IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	Supreme Court
Plaintiff and Respondent,	)	Crim. S120583
	)	
v.	)	Riverside County
	)	Superior Court No.
MICKY RAY CAGE,	)	RIF 083394
	)	
Defendant and Appellant.	)	

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE

APPELLANT'S REPLY BRIEF

On Automatic Appeal From a Judgment of Death

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Micky Ray Cage

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PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	**Supreme Court Crim. S120583**
v.	**Riverside County Superior Court No. RIF 083394**
MICKY RAY CAGE,	
Defendant and Appellant.	

APPELLANT'S REPLY BRIEF

(Death Penalty Case)

INTRODUCTION

Appellant and respondent agree as to certain basic facts of this case. On the evening of November 9, 1998, appellant brought a shot gun to the home of his estranged wife's mother, and used that gun to kill his mother-in-law, Brunilda Montanez, and her 16-year-old son, David Montanez. Each victim was shot multiple times, creating a crime scene so gruesome that law enforcement officers with decades of experience termed it the worst they had ever seen. For a variety of reasons discussed in the AOB, this evidence, while horrifying, did not establish premeditated and deliberate first degree murder. Appellant's convictions, and subsequent sentence of death, were the result of several erroneous evidentiary rulings, incorrect and inadequate jury instructions, and, above all, an enormously emotional trial atmosphere in which jurors were encouraged to punish appellant for his abusive history and poor character.

Respondent contends all of appellant's arguments are meritless, no errors occurred at either phase of trial, and, should any error should be found, it certainly was harmless. Respondent reasons that even if the evidence is insufficient to establish premeditation, harmless error applies because the state advanced another theory of murder - murder by means of lying-in-wait. And, should the evidence of lying-in-wait also prove insufficient, this error too is harmless because the multiple murder special circumstance was found true. Respondent repeatedly asserts the evidence of appellant's guilt was "overwhelming," and therefore no more favorable result could have been obtained even in the absence of any or all errors raised in the AOB. This dismissive attitude toward all errors potentially infringing upon fundamental constitutional rights is disturbing particularly in this capital context.

Throughout its brief respondent repeatedly suggests that the purpose of this Court's review is to uphold the verdicts and sentence if at all possible. Even egregious constitutional violations must, respondent suggests, be deemed harmless where the defendant has committed a heinous crime. The implications of such an approach are predictable and will extend to the entire criminal justice system:

> By applying a toothless form of harmless error analysis that focuses on the reprehensibility of the crime rather than the impact of the improper testimony, we only embolden those who would commit further constitutional violations.

(*DeRosa v. Workman* (10th Cir. 2012) __F.3d __ ; 2012 WL 3974496 [Lucero, J., dissenting from the denial of a petition for rehearing en banc and/or panel rehearing].)

The crimes in the instant case were tragic, and appellant is, to some

degree, responsible for them. However, it does not automatically follow that the multiple errors which occurred in his capital trial were harmless. Due to the synergistic effect of unduly prejudicial evidence, erroneous jury instructions, and, *inter alia*, the prosecutor's argument with respect to motive, circumstances establishing manslaughter or second degree murder were improperly elevated to first degree murder, thereby making appellant eligible for the death penalty. For all of the reasons discussed here and in the AOB, justice requires reversal of the convictions and sentence. In this Reply Brief, appellant replies to those contentions of respondent that require an answer in order to present the issues fully to this Court. Arguments or sub-arguments that are adequately addressed in the AOB are not revisited. However, the failure to address any particular argument, sub-argument or contention raised by respondent does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but, rather, reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in the AOB.

LEGAL ARGUMENT

I.

RESPONDENT FAILS TO LEGITIMIZE THE TRIAL COURT'S ADMISSION OF THE IRRELEVANT AND INFLAMMATORY EVIDENCE OF APPELLANT'S PAST CRIMES.

