dr. Woods' testimony, then he must have

made such normal gestures other times during the weeks of testimony by prosecution and defense witnesses. Why would four people suddenly all observe the same negative expressions by the judge only at this time? Attorney Swartz and witness Masterson were not in the courtroom throughout the trial, but Mr. Jens was present at all times, and Mr. Wooden, as the designated investigator had observed the trial and was taking notes. (49RT 13572.)

In conclusion, the unexamined judicial misconduct deprived appellant of a fair trial and requires reversal.

C. The Unadjudicated Misconduct Requires Reversal of Appellant's Death Sentence.

Respondent argues that the prejudicial impact of any misconduct was "cured" by the "curative instructions" the trial court gave. (RB, p. 227.) Appellant foresaw this assertion and set out in Appellant's Opening Brief the wealth of case law rejecting the notion that an admonition to disregard is sufficient to eradicate the prejudicial impact. (See AOB, p. 259 and cases cited therein.) As the United States Supreme Court observed years ago, "The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453.)

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Respondent also suggests that any misconduct was harmless because two other experts, Dr. Myla Young and Julie Kriegler testified, as did Dr. Woods as to brain development and how appellant's background could have affected his decision making process. (RB, p. 228.) If respondent is correct in asserting that all three expert witnesses testified to the "same" facts and opinions, then the judge's facial expressions during Dr. Woods' testimony were more and not less prejudicial, i.e., jurors observing the judge while Dr. Woods was testifying would conclude that the judge had a similar reaction or opinion to the testimony of the other experts on the same subject matter. Appellant contends that the error was structural and defies harmless error analysis. Respondent does not address this argument. Appellant refers the Court to his argument in the Opening Brief. (AOB, pp. 260-61.)

D. The Trial Court's Misconduct and Ruling Violated Appellant's Eighth Amendment Right To a Reliable Sentencing Determination.

Respondent argues that appellant's Eighth Amendment reliability claim must fail because the assertion by appellant, citing to the testimony of attorney Russell Swartz, "that the jurors observed the judge on several occasions while he was grimacing, lacks any substantiation." (RB, p. 228.)

In the first place, appellant's Eighth Amendment claim does not cite nor does it rely wholly on testimony by attorney Russell Swartz. (See AOB, pp. 261-62.) Rather, the claim is that "because the facts show that the trial judge did make negative facial gestures during testimony by a critical

mitigation witness, and the jurors were never examined as to what effect seeing such gestures had on then, and the misconduct alleged was never adjudicated by an impartial tribunal, the resulting death sentence is not as reliable as required by the Eighth Amendment." (AOB, p. 262.) Appellant did summarize Swartz' testimony earlier in his argument.

Appellant reiterates that this testimony supports the claim of judicial misconduct. Swartz' testimony that the jurors looked at the judge on several occasions when Swartz himself observed the judge making dismissive gestures does indeed amount to evidence that at least some of the jurors observed the judge's grimaces. If the judge was grimacing, and jurors looked at the judge, it can certainly be inferred that the jurors observed the judge grimacing.[12] It may be circumstantial evidence, but that is sufficient: there is no requirement that direct evidence (which could only come from the jurors) be provided.

Respondent highlights testimony by Swartz that he could not "interpret" what it meant when the jurors looked at the judge. (RB, p. 228.) As a lawyer, Swartz knew that he could testify only to his observations and not the thought processes of others. However, Swartz also that he himself felt that the jurors might be influenced by the judge's expressions which

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[12] Respondent points out that jurors are presumed to follow instructions. Appellant maintains that we can also infer that if jurors look at the judge, they see the judge.

was why he brought the matter to the attention of counsel. (48RT 13566.)

Respondent concludes that "contrary to appellant's assertions here," there is "absolutely no evidence that the jurors noticed or placed any emphasis on the alleged conduct by the judge during the testimony of Dr. Woods" and thus no indication "the jurors based their sentence finding on the judge's alleged mannerisms." (RB, pp. 229-29.) Respondent mischaracterizes appellant's argument: as stated above, appellant's Eighth Amendment claim is based on the facts showing that the trial judge did make negative gestures during critical mitigation testimony, and that the jurors were never examined as to what effect seeing those gestures had on them, and that the misconduct alleged was never adjudicated by an impartial tribunal.

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Without citation to any authority, or any discussion of the authorities provided by appellant, respondent once again makes an ipse dixit argument that unless appellant can show (through direct evidence no less) that the jurors were influenced to sentence appellant to death by the judge's facial expressions, then there is no Eighth Amendment claim of unreliability. Appellant disagrees. In any case, as set out immediately above, the record does contain circumstantial evidence that the jurors noticed the judge's negative gestures during Dr. Woods' testimony. Moreover, the standard for reliability of sentencing under Eighth Amendment does not require appellant to prove that the jurors based their death penalty decision on the fact that the judge grimaced during mitigation testimony. Because of the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Monge v. California* (1998) 524 U.S. 721, 732 [High Court recognizes an "acute need for reliability in capital sentencing proceedings"].) Thus, any error creating a risk that the jury verdict of death is not reliable raises an Eighth Amendment question.

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Appellant contends that appellant's death sentence does not meet this standard of "acute need for reliability in capital sentencing proceedings" because, as the facts do show (1) the judge made negative facial gestures during testimony by a critical mitigation witness, (2) at least some of the jurors looked at the judge during this time, thus supporting an inference that they saw the negative dismissive gestures, (3) the trial judge refused to allow examination of the jurors (even though he had initially proposed doing exactly that) so appellant was precluded from obtaining information as to the effect that seeing such gestures had on them, and (4) the misconduct was not adjudicated by an impartial tribunal (even though the judge initially suggested that would be appropriate). Appellant contends that these four factors render the sentence of death unreliable because it cannot be determined that the jurors were not influenced by the judge's actions. Consequently, this Court must vacate the death sentence as unreliable under the Eighth Amendment.

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XII. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY, AND A RELIABLE SENTENCING DETERMINATION BY FAILING TO EXCUSE JUROR NUMBER 11 FOR MISCONDUCT DURING PENALTY PHASE DELIBERATIONS AND FOR DENYING THE NEW TRIAL MOTION BASED ON MULTIPLE INSTANCES OF SERIOUS JURY MISCONDUCT

A. JN 11 Committed Misconduct by Discussing JN 6's Notebook with JN 6 And the Jury Coordinator.

(AOB, Part C, section 3, pp. 279-81; RB, pp. 243-45.)

According to respondent's reading of the record, the jury coordinator's sworn testimony merely "assumed" that JN 11 heard former JN 6's objectionable comments. (RB, p. 244-45.) Respondent is wrong. When asked if JN 6's statement was "within hearing range" of JN 11, the jury coordinator answered, "Most definitely." She elaborated: "They were standing right next to each other. I was seated in a chair at the bar there in the cafeteria, and I had turned around and they were both standing right in front of me, and she definitely heard everything that was said." (50RT 14356; emphasis provided.) The prosecutor then asserted: "It's just your opinion that she heard what she said . . . . You don't know for a fact whether or not she did actually hear what was said?" The jury coordinator responded, "Well, she was standing right next to her when it was said. I heard it, and I'm assuming if I heard it she would have heard it as well. We were [in] very close proximity to each other. I mean, literally my knees

were almost touching the two jurors, so she would have been completely ignoring the entire conversation to not hear what was said." (50RT 14356-57.)

Appellant contends that the jury coordinator's testimony is more than sufficient to establish that JN 11 heard JN 6's objectionable comment. Indeed, the trial court itself found that JN 11's statement that she did not hear the comments by JN 6 "conflicted" with the jury coordinator's testimony, which can only mean that the coordinator testified that JN 11 did hear the comment. (See 50RT 14367.) Moreover, when recalled before the judge after the jury coordinator's testimony, JN 11 admitted that she "barely heard" JN 6's statement about "a word in [her] notebook she didn't want anybody to read." (50RT 14366.) Although JN 11 tried to minimize the fact ("barely") her testimony was that she did hear. Furthermore, her ability to recount the general content of JN 6's negative comment (a word in her notebook she didn't want anyone to read) shows that she did hear JN 6's conversation with the jury coordinator – either that, or she had a prior or previous conversation with JN 6 apart from the jury coordinator, even though she denied that.

Respondent also mistakenly claims that the other jurors' declarations "refute" appellant's claim that JN 11 knew about former JN 6's comment about appellant. (RB, p. 245.) First, JN 11's own statement shows that she

did know that former JN 6 had a "word" in her notebook that she didn't want anybody to read (after first claiming she heard nothing about former JN 6's notebook). Secondly, respondent's reasoning is flawed. He argues that new JN 6 declared that JN 11 did not describe and said she did not hear the communication between former JN 6 and the jury coordinator. This does not show that JN 11 did not hear that conversation, only that she denied hearing it. And at this point, former JN 6 having been excused from the jury, JN 11 knew that knowledge of the contents of that communication would be trouble for her as well. These negative facts (that JN 11 denied knowing and did not disperse the contents of former JN 6's notebook comments) prove nothing. JN 11's failure to repeat the objectionable comments to the other jurors does not support respondent's claim that "there is no indication that Juror 11heard former Juror 6's comment about appellant." (RB, p. 245.) In fact, the indications are manifold, as elaborated above in this paragraph.

Respondent's parting shot is that because appellant's claim is all "speculation," the trial court's credibility finding on this point is "entitled to great weight." (RB, p. 245.) As shown above, appellant's argument is based on record facts that respondent chooses to ignore. Moreover, the trial court's credibility finding should not be deferred to by this Court, because the trial court also disregarded the fact that JN 11's statements were

internally inconsistent, in that she denied hearing or have conversation with JN 6 at first, and then admitted that did she "barely hear" something JN 6 said, and her explanation showed she was privy to the contents of JN 6's statement which included a bad word about appellant. (See AOB, p. 280.)

In sum, the record shows as a demonstrable reality that JN 6 heard JN 11's negative description of appellant, either when JN 6 talked to the jury coordinator, or at some other time; in either case, it was misconduct the discussion with JN 6 outside of deliberations was misconduct. (AOB, Part C, section 1, pp. 272-76; RB, pp. 247-48.)

Appellant contends that JN 11 purposefully concealed in voir dire the fact that she had been sexually abused as a child, thus committing misconduct.

Citing to *In re Hitchings* (1993) 6 Cal.4th 97, 110-11, respondent agrees that concealment of relevant facts during voir dire may constitute misconduct. Nonetheless, he argues that it is "highly questionable" whether JN 11 "intentionally concealed relevant information," and that a juror should only be excused if she is "sufficiently biased" that she is unable to perform her duty. (RB, p. 247.)

Respondent makes a mighty effort to fit the facts into the category of "inadvertent" rather than "intentional" concealment of facts during voir dire, presumably because intentional concealment is misconduct raising a

presumption of prejudice, *People v. McPeters* (1992) 2 Cal.4th 1148, 1175, whereas inadvertent concealment is only considered misconduct if the juror is deemed sufficiently biased so as to be able to perform her duty. (RB, p. 245.) Thus, respondent tries to align the facts of this case with those in *People v. Wilson* (2008) 44 Cal.4th 758, 823.) The attempt fails.

In *Wilson*, the juror in question "affirmed during voir dire that he would not consider defendant's race to benefit or disadvantage him . . . . When questioned during the penalty phase [after allegations of misconduct surfaced], he affirmed his views, explaining that he viewed the mitigating evidence favorably because defendant came from a broken, disadvantaged family, not simply because he was African-American." (*Ibid.*) The trial court had concluded that the juror had concealed race-based assumptions about young African-American men who grew up without strong positive male role models. However, this Court observed that the juror "was never asked about that subject" and thus did not conceal his views about them (and his failure to express his views on African-American family dynamics is not the kind of concealment that would justify his removal in any case). (*Id.* at 823-24.)

Respondent relies on Wilson to argue that there was no intentional concealment in this case because JN 11 "was never asked whether she would interpret evidence of any abuse defendant may have offered as a

child 'through the prism of [her] own experiences.'" (RB, p. 247.) Respondent's facts are incorrect and his reliance on Wilson misplaced, because on the jury questionnaire JN 11 was indeed asked whether she, a close friend, or relative had ever been a victim of a crime. She answered yes but left blank the questions about who, what crime, and when. (78CT 20470.) When she was asked about this in voir dire, JN 11 answered that "it was my sister" who had taken "bad drugs" and was institutionalized for awhile. (16RT 4363.)

In short, JN 11 was asked about being a crime victim and she concealed the information about her own sexual abuse, then in penalty phase deliberations told the other jurors that she had been severely abused and brutally raped, like appellant, but unlike him, she had never killed anyone. (27CT 6576, 6583.) The brutal treatment JN 11 suffered as a child could not have been innocently or inadvertently "forgotten" when she was asked whether she was a victim of a crime, when it so easily came to mind during penalty phase deliberations.[13] Moreover, although she answered "yes" on the questionnaire without explanation, when asked for an

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[13] Moreover, in the questionnaire she had also given her opinion of Child Protective Services, stating that "protecting a child is a good thing." (78CT 20468.) This question and answer would certainly have triggered her memory of her own tragic abuse (even assuming that she had momentarily and inadvertently forgotten about it when asked whether she or someone close to her was a crime victim.

explanation of the victimization she reported an incident about her sister which did not seem to be a crime. And JN 11 obviously remembered the incident vividly at the time of penalty phase deliberations – indeed she brought up her own abused childhood twice, once during the initial deliberations, and again after the new JN 6 joined the group and deliberations were to begin anew. (27CT 6576, 6583.)

Respondent quotes this Court's discussion in *Wilson* that "it is unrealistic to expect jurors to be devoid of opinions, preconceptions or even deep-rooted biases derived from their life experiences" in diverse racial or ethnic or religious groups, and then concludes that '[a]s such, appellant cannot demonstrate that juror 11's failure to disclose [her] prior victimization was intentional in any way." (RB, p. 248.) The leap to this conclusion lacks logic. Granted that jurors in a diverse society have diverse opinions and preconceptions and can be expected to use their life experiences when evaluating the evidence. (*Wilson*, 44 Cal.4th at 833, citing *People v. Bell*, 49 Cal.3d at 564.) But it certainly does not follow that a juror who is asked whether she or anyone close to her was a crime victim, and then fails to reveal that she herself was a victim of a severe and brutal crime (that she remembered in dramatic and prejudicial fashion when deliberating at penalty phase) should be deemed to have "inadvertently"

concealed that information at voir dire.

In this case, JN 11 was asked a specific and relevant question and she concealed the answer. This is far different than what happened in *Wilson*, where the consensus of the trial court and this Court was that the juror "was himself unaware" of any race-based assumptions, and so could not be deemed to have intentionally concealed them. (*Id.* at 824.) JN 11 was more than aware of her victimization and her remarks in deliberations showed that was biased against appellant because she had managed to survive that victimization. *Bruton v. Johnson* (10th Cir. 1991) 948 F.2d 1150, 1159 reversed a murder conviction in identical circumstances, i.e., the juror failed to reveal her own sexual abuse during voir dire then discussed that experience during deliberations. The Tenth Circuit observed that the juror's dishonesty was itself "evidence of bias," and this Court should find the same.

B. JN 11 Committed Misconduct by Discussing The Case with Former JN 6 After She Had Been Excused and then Repeating Former JN 6's Comments to the Deliberating Jury.

(AOB, Part C, section 2, pp. 276-79; RB 248-50.)

Respondent argues that the unauthorized communication between former JN 6 (after she had been excused from serving on the jury) and JN 11 (while she was still deliberating) should be "taken into context." Respondent then provides his own context. He interprets the comment of

"remember the work we've already done" (according to JN 3) as "words of encouragement" to the jury; and the comment "don't forget everything I've done" according to new JN 6) as "encourag[ing] the remaining jurors to deliberate fairly and in an organized manner," since JN 6 was the former foreperson. (RB, p. 249.)

Respondent contends that neither comment, as he reformulates them, constitutes misconduct: First, because the communicator was the former foreperson of the jury, which, according to respondent (who cites no authority for the assertion) does not carry the "stigma of a third party who has an actual stake in the outcome." (RB, p. 250.) Secondly, respondent argues the communication was not misconduct because "it did not order the jurors to vote a certain way" and more importantly, the communication did not "discuss the guilt or innocence" or "impart any information about the case." (*Ibid.*)

Appellant contends that the Penal Code is of more value to this Court in evaluating this issue than the "context" and interpretation supplied by respondent that are wholly devoid of citation to any statutory or case authorities. Penal Code section 1122, subdivision (a) forbids jurors to discuss "any subject connected with the trial" with either sitting jurors or non-jurors outside of deliberations. The trial court repeatedly instructed the jurors not to discuss "anything even connected with this case" until after the

case was submitted and all 12 jurors were deliberating. JN 11 was a sitting juror and former JN 6 was a non-juror. Their discussion focused – even in the interpretation provided by respondent – on a "subject connected with the trial," i.e., the deliberations themselves. Whether former JN 6 referred to "work" they had done while she was a juror, or "work" she had done as a juror and foreperson, the "work" can only be understood as the evaluation of the evidence and the deliberative process. Moreover, when JN 11 repeated former JN 6's admonition to "remember" or "not to forget" the "work already done," the communication directly violated the trial court's instruction to the newly formulated jury to begin deliberations anew and not to rely on former deliberations.