A. Introduction and Overview of Arguments.

In Argument I of the AOB, appellant contends he was denied a

fundamentally fair trial and determination of penalty as a result of an evidentiary ruling made at the outset of the guilt phase. Over defense objections, the trial court allowed the prosecution to present evidence of *other* crimes and acts allegedly committed by appellant. Appellant's wife, Clari, and his daughter, Vallerie, testified about multiple episodes of the violence and abuse appellant had inflicted on one or both of them in the 14 or 15 years preceding the homicides. Their testimony constituted classic examples of character and propensity evidence prohibited by California Evidence Code section 1101, subdivision (a). The prosecutor, however, persuaded the trial court this evidence was relevant to appellant's intent and motive in the capital crimes and therefore was admissible under Evidence Code section 1101, subdivision (b). The prosecutor reasoned that the past domestic abuse and the murders of Bruni and David arose from the same motive, that appellant had abused Clari and Vallerie in order to maintain "power and control" over his family. When Clari left the country in October of 1998, taking Vallerie and Mick, Jr., appellant acted out, killing other family members as a way to exert control over Clari.

For multiple reasons discussed herein and in the AOB, this evidence should not have been admitted in the guilt phase of appellant's trial. The trial court did not undertake the careful evaluation California law requires before allowing evidence of the defendant's other crimes. As a result, the court did not recognize the obvious weaknesses in the prosecution's rationale for admitting this evidence. Initially, the court should have perceived the circular reasoning of the prosecutor's argument. In order to find the proffered evidence relevant and admissible, the court first had to accept the inference the evidence was claimed to support. The second obvious problem was the prosecution's characterization of "motive," which

was so broad and general as to make the concept indistinguishable from character or propensity, and made virtually any evidence relevant for this purpose. Though careful evaluation is required by California law, the prosecutor was not pressed to explain the state's need for the evidence.[1] This evidence was not actually needed because, contrary to her representations in the trial court, the prosecutor had independent evidence of motive and thus had an alternative to introducing appellant's past acts.

The trial court's ruling was, in addition, an abuse of its discretion under Evidence Code section 352. The court failed to consider the full extent of the possible prejudice. Given the case's unusual circumstances, it was highly likely that Clari's and Vallerie's testimony would be not only unduly prejudicial but potentially inflammatory.

Respondent disputes all of appellant's contentions, but directly addresses only a few of them, relying mostly on the supposed relevance of the prior conduct to show appellant's motive and intent. (Resp. Brief at pp. 34-38.) Respondent observes that "motive is an intermediate fact which may be probative of such ultimate issues as intent, identity or commission of the criminal act itself." (Resp. Brief at p. 36, citing and quoting *People v. Lewis* (2001) 26 Cal.4th 334, 370.) The lack of similarity between the past acts and the capital case is not problematic, respondent reasons, because an intermediate fact like motive may be established through

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As discussed in the AOB, the testimony was not relevant to prove identity, or the existence of a common design or plan, or motive and/or intent. Appellant's prior crimes and the capital charges differed markedly in terms of the conduct alleged, the identities of the victims, and the required mental states. (See AOB at pp. 81-85.) Additionally, many incidents were remote and most were unadjudicated. (See AOB at pp. 88-89.)

evidence of prior dissimilar crimes. (Resp. Brief at pp. 36-37, citing *People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23.) Where offered to prove motive, all that is required for past crimes to be admissible under Section 1101 (b) is a "nexus between the prior crime and the current one." (Resp. Brief at p. 37, citing *People v. Daniels* (1991) 52 Cal.3d 815, 857; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) In appellant's case the nexus "between the prior bad acts and the murders of Bruni and David is the power and control [appellant] sought to exert over his family." (Resp. Brief at p. 37.)

Respondent also finds that the trial court correctly balanced the probative value of the evidence against the potential prejudice, as required by Evidence Code section 352. (Resp. Brief at pp. 38-41.) According to respondent, little prejudice could have resulted from this evidence for several reasons. First, the "prior abuse evidence was no more inflammatory than [the] evidence presented concerning Cage's shotgun murders of Bruni and David." (Resp. Brief at p. 40, citing *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211.) Second, the limiting instruction (CALJIC 2.50) minimized the prejudicial impact. Finally, the prosecutor "decreased any possibility of prejudice" through her comments in closing argument. (Resp. Brief at pp. 40-41.) In conclusion, respondent asserts that, should this Court find error in the admission of appellant's past acts, "any such error was harmless because it is not reasonably probable that [appellant] would have received a better result in the absence of the error." (Resp. Brief at p. 41, citing *People v. Malone* (1988) 47 Cal.3d 1, 22, and *People v. Watson* (1956) 46 Cal.2d 818, 836.)