Respondent mistakenly focuses on the communication by former JN 6: but it is JN 11 who committed the misconduct. At the time of the communication former JN 6 was no longer a juror; but JN 11 was, and she was still in deliberations. Therefore, JN 6 violated the trial court's order not to discuss any subject connected with the case, and committed misconduct by speaking about the case with JN 6, and then again by repeating JN 6's comment to the other deliberating jurors.

Furthermore, there is no exemption to the mandate of Penal Code section 1122, despite respondent's implication to the contrary, for communications by former jurors to sitting jurors, or to communications

about matters connected to the case but not directly about guilt or innocence (in any case this was the penalty jury).

People v. Wilson, 44 Cal.4th at 839-40 held that a "technical" violation of section 1122 and the trial court's admonition were not grounds for excusing a sitting juror who made solitary and fleeting comments to a fellow juror in the hallway, because they were "trivial" and not made "in an obvious attempt to persuade anyone." Here, in distinct contrast, the improper communications were repeated to the entire sitting jury during deliberations, and were made in the first instance in an obvious and blatant attempt to persuade the newly deliberating jury. Respondent's "contextual" interpretation of former JN 6's comments as mere "encouragement" to be "organized" is risible. The former juror had no business or need to encourage the jury to deliberate "fairly and in an organized manner." Surely she understood that this was the judge's purview, and that once she had been excused as a juror it was not any concern of hers.

The only motive for former JN 6's call to JN 11 – which both women had to know was in violation of the court's order – was to encourage the jurors to do her bidding. And JN 11's only purpose in repeating the admonition from the former JN 6 was the same. If JN 11 had understood or believed the communication as an encouragement to deliberate fairly in an organized manner, she could have just said, without repeating what former

JN 6 had said, "Let's be fair and organized." The only possible motive for JN 11 to repeat to the deliberating jury the words of former JN 6 was to remind, persuade and urge them to deliberate in the same manner they had done before former JN 6 was discharged – in direct violation of the trial court's order. The communication with the former juror and the repetition of their conversation to the sitting jury was egregious misconduct.

C. JN 11 and JN 4 Committed Misconduct by Injecting Into Deliberations Extrajudicial Information About Appellant's Security Level as a LWOP Prisoner.

(AOB, Part C, section 4, pp. 281-82; RB, p. 250.)

Appellant maintains that JN 11's statement to the other jurors that appellant would be in the "general population" in prison if they did not render a death verdict, assuring the others that she (a former military personnel with training in security) knew what prison was like. JN 4 also told the other jurors that appellant would be in the yard with other prisoners and not locked in his cell. (27CT 6576, 6582, 6571-72.)

Respondent argues that the jurors were properly using their own life experiences in analyzing the evidence (which is appropriate) rather than improperly injecting an opinion explicitly based on specialized information from outside sources. (RB, pp. 251-52.) *People v. Steele* (2002) 27 Cal.4th 1230, 1266 described the boundary between proper and improper use of life experiences by a juror as a "fine line."

Appellant contends that JN 11 (JN 18064) crossed that line. She stated in her juror questionnaire that she was in the military and listed her occupation as "security." (78CT 24067-69.) She stated in voir dire that she had training in security. (16RT 4362.) When she told the other jurors that she knew that an LWOP sentence would place appellant in general population at the prison, she was injecting her opinion "explicitly based on specialized information obtained from outside sources," which this Court has described as misconduct. (*Steele,* 27 Cal.4th at 1266.)

Respondent claims that there is "no indication that any one juror's voice was authoritative on this topic." (RB, p. 252.) This is incorrect: In both her jury questionnaire and voir dire JN 11 indicated her professional and military experience in security. Respondent also asserts that because none of the jurors "could have personally experienced prison life" there is necessarily "no indication" that any juror was injecting her own expertise into the deliberations; instead the jurors were instead merely making "reasonable inferences as to what prison life would be like." The argument is absurd: it is akin to arguing that a medical doctor juror who opined about the cause of death in a homicide case -- without any evidence to support his conclusion -- would not be improperly injecting his professional opinion as long as the doctor had not personally experienced a gunshot wound. A juror holding herself out as a security officer with training in that field

would reasonably be viewed by others as having specialized knowledge of the conditions of incarceration based on outside sources. JN 3 stated as much in her declaration: JN 11 said she knew what prison life was like and acted like she knew, when she said that a LWOP sentence would result in appellant serving his time in general population. (27CT 6566.) JN 11's claim is similar to that in *People v. Stankewitz* (1985) 40 Cal.3d 391, 397, 399-400 in which a former police officer juror told the other jurors that he knew the law. In sum, JN 11 committed misconduct by offering her opinions that were not based on the evidence at trial but on her own outside expertise.

D. The Jurors Committed Misconduct by Failing to Report the Improper Communications by JN 11, and by Failing to Begin Deliberations Anew After Former JN 6 Was Removed from the Jury.

(AOB, Part C, section 5, pp. 282-83; RB, pp. 252-53.).

As to appellant's claim that the jurors committed misconduct by failing to follow instructions to begin deliberations anew after former JN 6 was replaced, respondent repeats his refrain that appellant's claim is "speculative and unsupported by the record." (RB, p. 253.)

The evidence shows that when new JN 6 replaced former JN 6, and the newly formulated jury was told to begin deliberations from the beginning, the other jurors "shoved the evidence" at new JN 6 for her to review on her own because the other eleven had "already been through it."

(27CT 6580-81.) Respondent interprets this as the other 11 jurors giving JN 6 "time to catch up" with them before beginning deliberations again. (RB, p. 253.)

Appellant contends that reviewing the evidence is a critical part of deliberations, and the refusal of the 11 other jurors to review the evidence together with new JN6 amounted to a refusal to follow the court's order to begin deliberations anew with all 12 jurors.

Respondent also argues that the jurors knew they had to start anew. (RB, p. 253.) The argument misses the point, which is not what the jurors "knew," but what they did. And what they did was shunt new JN 6 aside to review the evidence on her own, because they had already been through it and all 11 had already voted for the death penalty. (27CT 6575.)

Appellant cited *People v. Engleman* (2002) 28 Cal.4th 436, 445, because it states, on the cited page, that the jurors' refusal to follow a court order, including the instruction regarding the duty to deliberate, constitutes misconduct. Respondent takes issue with appellant's citation to this case on the grounds that it is "procedurally different" from the case at bar. (RB, p. 252.) That the posture in *Engleman* is different from the procedural posture of this case does not render the principles espoused there inapposite. As explained in *Harris v. Superior Court*, 3 Cal.App.4th at 666-67: "In an attempt to extract legal principles from an opinion that

supports a particular point of view, we must not seize upon those facts, the pertinence of which go only to the circumstances of the case but are not material to its holding. The *Palsgraf* rule, for example, is not limited to train stations."

In addition to appellant's claim that the jury committed misconduct by failing to begin deliberations anew (addressed immediately above), appellant also argued that the jurors committed misconduct by failing to report that JN 11 had improperly related to them the contents of her communication with former JN 6. Respondent does not address this portion of appellant's argument.[14] Appellant refers this Court to his discussion in the Opening Brief, p. 283.

E. The Multiple Instances of Juror Misconduct Require Reversal of Appellant's Sentence Of Death.

(AOB, Part D, pp. 283-86; RB, pp. 253-54.)

As to the trial court's mistaken refusal to remove JN 11 in the first instance (after the incident in which she and former JN 6 discussed their notebooks with the jury commissioner)[15] the misconduct raised a

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[14] Respondent did address appellant's related claim that JN 11 committed misconduct by talking to former JN 6 and then reporting to the deliberating jurors what former JN 6 had said. (See RB, pp. 248-50.) However, the other 11 jurors also violated a court order by failing to report JN 11's comments, and thus they also committed misconduct.

[15] See AOB, Arg. XII, Part C, section 2, pp. 276-79; RB, pp. 248-50.)

presumption of prejudice that was not rebutted by the prosecution. (*People v. Daniels* (1991) 52 Cal.3d 815, 864.) As to the claims of misconduct based on the trial court's denial of the new trial motion, even assessing the prejudice under the "substantial likelihood of bias" standard[16] requires reversal of appellant's convictions.

Respondent argues that any misconduct should be considered harmless by this Court because the trial court ruled that "'the jury did its job.'" (RB, p. 254.) Respondent maintains that this ruling is "supported by the record" because portions of two juror declarations state that the "jury did its job" and that the final decision was collective. (RB, p. 254.) The jurors' claims that they did their job does not "support" the trial court's ruling: the jurors are neither authorized nor competent to evaluate their own performance under the applicable legal standards

As appellant pointed out in Appellant's Opening Brief, the misconduct prejudiced appellant at the penalty phase. Former

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[16] Respondent cites *People v. Nesler* (1997) 16 Cal.4th 561, 580, 590 and *In re Carpenter* (1995) 9 Cal.4th 634, 654-54 as requiring a "substantial likelihood of juror bias" after denial of a motion for new trial based on juror misconduct for receipt of extraneous information. (RB, p. 253.)

JN 6 tainted the jury through JN 11 who reminded the jury "not to forget" the work they had already done, which together with the jurors making the new JN 6 review the evidence on her own, signaled a strong message that the new deliberations were not really going to be new, but rather a continuation of what had gone on before, a flat-out denial of appellant's right to trial by an impartial jury of 12 persons. Instead he had a jury of 13, with the ghost of former and biased JN 6 hovering over the deliberations.

JN 11's concealment of her own sexual abuse and her subsequent use of that information ("I was abused and I never killed anyone") was highly prejudicial in that her statement went to the heart of appellant's mitigation, and tended to negate it.

The extrajudicial information that appellant would serve a prison sentence in general population was highly likely to have influenced the verdict because appellant's future dangerousness was a question emphasized in a jury note to the judge. Furthermore, in assessing cumulative prejudice on this point, this Court must factor in the prejudicial impact of the trial court's exclusion of testimony by former Warden Parks that appellant would adjust well in prison. (See AOB, pp. 285-86.)

XIII. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO A RELIABLE SENTENCING DETERMINATION BY ERRONEOUSLY ADMITTING IN AGGGRAVATION EVIDENCE THAT DID NOT INVOLVE CRIMINAL ACTIVITY OR FORCE OR VIOLENCE, AND THAT WAS UNRELIABLE

A. The Alleged Escape of April 1999 Was Inadmissible Aggravating Evidence Under Factor (b) or as Rebuttal Evidence.

(AOB, p. 289; RB, pp. 256-62.)

Respondent acknowledges that in *People v. Boyd* (1985) 38 Cal.3d 762, 776, this Court held that a threat of violence against property which is not itself a violation of a penal statute is inadmissible as an aggravating factor under Penal Code section 190.3(b), and thus evidence of a nonviolent escape also "may be inadmissible." (RB, p. 256.)

Nonetheless, as to the alleged escape attempt of April 1999, respondent argues it was admissible under section 190.3(b) because the attempt, had it been carried out, could have involved a confrontation with a guard and thus the challenged evidence "contained" "criminal activity" that involved the "implied threat to use force or violence." (RB, pp. 257-58.) Respondent's argument relies on the fact that his request for jail photographs was detailed and specific, and on appellant's statement to his former wife that he would not die in jail but would "go down in a blaze of

glory." (RB, p. 258.) However, the detailed requests, if anything, suggest an attempt to avoid confrontation with jail personnel; and the "blaze of glory" statement implies not a threat of violence not committed by him but to him.

Respondent's argument is based not on the evidence presented, but on respondent's speculation that "if anyone tried to prevent [appellant's] escape, he would use force or violence against them." (RB, p. 258; emphasis provided.) There was no evidence that appellant had or wanted a weapon; appellant made no mention of jailhouse personnel or what would or might happen were he to confront them.

Respondent tries to distinguish the facts at bar from those in *People v. Boyd*, 38 Cal.3d at 776, arguing that in *Boyd*, the connection between the defendant and a metal grate removed from an air vent was circumstantial, whereas in this case, there is "direct evidence" consisting of appellant's statements regarding an attempted escape. But the distinction between direct and circumstantial evidence was not the *ratio decidendi* in the *Boyd* decision. Rather it was the fact that the evidence of the escape attempt did not involve violence or the threat of violence – even though the attempt in *Boyd* was the actual removal of a grate and not, as in this case, still theoretical. *Boyd* emphasized that the purpose of section 190.3(b) is "is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision."

(*Id.* at 792.) Thus, damage to property or a threat to damage property was inadmissible under the statute.

Here, the evidence of an implied threat of force of violence is less than that in *Boyd*. Appellant asked for photographs: a step towards an escape attempt perhaps, but not one implying a threat of force or violence. Respondent's entire argument is premised on his interpretation of appellant's statement of bravado to his then-wife as a threat of violence, but that interpretation is not evidence.

Respondent further argues that even if this Court finds the evidence insufficient under factor (b), it was admissible to "rebut" testimony: (1) by William Sweeney, administrator of a group home in which appellant was housed when he was 12 years old, who testified that such group homes did not at that time have the resources to deal with children as traumatized and damaged by sexual abuse as appellant was; and (2) group home counselor Rhonda Schuchart who testified inter alia that she liked appellant and considered him intelligent. (RB, pp. 259-60.) Respondent argues that because the defense "was attempting to get the jury to show mercy on him," the prosecution was entitled to introduce non-statutory aggravating evidence against him.

Appellant disagrees. As this Court held in *People v. Loker* (2008) 44 Cal.4th 691, the scope of rebuttal evidence must relate to a specific incident or character trait offered in mitigation. *Loker* held that the trial

court should have required the prosecutor to ask about specific incidents in a psychiatric report that were relevant to the particular positive aspects of the defendant's character testified to by several witnesses, rather than allowing the prosecutor to reference contents of the report referring to "bad things" the defendant had done. This ruling violated several well-established principles regarding the scope of rebuttal evidence in the penalty phase: First, if a witness's testimony regarding defendant's good character is "limited to a ... singular incident [or] personality trait," that does not "open the door to any and all 'bad character' evidence the prosecution can dredge up.... [T]he ... rebuttal ... evidence ... must relate directly to [the] ... particular incident or character trait defendant offers in his own behalf. [Citations.]" (*Id.* at 709.) Secondly, when a mitigation witness testified about the "defendant's problems" rather than his "good character," the prosecution cannot properly rebut that evidence with evidence of misconduct unrelated to the specific adverse circumstances evidence introduced in mitigation. (*Id.* at 715-16; see also *People v. Nelson* (2011) 51 Cal.4th 198, 223-24 [citing *Boyd*, 38 Cal.3d at 773-74 and holding that evidence of a defendant's background, character, or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible]; *People v. Medina* (1995) 11 Cal.4th 694, 769) [a sister's "fear" of her brother is

neither a proper aggravating factor, nor proper rebuttal to mitigating "background" evidence.]

Examples of evidence properly admitted to rebut specific mitigating evidence are shown *in People v. Eubanks* (2011) 53 Cal.4th 110, 144-45, in which the defendant presented evidence of her good parenting abilities, and the prosecution was thus permitted to rebut that evidence with defendant's admission of a single incident of child abuse, and in *People v. Clark* (2011) 52 Cal.4th 856, 936, in which the defense presented evidence of the defendant's work ethic, a likely brain damage-induced rage at the time of the crimes, and the prosecution then properly presented expert testimony that the defendant suffered from antisocial personality disorder, and other testimony that the defendant had no income, never sought employment and usually slept until noon.

Finally, respondent argues that the relative weakness of the objected-to evidence renders its admission harmless, especially when viewed against the facts of the capital murder and the jailhouse incident. (RB, p. 261.) Appellant contends that the prejudice from the erroneously admitted aggravating evidence, and the erroneously excluded mitigating evidence (Arguments XIII and XIV) must be viewed cumulatively and not in piecemeal fashion. (See Arg. XVI, p. 124.)

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B. The Alleged Escape Attempt of May 2002 Was Inadmissible Aggravating Evidence Under Factor (b) or (c).

(AOB, p. 291-93; RB, pp. 262-66.)