For all of the reasons discussed below and in the AOB, respondent is mistaken and this Court should reverse appellant's convictions and

sentence.

B. The Past Crimes Evidence Had No Relevance to Any Legitimate Purpose.

The proponent of the evidence bears the burden of establishing its relevance and admissibility. (*People v. Blaksher* (2011) 52 Cal.4th 769, 819-820; *People v. Morrison* (2004) 34 Cal.4th 698, 724.) The weight of that burden may vary with the context and type of evidence at issue. Because of its high level of inherent prejudice, "[i]t is [] appropriate when the evidence is of an uncharged offense, to place on the People the burden of establishing that the evidence has *substantial* probative value that *clearly outweighs* its inherent prejudicial effect." (*People v. Soper* (2009) 45 Cal.4th 759, 773 [emphasis added; citation and internal quotation marks omitted].) For the reasons discussed below, these standards were not met in appellant's case

1. The trial court failed to exercise the caution and restraint required by California law.

The standard for admitting past crimes evidence is well-settled, [2] and this Court has spoken clearly about how trial courts are to approach this issue. (See, *e.g.*, *People v. Sam* (1969) 71 Cal.2d 194, 204.) A decision to

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[2] Evidence of a defendant's prior crimes may be admitted only if it:

> (a) tends logically, naturally and by reasonable inference to prove the issue upon which it is offered; (b) is offered upon an issue which will ultimately prove to be material to the People's case; and (c) is not merely cumulative with respect to other evidence which the people may use to prove the same issue.

(*People v. Guerrero* (1976) 16 Cal.3d 719, 724.)

admit evidence of uncharged misconduct must be preceded by "extremely careful analysis." (*People v. Lopez* (2011) 198 Cal.App.4th 698, 715; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) When evaluating the prosecution's justification for the evidence, the court must be "keeping in mind the presumption for exclusion where there is substantial doubt as to relevance." (*People v. Sam, supra,* 71 Cal.2d 194, 204.) Where the offer of proof is inadequate, the evidence must be excluded. (*People v. Soper, supra*, 45 Cal.4th at p. 773; see also, *People v. Hill* (1967) 66 Cal.2d 536, 569-570.)

In this context the trial court must not accept at face value the prosecution's asserted purposes for admitting evidence of the defendant's past crimes or misdeeds. Under both state and federal law, the court must take a pro-active approach in exercising its discretion. "When prior bad act evidence is offered to prove a motive for the crime, courts must be on guard to prevent the motive label from being used to smuggle forbidden evidence of propensity to the jury." (*United States v. Mahone* (D. Me. 2004) 328 F.Supp.2d 77, 86.) This Court has been most explicit in this regard, observing:

> Courts have been frequently faulted for fail[ing] to engage in the analysis of the evidence necessary for a determination of relevancy. Rather, the admissibility of evidence of other offenses is determined by a seemingly mechanical application of such precedent. For example, in the case of most crimes, the defendant's criminal intent is a fact necessary to be proved. The people offer evidence of defendant's prior crimes to prove his intent. The courts seem to reason that evidence of defendant's other offenses is deemed by precedent to be admissible to show intent; here the people offer such evidence to show intent; therefore, the evidence is admissible. In this analysis, the courts appear to omit the most essential step in the proper determination of the admissibility of the evidence

> offered. They fail to determine whether the particular evidence of defendant's other offenses here offered is logically relevant to prove the defendant's intent *in this case*.

(*People v. Thompson*, *supra*, 319, fn 22; *People v. Guerrero, supra*, 16 Cal.3d at p. 724.)

The trial court did not hold the prosecution to its burden before admitting evidence of appellant's past acts. The court accepted without question the prosecutor's "power and control theory," and the accompanying assertion that the past acts were relevant to prove identity and motive because the evidence of appellant's past acts demonstrated his (actual or intended) "power and control" over his family, and this "power and control" was relevant to appellant's motive and intent.[3] The court never sought clarification on precisely *how* the past crimes were relevant to the questions of intent and/or motive *in the capital case*. The court's ruling was based merely on a general sense this evidence would be helpful to

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The "power and control" language first appears in the prosecutor's trial brief, where she argues the prior conduct evidence should be admitted to demonstrate motive: "[T]he defendant's prior acts of abuse toward the Burgos/Montanez family explain several things. First of all, it shows the *power and control* that he exercised over all of them for so many years." (2 CT 540 [emphasis added].) Respondent adopts this language: [T]his 'nexus' between the prior bad acts and the murders of Bruni and David is the *power and control* Cage sought to exert over his family, shown by Cage's prior acts of abuse against his family and the threats he made to Clari that he would harm her family [if] she left, threats he made good on by killing her mother and brother when she finally did leave him. (Resp. Brief at p. 37 [emphasis added].) The actual *exercise* of power and control is not equivalent to a *desire* to exert power and control. The court's (and respondent's) failure to recognize this discrepancy is further proof of the lack of precision applied to the Section 1101 analysis.

"show the overall picture." (See AOB at pp. 53-54, [3 RT 446].) Had it adopted the disciplined approach this Court has required for over 30 years, it would have recognized the low probative value of the prior crimes and excluded them.

2. Respondent endorses the prosecution's argument despite its circular reasoning and faulty logic.

In order to utilize the exception of Section 1101, subdivision b, the prosecution needed to find a "nexus between the prior crime and the current one." (*People v. Daniels, supra,* 52 Cal.3d at p. 857; *People v. Scheer, supra,* 68 Cal.App.4th at p. 1018.) A nexus was created here, by artificially fashioning a theory of motive in such broad and general terms that it might arguably apply to both sets of acts. The motive, according to the prosecution's theory, was the "power and control [appellant] sought to exert over his family." (Resp. Brief at p. 37.) The past acts are claimed to be relevant because they demonstrate motive in the instant case, but the only nexus between the past crimes and the capital case is the very motive that the nexus purported to establish. Thus, in order to admit the evidence, the court had to first accept the very inference the proffered evidence was supposed to sustain.

This obviously circular reasoning should have been recognized by the trial court. The prosecution's argument was a classic example of *petito principii* – "assuming the initial point," – one of the classic informal fallacies mentioned in Aristotle's Prior Analytics. [4] This argument has long been criticized in judicial opinions. (See, *e.g.*, *People v. Guiton* (1993) 4

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Aristotle's Prior Analytics, book 1, translated by Gisela Striker (Oxford U. Press 2009) pp. 80-81.

Cal.4th 1116, 1132, wherein Justice Mosk, concurring, criticized the majority's "illegitimate use of a legitimate assumption, *viz.*, that any given jury is 'reasonable.' Since the very question to be determined involves the 'reasonableness' *vel non* of a specific jury, to proceed as stated is to engage in *petitio principii.*")

3. The prosecution's overly broad theory of motive contravened the purposes of Section 1101(b).

The theory of motive the prosecution advanced in appellant's case was so broad that it failed to distinguish motive as a concept from propensity, character or disposition. These concepts are not, however, synonymous, and maintaining the distinctions between them is central to Evidence Code Section 1101. Legal definitions of motive vary, but all are relatively narrow and refer to a particular action. Motive is often defined as "the moving power which impels to action for a definite result." (*People v. Molineux* (N.Y. 1901) 61 N.E. 286, 296, see The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct and Similar Events (2013) (hereinafter "New Wigmore") § 8.2 , p. 1 [noting this definition has been consistently relied upon and approved by various legal authorities].) Another accepted definition of motive is "an emotion or state of mind that prompts a person to act in a particular way; an incentive for certain volitional activity." (22 Wright & Graham, Federal Practice and Procedure (1978) Evidence § 5240, p. 479.) Motive, therefore, has an immediacy and specificity that distinguishes it from character or disposition.[5] Character and

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Dictionary definitions may be less specific, and include: "something within a person (as need, idea, organic state, or emotion) that incites him to action," or, "a prompting force or incitement working on a person to influence volition or action" (Webster's Third New International

disposition, in contrast, describe qualities and personality traits that are perceived as fairly constant. "Character is thought to be a generalized tendency to act in a particular way, caused by something internal to the actor that arises from that person's moral bearing." (New Wigmore, § 8.3, p. 1) [6] The prosecutor persuaded the court to accept a concept of motive that was so broad and general that the prior crimes could be made to appear relevant and admissible under Evidence Code Section 1101(b). According to the prosecutor and respondent, appellant's desire to exercise "power and control" over Clari and Vallerie motivated his past acts and the capital crimes. Appellant has found *no* cases in which such a general concept of motive has been used to admit evidence of past crimes. On the contrary, California courts have refused to admit past crimes on the basis that they "shared the same general purpose" as the new offense. (See *People v. Scheer, supra,* 68 Cal.App.4th at p.1118; *People v. Sam, supra,* 71 Cal.2d at p. 205 [apparently spontaneous unrelated past conduct by defendant who

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Dictionary (1961, 2002) p. 1475, or, "something that causes a person to act in a certain way, [or to] do a certain thing, [e.g., an] incentive" (www.dictionary.com).