Respondent repeats the argument that evidence of the alleged escape attempt of May 2002 was admissible because it contained both "criminal activity" and an "implied threat to use force or violence" as required under factor (b). Inmate Cozart informed the deputies that appellant and Ben Williams had a plan to effect an escape and that someone named Tim was supposed to put money in appellant's account as a sign that the plan was ready to be carried out. However, Tim never showed up on the scheduled dates and apart from talk, nothing happened. Deputy Jackson determined that someone named Tim Yakiatis had put money in appellant's account on May 15. However, Jackson also testified that Cozart believed the attempt was scheduled for May 24, and Jackson did not know if the money deposited by Yakiatis on May 15 had anything to do with the escape plan.

Consequently, respondent's arguments as to why the plan amounted to an "implied threat of force or violence" are immaterial. As Cozart testified, nothing happened. Respondent argues that the deposit of money into appellant's account on May 15 was "an act in furtherance" of the conspiracy or escape attempt. However, there was no evidence of this. Deputy Jackson stated he did not know if the two events were related in any

way. (RB, p. 263.) Thus, the evidence did not satisfy the requirement of "criminal activity" and it should not have been admitted under factor (b).

Respondent makes the further argument that the alleged escape attempt of May 2002 should be deemed admissible as "part and parcel of the June 22, 2002" escape attempt, which was admitted in aggravation and which appellant does not challenge. Under this theory, the two incidents were part of the same transaction, i.e. "a continuous and consistent plan to escape custody by force." (RB, p. 264.) As set out immediately above, appellant contends the evidence was insufficient to constitute an attempt; thus, the mere talk cannot be deemed part of a "continuous and consistent" plan to commit a violent crime.

In any case, respondent cites no authority for his assertion that a non-crime can be corralled into factor (b) evidence by describing it ipse facto as part of a separate incident a month later. Respondent asserts that the prosecutor intended to treat the two incidents as "linked" because he presented the testimony of Cozart and Jackson during the testimony regarding the supposed escape attempt of June 2002. This "reasoning" is specious at best. The prosecutor's intent does not amount to an evidentiary rule of admissibility, an exception to the statutory prohibition of section 190.3, subdivision (b), or proof of appellant's act or intention.

In the alternative, respondent argues that the May 2002 evidence was admissible under Evidence Code section 1101(b) to show appellant's intent

to escape from jail by force in June of 2002. (RB, pp. 264-65.) Respondent cites no authority for the proposition that the cited Evidence Code section can be used to admit misconduct otherwise inadmissible under factor (b). The only case appellant has found that permitted the use of Evidence Code section 1101(b) to present additional evidence of the defendant's intent in a factor (b) incident was "because there was a dispute as to whether [the intentional brandishing of a gun, which was on its face admissible under factor (b)] was a deliberate act or an accidental one." (*People v. Jablonski* (2006) 37 Cal. 4th 774, 834-35.) The reasoning does not apply in this case. There was no dispute as to appellant's intent in the June 2002 escape attempt, and thus no need to present "additional evidence" of that intent with the non-crime of May 2002.

As to prejudice, respondent again argues that even if this evidence was erroneously admitted, it should be deemed harmless it "paled in comparison" to the circumstances of the capital crime and the June 2002 incident. (RB, p. 265.) Appellant repeats that the errors in admitting aggravating evidence and in excluding mitigating evidence cannot be viewed on a one-by-one basis; the prejudice from each must be viewed cumulatively. (Arg. XVI, p. 124, below.)

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/ ARG XVI p. 124

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C. Evidence of Appellant's In-Custody Possession of a Rolled-Up Newspaper and a Flattened Soda Can Was Inadmissible Aggravating Evidence.

(AOB, p. 293; RB, pp. 270-275.)

1. The flattened soda can.

Respondent refers to the flattened Pepsi can as a "shank," and relies on *People v. Michaels* (2002) 28 Cal.4th 486, 535 to argue that its possession can demonstrate an implied threat of violence despite the lack of evidence that appellant used or displayed it in a threatening manner. (RB, p. 272.)

Appellant notes that Juvenile Hall Counselor Schuchart, to whom appellant showed the object, described it as a broken-down or flattened Pepsi can that was "possibly" in the shape of a knife although she could not recall exactly what it was.[17] (39RT 11075-76.) Respondent argues that "the specific manner in which appellant presented the shank to Schuchart strongly suggested a threat of violence against her or other staff." (RB, p. 272.) Appellant submits that Counselor Schuchart's testimony -- which is

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[17] The flattened can was not preserved. Schuchart testified that the object was "just in the shape of maybe – I don't know, a make-shift knife. I'm not – I can't really exactly recall exactly what it was. All I know is it was Pepsi can that was broken down." Deputy Masterson, who saw it and could not remember its dimensions, nonetheless described it as a "knife." (39RT 11084-86, 11089.)

the only evidence of the "specific manner in which appellant presented" the flattened can to her – she testified that appellant slid it under the door to show her and she did not feel threatened – flatly refutes respondent's argument.

Respondent also contends that "the incident caused Schuchart to file an incident report." (RB, p. 272.) Respondent ignores Schuchart's testimony that the soda can itself was contraband, and thus the filing of an incident report does not show that the item was considered an illegal "shank."

2. The rolled-up newspaper.

As to the rolled-up newspaper, respondent argues that because it was "discovered on the same day as the June 22, 2002, escape attempt" it "can be viewed as part and parcel of the evidence" of that escape attempt, and "as such, the violent nature and result of the escape attempt can be attributed to the newspaper baton as appellant possessed it in anticipation of effectuating his escape." (RB, p. 273.) The argument is speculation based on surmise: the fact that the newspaper was discovered by correctional officers on June 22 does not mean that it was "part and parcel" of an escape attempt, or that appellant intended it as part of a violent escape, particularly since the newspaper was in appellant's cell and not at the scene of the

assault on Deputy Renault. Respondent cites no authority for his ipse dixit argument.[18]

Respondent further argues that the "stiffness/density of the weapon made it comparable to a police baton," citing Deputy Heberling's testimony that it was "softer than metal" and "roughly comparable" to a baton, and that it "would have had "more of a cushioned blow." (40RT 11393.) Although respondent conjectures that the "[t]here was no other reason to possess [the rolled newspaper] in a jail cell except to use it as a violent weapon," (RB, p. 274), this assertion contradicts the trial court's ruling that the evidence was insufficient to permit testimony by the officer that it was a weapon. (See 38RT 10894.)

Appellant reiterates that neither the flattened soda can nor the rolled-up newspaper was preserved. Respondent fails to address this point. Moreover, as to the soda can, the testimony was equivocal as to whether it was even sharpened; as to the rolled-up newspaper, the trial court found the evidence was insufficient to permit it to be described as a weapon. Thus, appellant contends that the trial court was unable to determine with

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[18] In support of his argument, respondent also refers to the fact that appellant "was specifically transferred" to a "behavior modification unit" which required "security supervision." (RB, p. 272.) Respondent apparently means to emphasize that appellant was dangerous based on facts not in the record. However, appellant's housing unit does not tend to prove that the soda can was a dangerous weapon.

sufficient reliability whether these items were "potentially dangerous weapons" admissible under factor (b) or not.

Respondent again argues that the prejudice from error in admitting this evidence because it was "relatively minor" in comparison with the crimes of which appellant was convicted. (RB, pp. 274-75.) Appellant repeats that the prejudicial analysis must include all the erroneously admitted aggravants and the erroneously excluded mitigants together. (See Arg. XVI, p. 124, below.)

D. Evidence of the Forcible Extraction of Appellant From His Cell in February 2001 Was Inadmissible As Evidence in Aggravation.

(AOB, pp. 296-99; RB, pp. 266-270.)

Respondent fails to address the case law cited by appellant holding that verbal threats, and specifically death threats against correctional employees made by an incarcerated inmate are not admissible under factor (b). (See AOB, p. 298, citing *People v. Wright* (1990) 52 Cal.3d 367, 425-26, *People v. Tuilaepa* (1992) 4 Cal.4th 569, 590 and *In re Gay* (1998) 19 Cal.4th 771, 786 & fn. 10.)

In blatant disregard of these cases, respondent argues that appellant's "verbal threats" and other appellant's other conduct while locked inside his cell and while the correctional officers were on the other side of the locked door "evidenced an intent to challenge the jail officers to provoke a

physical confrontation," and "as such" the jail extraction of appellant by the officers demonstrated criminal activity and an implied threat to use force or violence. (RB, p. 269.) Respondent relies on testimony that appellant was "kicking and yelling loudly" inside his cell when the deputies approached the door to argue that the conduct "constituted a physical threat." (*Ibid.*) Respondent also argues that appellant "was ready to resist any attempt to take him out of his cell." (*Ibid.*)

Appellant is not sure what respondent means by a "physical threat," or if he means to suggest that appellant was "kicking" the officers. Appellant reiterates that there was no evidence of any physical confrontation between the officer and appellant (he kicked the door and did not kick the officers) except for the actual one-sided extraction itself in which padded and helmeted officers first threw a stun grenade under the door of appellant's cell, then extracted and immobilized appellant. (See 38RT 10800-05.)

Respondent chooses to ignore the case law relied on by appellant and to rely instead on his own speculation – unadorned by citation to authority -- as to what appellant's words and actions made inside a locked cell might have meant. Appellant submits that the failure to address the case law amounts to a concession and acknowledgment that verbal threats by an inmate are not admissible under factor (b), as this Court has repeatedly held. (Compare *People v. Adams*, 143 Cal.App.3d at 992

[prosecution's failure to address prejudice is deemed a concession that if error occurred, it was prejudicial].)

Indeed, in arguing that if the admission of this evidence was error it should not be deemed prejudicial, respondent cites *People v. Silva* (1988) 45 Cal.3d 604, which he describes as a case in which this Court found harmless the erroneous "admission of evidence at the penalty phase that defendant threatened officers." (RB, p. 270.) In *Silva*, the defendant challenged the admission of "his statement to a police officer that he would kill the first police officer to step inside his cell if he was not permitted to visit with his wife." The Attorney General conceded the error. (*Id.* at 636.)

Respondent should have done the same here. Instead, he makes an argument contrary to case law cited by appellant, and contrary to a case he himself cited (in arguing harmlessness of any error) even though in that case the Attorney General conceded that threats to hurt or kill a correctional officer are not factor (b) evidence; in making his argument that the jail extraction testimony was admissible because of threats made by appellant, respondent cites to no authority other than his own speculation.

Again, respondent argues that this error should be considered harmless because the jury would not have been influenced by this evidence, but rather by the "brutal and extensive beating" death of Lora Sinner and

the assault on Deputy Renault. (RB, p. 270.) Appellant repeats that the prejudicial analysis must include all the erroneously admitted aggravants and the erroneously excluded mitigants together. (See **Part **,** below.)

E. The Erroneous Admission of Aggravating Evidence Rendered Appellant's Death Sentence Unreliable in Violation of the Eighth Amendment.

(AOB, p. 299.)

Appellant contends the evidence admitted in aggravation challenged above was insufficiently reliable under the Eighth Amendment, even assuming arguendo any of it is deemed to meet the requirements under section 190.3, subdivision (b). Respondent does not address this argument.

F. The Erroneous Admission of Multiple Incidents As Aggravating Evidence Requires Reversal of Appellant's Death Sentence.

(AOB, p. 300-01.)

As to each of these items of aggravating evidence, respondent argues that any error in their admission should be deemed harmless because, viewed separately, each was relatively minor in comparison with the circumstances of the crime, and the assault on Deputy Renault. (See RB, pp. 261, 265, 270, 274-75.) Appellant contends that the only realistic and fair way to assess the prejudicial impact of evidentiary errors at penalty phase is to view them as a whole. The jurors are told to consider the "totality" of the mitigating circumstances with the "totality" of the aggravating circumstances. (See CALJIC No. 8.88.)

Thus, the fact that numerous items of aggravating evidence were admitted, even if that evidence involved incidents relatively "minor" when compared to the murder or assault of Deputy Renault, was significant in terms of prejudicial impact. For example, although respondent repeatedly claims that the prosecutor did not rely on the erroneously admitted aggravating evidence to urge a death verdict, in fact the prosecutor did focus on the number of incidents in aggravation presented. The series of misdeeds was the centerpiece of the prosecutor's argument that appellant was violent, antisocial, that he liked to hurt people, that he makes shanks and wants to kill, in short that he was "consistently irresponsible" and was "going to get worse." (50RT 14234-42, 14240-41 14252, 14254-55.)

This Court has held that prosecutorial argument exploiting error "tips the scale in favor of finding prejudice." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071; accord *People v. Woodard* (1979) 23 Cal.3d 329, 341.) The prosecutor here exploited every single erroneously admitted incident of aggravation addressed above to argue to the jury that it had to return a verdict of death. The evidentiary errors were thus prejudicial.

A final note: although respondent repeats at every opportunity that the circumstances of the crime should render all error harmless, this Court has recognized that the circumstances of a capital crime can be mitigating as well as aggravating. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1189

[error to instruct jury that factor (a) was aggravant; a jury may consider some aspects of the offense as mitigating]; *People v.Smith* (2003) 30 Cal.4th 581, 639 [factor (a) can be aggravating or mitigating].) Appellant contends that this was the case here in that accomplices Amy and Lori, and not appellant, initiated the fatal attack on the victim.

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XIV. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY ERRONEOUSLY EXCLUDING MULTI-GENERATIONAL MITIGATION EVIDENCE, INCLUDING A FAMILY HISTORY OF COVERING UP ABUSE

Respondent argues that the trial court properly excluded any evidence in mitigation since any evidence "that did not directly involve appellant and his upbringing was irrelevant." (RB, p. 286, see also p. 285.) Appellant disagrees for this reason: In *Wiggins v. Smith* (2003) 539 U.S. 510, 522, the United States Supreme Court held the standards for capital defense as articulated by the American Bar Association are the guidelines for determining the competency of counsel. Those guidelines specifically require defense counsel to prepare a multigenerational social history as part of the Sixth Amendment duty to investigate and present mitigating evidence, as multigenerational evidence is often required to fully explain the defendant's character, background and even the circumstances of the offense. (*ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases* (1989), Commentary, ABA Guideline 10.11; see also *Hamblin v. Mitchell* (6th Cir. 2003) 354 F.3d 482, 487 & fn. 2, 488; see also additional cases cited in AOB, p. 208.)

The trial court excluded multigenerational mitigation evidence from two witnesses: (1) appellant's paternal aunt Sarah Belongie, who would

have testified that her father – appellant's grandfather -- sexually abused her, and physically abused her and her mother – appellant's grandmother Phyllis Jones, who herself was instrumental in covering up appellant's own abuse by his father (her son), and that nothing was ever done about the abuse; and (2) Sherry Bigger, the girlfriend of one of appellant's mother's brothers, who would have testified to that the problems that family (the Cromps) had involving drugs, prison, and parenting. (43RT 12086-89; 12202-03; 12363-72.)

Respondent argues that this testimony was properly excluded because the witnesses would not have testified to personal knowledge of appellant or evidence involving appellant's own background or character. (RB, pp. 285-86.) Appellant disagrees: multigenerational evidence of abuse, and its passive acceptance in the family, helps to explain not only the depth of the trauma suffered by appellant but also that such abuse was "normative" for generations in appellant's family, making it almost impossible for appellant to escape its consequences on his own character and conduct. Moreover, multigenerational sexual abuse that goes unacknowledged and untreated, and is so ingrained in the family dynamic, helps to explain why family members were unwilling or unable to protect or provide alternative for a child such as appellant, and thus why appellant himself was later unable to benefit from the bits and pieces of help later intermittently provided to him. As Justice Oliver Wendell Holmes, Jr. said,

"A child's education should begin at least one hundred years before he is born."[19] The same is true as to the mitigation of a severely sexually abused and neglected child of a sexually abused mother.

Respondent also argues that any error in excluding this mitigation should be deemed harmless given the circumstances of the capital murder and the assault on Deputy Renault, since it "would not have added anything in mitigation." (RB, p. 286.) Appellant disagrees and has just explained how the multigenerational evidence would strengthen the case in mitigation. Moreover, it would have weakened the prosecutor's theme in cross-examination and closing argument to the effect that appellant was given opportunities to fix himself and simply chose not to. (See 14248-49.) The multigenerational evidence would have gone a long way to help the jury understand why appellant's upbringing and family history rendered him unable to make that choice.