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Character may, of course, be variously defined as the authors observe in New Wigmore, § 8.3, fn 1. Professor Wigmore defined character as "the actual moral or psychical disposition or sum of traits." (1 Wigmore, Evidence in Trials at Common Law (1904) §52, p. 121. McCormick considered character to be "a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness." (McCormick, Handbook on the Law of Evidence (1954) §162, p. 340.) In reference to the general prohibition applied to evidence of a criminal defendant's character, the Advisory Committee on the Federal Rules of Evidence suggested that "character is defined as the kind of person one is." (Fed. R. Evid. 405 advisory committee's note.)

kicked former girlfriend in ribs on one occasion and kicked another person during a separate altercation was inadmissible in subsequent murder case where the defendant stomped on the victim's stomach during an argument].)

Without more specificity, the concept of motive cannot be meaningfully distinguished from propensity. The dangers of adopting such an approach are apparent. All the prosecution would need do to admit evidence of a defendant's past misdeeds under Section 1101 (b) would be to formulate a theory of motive broad enough to arguably encompass both the past criminal activity and the current crime. As the Arizona Supreme Court observed:

> The distinction is between proving a specific plan embracing the charged crime and proving a general commitment to criminality which might well have involved the charged crime.

(*State v. Ives* (1996) 187 Ariz. 102, 106-107 [927 P.2d 762, 766-767], quoting and citing, *State v. Ramirez Enriquez* (App. 1987) 153 Ariz. 431, 433 [737 P.2d 407, 409]; Udall, *et al*, Arizona Practice: Law of Evidence (2d ed. 1982) § 84, p. 184, n. 17.) Assuming, arguendo, appellant wished to maintain power and control over his family, this alone is not evidence of a specific plan that included the murders of Bruni and David.

In *Hernandez v. Martel* (C.D. Cal. 2011) 824 F.Supp.2d 1025, The federal district court rejected a similar motive theory used to admit evidence pursuant to Section 1101(b). Petitioner was convicted of the first degree murders of two women, with rape and forcible sodomy special circumstances found true in each murder case. Petitioner told police that earlier on the day of one murder he had gone looking for a homosexual to assault, found one, and then beat him up and robbed him. The jury heard evidence about the uncharged assault in the guilt trial. In closing argument the prosecutor urged

that petitioner had the same motive and intent when he assaulted the gay man as he did a few hours later when he raped, sodomized, and murdered one of the female victims:

> [Y]ou can tell what his intent was, because he admits to the police officers that he was angry that night, he was upset, he wanted to hurt somebody; that, in fact, he picked up a homosexual, beat him up, robbed him of his last five dollars or ten dollars, whatever it was. He then went out looking again, and he saw Edna Bristol over here on Broadway, as opposed to the homosexual on Ocean, picked her up .... [H]e is out to hurt people. Now, you don't think rape is only an act of sex. It's an act of violence. That's what occurred here. **He is out to hurt people. That's his intention.** Okay .... For example: 'I was driving down the street ... I was in a weird mood and thinking about a lot of things and just decided to go out and find—find myself a homosexual to beat up on, and I just found one.'—**indicating he is angry, he is frustrated and he wants to hurt somebody**.

(*Hernandez v. Martel, supra,* 824 F.Supp.2d at p. 1104-1105 [emphasis added].)

The district court found this evidence so clearly improper under California law that defense counsel's failure to object constituted ineffective assistance. The prosecution had not met its burden simply by theorizing a common motive for both sets of crimes:

> Petitioner's attack on the gay man, just before he picked up Edna Bristol, suggests that petitioner may have been seeking out individuals he perceived as vulnerable in order to take advantage of them. **At this level of generality, petitioner's uncharged conduct does have some relevance to his intent** to rape and murder Edna Bristol later that same night.