Prosecutorial reliance in argument on inadmissible testimony is a powerful indicator of prejudice. (*People v. Minifie* (1996) 13 Cal.4th1055, 1071 [prosecutorial argument exploiting error "tips the scale in favor of finding prejudice"]; see also *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1017 [prosecutor's argument can enhance immensely the impact of false or

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[19] See <www.brainyquote.com/quotes/quotes/o/oliverwend135058.html#ixzz1p1Q76sBf>

inadmissible evidence]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1385 [prosecutor's reliance in argument on erroneous jury instruction exacerbated the prejudicial impact].) By parity of reasoning, a prosecutor's argument that is made possible by the wrongful exclusion of mitigating evidence also indicates prejudice.

XV. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, TO A FAIR TRIAL, AND THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND A RELIABLE SENTENCING DETERMINATION BY EXCLUDING EVIDENCE THAT APPELLANT WOULD ADJUST WELL IN STATE PRISON AND BY EXCLUDING PROPER REBUTTAL EVIDENCE AS TO THE SECURITY LEVELS IN STATE PRISON; ALTERNATIVELY, DEFENSE COUNSEL WAS INEFFECTIVE UNDER THE SIXTH AMENDMENT FOR MAKING PROMISES IN OPENING STATEMENT PRIOR TO LITIGATING THE ADMISSIBILITY OF THE PROMISED EVIDENCE REGARDING APPELLANT'S ADJUSTMENT AND PRISON SECURITY LEVELS

A. Expert Testimony that Appellant Would Adjust Well to Life in Prison Was Admissible in Mitigation.

Respondent argues that this Court has "routinely held" that evidence of conditions of confinement is irrelevant at penalty phase, citing *People v. Martinez* (2010) 47 Cal.4th 911, 963 and other cases. (RB, p. 291.)

In *People v. Fudge* (1994) 7 Cal.4th 1075, this Court ruled that testimony as to the "execution ritual" of a condemned prisoner, and the "nature and qualify of life" for an LWOP prisoner was properly excluded.

(*Id.* at 1117.) However, *Fudge* went on to hold that testimony that "the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and testimony that "would have described [the defendant] as being a likely candidate to lead a productive and nonviolent life in prison" was "relevant and admissible mitigating evidence." (*Ibid.*) *Fudge* emphasized that under *Eddings v. Oklahoma* (1982) 455 U.S. 104 and *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, "such evidence may not be excluded from the sentencer's consideration." (7 Cal.4th at 1117; emphasis provided.) Finally, *Fudge* held that the exclusion of this mitigating evidence violated the federal "constitutional requirement that a capital defendant must be allowed to present all relevant evidence to demonstrate he deserves a sentence of life rather than death." (*Ibid.*)

Respondent's argument is that the *Martinez* case is "controlling" here. (RB, p. 291.) Appellant points out that the trial court in *Martinez* allowed testimony from a prison expert, which the trial court here did not do; and that rebutting evidence of future dangerousness was not in issue in *Martinez* because the prosecution had not introduced such evidence. (47 Cal.4th at 962.) If *Martinez* is "controlling" then it should mandate a finding by this Court that the trial court erred in its ruling here.

In *Martinez*, the defense offered a corrections expert to testify to conditions of confinement for a Level IV inmate sentenced to a life term,

including a description of conditions designed to minimize risks of escape and assault by the inmate, including photographs. The defense argued that the evidence was relevant to the defendant's potential to adjust successfully to an LWOP sentence, and that it would rebut evidence of future dangerousness. However, the prosecutor had not offered any evidence of the defendant's future dangerousness. (*Id.* at 962.)

The trial court in *Martinez* excluded testimony as to the details of the prison system,[20] but allowed the expert to testify on "'general descriptions of prison life' as well as his opinions on defendant's future dangerousness and whether prison life was the kind of structured environment that defendant needed." (*Ibid.*) The trial court also allowed expert testimony describing "the level 4 classification and its subdividing classifications." (*Ibid.*)

Respondent mistakenly argues that in this case, "[a]s in *Martinez*, the trial court's ruling excluding the specific testimony offered was narrow," and did not "interfere[] with appellant's overall ability to present evidence on his future dangerousness or his ability to conform from a structured environment," because, according to respondent, a "careful reading" of the

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[20] *Martinez* did repeat the Court's rule that evidence concerning conditions of confinement for LWOP inmate is not relevant to penalty determination. (*Ibid.*)

ruling shows that the trial court "did not specifically exclude Jim Parks' testimony regarding appellant's likely adjustment to prison." (RB, p. 292.) (45 RT 12753.) This is flatly incorrect. The prosecutor objected to "any evidence presented by Mr. Park [the proffered prison expert]" and the trial court sustained the prosecution's "objection to the presentation of that witness." (26CT 6257; 45RT 12753.)

In sum, the trial court wrongly precluded "the presentation" of expert witness Parks.[21] In contrast to *Martinez*, the trial court allowed no testimony on "'general descriptions of prison life'" or an expert opinion on appellant's "future dangerousness and whether prison life was the kind of structured environment that defendant needed." (47 Cal.4th at 962.) Instead, the trial court prohibited "the presentation" of the defense expert.

Moreover, the defense requested presentation of the prison expert's testimony as rebuttal to the future dangerousness evidence presented by the prosecution. In *Martinez*, there was no aggravating evidence of future dangerousness presented and thus the issue of rebuttal was moot. However, the penalty phase case in aggravation here relied heavily on future dangerousness in the guise of the evidence of appellant's escape attempts

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[21] To the extent the defense proffered evidence of prison conditions inadmissible under this Court's precedents, the trial court should have tailored its ruling, as did the trial court in *Martinez*.

and assaults. The prosecutor explicitly argued the evidence of future dangerousness in urging the jury to return a death verdict, saying that "the only appropriate verdict is death," because appellant "attacks guards, he makes shanks, he wants to kill, he gets a rush over it," and "he's going to get worse." (50RT 14252, 14255.)

Appellant argued at length in the Opening Brief that he had a due process right to rebut the prosecution's case in aggravation. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 174; see AOB, pp. 312-16.) Respondent fails to address this argument.

Respondent does argue that any error was harmless. As with other penalty phase errors, the reason offered by respondent in support of a finding of harmlessness is the "overwhelming evidence" of appellant's violent escape attempt and assault on the deputy. (RB, p. 292.) However, appellant was not allowed to rebut this evidence with proffered evidence of future successful adjustment. (See AOB, pp. 310-11.)

Appellant submits that it is summarily unfair to argue that all penalty phase errors should be considered non-prejudicial because of evidence of a violent jail escape attempt that appellant was forbidden from rebutting, despite his federal due process right to rebut the prosecution's evidence.

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B. Trial Counsel Was Ineffective for Promising Testimony in Opening Statement to the Jury Prior to Having Litigated the Issue.

Appellant contends that trial counsel's promise of Parks' testimony in his opening statement, prior to litigating the issue, was prejudicial ineffective assistance of counsel.

Respondent argues that making promises about the defense evidence in opening statement and failing to deliver "does not constitute ineffective assistance of counsel per se," citing *People v. Burnett* (2003) 110 Cal.App.4th 868, 885, and that it is a fact-based determination to be assessed case by case, citing *People v. Stanley* (2006) 39 Cal4th 913, 955.) (RB, p. 293.) Appellant does not disagree with these general propositions, but contends that under the specific facts of this case, counsel's failure to litigate the extent of permissible testimony by the prison expert Parks prior to promising his testimony in broad terms did amount to prejudicial ineffective assistance of counsel.

Respondent complains that appellant cites no authority in support of his argument that counsel is deficient for reciting to the jury expected testimony by a defense witness prior to obtaining a ruling on the admissibility of that witness. (RB, p. 294.) This is incorrect. Appellant cited four cases for that proposition, all of which found the deficient performance by counsel warranted reversal, and none of which respondent addressed. (See AOB, pp. 317-18.)

Appellant disagrees with respondent's suggestion that this case presents a "parallel" to *People v. Coddington* (2000) 23 Cal.4th 529, 629-30. In *Coddington* the claim on appeal was that trial counsel, before calling defense witness Allen Hacker, should have anticipated that the prosecution would offer an FBI agent to testify in rebuttal, and that trial counsel should have sought a ruling on the admissibility of the rebuttal witness before offering Hacker's testimony. This Court dismissed the argument, noting that the primary thrust of the defense was to persuade the jury that the murders were not premeditated; and counsel obviously believed that Hacker's testimony was important to that defense, and presentation of his testimony was a reasonable tactic. (*Id.* at 629-30.)

In this case, one of the two defense theories[22] at penalty phase was that appellant could adjust successfully to life in prison if the jury returned an LWOP verdict. Appellant does not question the reasonableness of that tactic. Nor does appellant claim that proficient performance by trial counsel required them to anticipate what the prosecution might have done. But trial counsel themselves knew what their theory was and the expert witness they planned to present in support of that theory, because they announced it to the jury in opening statement: "[Jim Parks] will render the opinion that if

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[22] The other defense theory was that appellant's abused and neglected background had profound neurological and physiological consequences rendering him less morally culpable. (See Arg. IX, above.)

sent to prison [appellant] will adjust to prison life." (41RT 11772-73.) These facts are thus not "parallel" to those in *Coddington*, and *Coddington* is not helpful in resolving the claim presented here.

This is not a case (such as *People v. Burnett*, 110 Cal.App.4th 868, 855, relied on by respondent at RB, p. 293) in which testimony was promised in opening statement, and then, because of the many contingencies over the course of the trial, counsel made a tactical decision not to call the promised witness, because calling that witness (the defendant) would result in a damaging credibility duel.

Rather, the defense promised an expert witness, a former associate warden at San Quentin, and promised that he would provide the testimony that only someone with his qualifications could provide, that would support a major theme in mitigation. Under these particular circumstances, trial counsel definitely should have litigated the admissibility of this testimony prior to showcasing it in opening statement. First, it is commonplace to litigate the scope and boundaries of expert opinion testimony prior to trial; expert witnesses are distinct in this sense from percipient and police officer witnesses. Second, reasonably proficient counsel would have been cognizant of the applicable case law, which does indeed place limits on expert testimony regarding adjustment to prison life, prison conditions, and security measures in place.

For example, *People v. Thompson* (1988) 45 Cal.3d 86, 138-39, and *People v. Quartermain* (1997) 16 Cal.4th 600, 632, cases decided 14 and five years prior to appellant's trial, held that testimony describing "future conditions of confinement" for an LWOP prisoner involved speculation and was thus inadmissible, whereas *People v. Fudge* (1994) 7 Cal.4th 1075, 1117, a case decided eight years before appellant's trial, held that expert testimony as to the defendant's prospect for successful adjustment to prison life was "relevant and admissible mitigating evidence."[23]

Reasonably competent counsel would have been aware of these distinctions and limits, and would therefore have litigated the scope of admissibility of Parks' testimony prior to opening statement. The failure to do so resulted in two adverse effects: (1) the trial court excluded the witness from testifying altogether, even though his opinion testimony as to successful adjustment should have been admitted; and (2) the ruling excluding the presentation of the witness came after counsel had promised his testimony, thus leaving the jury to speculate that Parks refused to testify, or that counsel decided not to present his testimony because it would not be helpful.

Respondent suggests that any error should be deemed harmless

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[23] Counsel is charged with the duty to know the law. (*People v. Pope* (1979) 23 Cal.3d 412, 424; *People v. Zimmerman* (1980) 102 Cal. App. 3d 647, 656-657; see also *In re Neely* (1993) 6 Cal.4th 901, 919.)

based on the court's instruction to the jury that statements by attorneys were not "evidence" "but rather simply a [sic] outline of what counsel thinks the evidence will show." (RB, p. 295.) The instruction in no way cures the harm; to the contrary, it exacerbates it. If counsel's statement was not evidence, but an indication of what counsel thought the evidence would show, jurors would wonder why counsel thought there would be mitigating evidence that was not presented in any form. Respondent argues there is "no reason to assume the jury necessarily concluded counsel was unable to produce the witness, or that the failure to produce the witness meant defendant would not be able to adjust to life in prison." Appellant contends that is precisely what the jury necessarily concluded – particularly in that the prosecutor relied heavily in his closing penalty argument on the absence of this evidence, i.e., that appellant would not adjust to prison life but would only "get worse." As this Court held *in People v. Minifie*, 13 Cal.4th at 1071, a prosecutor's argument exploiting a trial error "tips the scale in favor of finding prejudice."

Respondent also suggests that the month between the opening statement and the end of the penalty phase presentation of evidence "attenuated" any adverse effect from the promise of Parks' testimony, noting also the "strength of the evidence against appellant in the penalty

phase." (RB, p. 296.) Once again, the strength of the aggravating evidence, which consisted mostly dramatically of the violent jail escape attempt, increases rather than lessens the prejudicial impact of the error – an error which prevented appellant from mitigating the damaging aggravating evidence.

As his final argument in support of a finding of harmlessness, respondent makes the point that appellant has not claimed that trial counsel could have presented other evidence "vindicating appellant." (RB, p. 296) This argument is meaningless on appeal since appellant is forbidden under the rules of appellate procedure of showing or obtaining evidence other than that which appears on the appellate record.

In sum, the exclusion of this evidence prejudiced appellant. It went to the heart of the defense case at penalty phase, i.e., that appellant could be a conforming life prisoner. Error striking at the heart of the defense is considered prejudicial. (See e.g., *People v. Herring* (1993) 10 Cal.App.4th 1066, 1077; *People v. Lindsey* (1988) 205 Cal.App.3d 112, 117; *People v. Vargas* (1973) 9 Cal.3d 470, 481.)

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XVI. THE CUMULATIVE PREJUDICIAL IMPACT OF THE ERRORS AT THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION

Appellant has shown that error occurred at every stage of his trial from jury selection through the evidence phase, to judicial and jury misconduct. Appellant contends that the multiple errors mandate an analysis of prejudice that takes into account the cumulative and synergistic impact of the errors. Respondent counters that since there was no error, there cannot be cumulative prejudice. (RB, p. 297.) To the extent he addresses prejudice, he does so in an error-by-error piecemeal analysis.

This Court must consider the cumulative prejudicial impact of these various constitutionally-based errors, because the cumulative prejudicial impact can itself be a violation of federal due process. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15.)

A trial is an integrated whole. This is particularly true of the penalty phase of a capital case, where the jury is charged with making a moral, normative judgment, and the jurors are free to assign whatever moral or sympathetic value they deem appropriate to item of mitigating and aggravating evidence. The jurors are told to consider the "totality" of the mitigating circumstances with the "totality" of the aggravating

circumstances. (See CALJIC No. 8.88.) Under these circumstances, the piecemeal prejudice analysis preferred by respondent makes little sense.

Moreover, as stated in the Opening Brief, appellant has shown that the death sentence is unconstitutionally excessive and unreliable where, as here, the behavior that ended in Lora Sinner's death was the direct result of the unimaginable abuse and neglect inflicted on appellant during the vulnerable years of his mental and emotional development. Appellant's tragic background diminishes his blameworthiness and renders the sentence of death fundamentally unjust.

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

XVIII. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD

XIX. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

XX. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

XXI. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

XXII. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHT AND FOURTEENTH AMENDMENTS

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California

capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." *(Id.* at 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has, in Arguments XVII through XXII of the Opening Brief, identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. Appellant contends that these arguments are squarely framed and sufficiently addressed in Appellant's Opening Brief, and therefore makes no reply.

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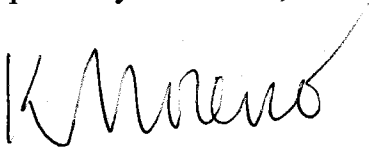
CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and remand for a fair trial on guilt, or in the alternative, vacate his sentence of death and remand for a fair penalty phase hearing.

DATED: April 16, 2012

Respectfully submitted,



KATHY MORENO
Attorney for Appellant

CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)

I, Kathy R. Moreno, attorney for Paul G. Smith, Jr., certify that this Appellant's Reply Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Word word-processing program on which it was produced, the number of words contained herein is 26,903 and the font is Times New Roman 13.

I hereby declare, under penalty of perjury, that the above is true and correct, this 16th day of April, 2012, in Berkeley, CA.

/s/ K Moreno

KATHY R. MORENO

CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S REPLY BRIEF by depositing in the United States mail on April ___, a true and full copy thereof, to the following:

Attorney General, ATTN: Angelo Edralin

P. O. Box 94425, Sacramento, CA 94244-2550

CAP, Attn Scott Kauffman

101 Second St., Ste. 600, San Francisco, CA 94105

Dist. Atty. Shasta County

1525 Court St., 3d floor

Redding, CA 96001

Superior Court Shasta Co., ATTN The Hon. James Ruggiero

1500 Court St., Redding CA 96001

Paul Smith, Jr. T 75092

San Quentin, CA 94974

I hereby declare that the above is true and correct.

Signed under penalty of perjury this __day of April, 2012,

in Berkeley, CA.

_____

KATHY MORENO