(*Hernandez v. Martel, supra*, 824 F.Supp.2d at pp. 1103-1104 [emphasis added].) The district court, however, found the uncharged conduct was not

relevant (though it might have appeared so initially) as it did not tend to prove intent, or to disprove accident, in the capital crimes:

> Here, there is insufficient "similarity in time, place and potential motive" to make petitioner's testimony that he beat up and robbed a gay man admissible to prove whether petitioner intended to rape and murder Edna Bristol later that night. The uncharged conduct does not tend to prove intent to rape or kill. On this basis alone, counsel could have successfully challenged the admission of the uncharged conduct as impermissible character evidence.

(*Id.*, at p. 1104, citing *People v. Curry* (1977) 76 Cal.App.3d 181.) [7]

4. Respondent fails to demonstrate the nexus between the dissimilar prior acts and the capital crimes required by California law.

In the AOB appellant noted several significant differences between

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[7] The district court further noted that even if the evidence had some relevancy, the prosecution had not met its burden under Evidence Code section 352 of establishing the evidence had substantial probative value clearly outweighing its inherent prejudicial effect:

> Evidence that petitioner went out looking for a gay man to assault, found one and then proceeded to assault and rob him has little materiality to the intent questions at issue at trial. Specifically, petitioner's assault and robbery of a gay man has little probative value, if any, to determining whether petitioner intended to rape and murder Edna Bristol a short time later. The prejudicial effect of this evidence outweighs any probative value it might have. Trial counsel failed to object to the admission of this evidence. His failure to do so was deficient.

(*Hernandez v. Martel, supra*, 824 F.Supp.2d at p. 1104.)

the prior crimes and the capital murders that suggest the absence of a shared motive in the two sets of acts. (See AOB at pp. 77-78.) Respondent acknowledges that appellant's "prior acts of abuse against family members were 'dissimilar' from the shotgun killings of Bruni and David" (Resp. Brief at p. 37), but does not find this lack of similarity significant because the past acts were supposedly relevant to motive. Respondent argues, "Motive is an intermediate fact which may be probative of such ultimate issues as intent, identity or commission of the criminal act itself." (Resp. Brief at p. 36, citing *People v. Lewis*, *supra*, 26 Cal.4th at p. 370.) Unlike prior conduct offered to show identity, common scheme, or plan, respondent argues motive may be established with evidence of *dissimilar* crimes. (Resp. Brief at pp. 36-37, citing *People v. Thompson, supra*, 27 Cal.3d at p. 319, fn. 23.) [8] Where the evidence pertains to motive, all that is required under Section 1101(b) is a "nexus between the prior crime and the current one." (Resp. Brief at p. 37, citing *People v. Daniels, supra,* 52 Cal.3d at p. 857; *People v. Scheer, supra,* 68 Cal.App.4th at p. 1018.) For respondent, the nexus is the "power and control" theory of motive. [9]

Respondent's argument is not supported by California law. Dissimilar conduct may be relevant to motive, but the proponent of the evidence must demonstrate a specific causal connection between the past and present crimes. For dissimilar crimes to be relevant, this Court has required a

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Respondent's concept of "power and control" does not fit within the section 1101(b) exception for common plan or scheme. (See AOB at pp. 80-81.)

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As discussed above, this argument fails because it rests on circular reasoning and a vague and unworkable characterization of motive. (Arg. I, Section B, subsections 2 and 3.)

"direct relationship" between the past acts and the new charges. (*People v. Thompson, supra,* 27 Cal.3d at p. 319, fn. 23.) The "direct relationship" in *Thompson* was that the subsequent offense was a direct outgrowth of the earlier crime. Cases decided after *People v. Thompson* are in accord, and their facts are readily distinguished from those of appellant's case. In some instances, the defendants committed a second crime trying to escape or avoid capture for an otherwise unrelated offense. (See, *e.g.*, *People v. Robillard* (1960) 55 Cal.2d 88, 127-128 [kidnapping and robbery of victim was motivated by defendant's need for money and transportation to escape apprehension for crimes committed 13 days earlier]; *People v. Durham* (1969) 70 Cal.2d 171, 186-189 [parole status and recent criminal activity relevant to show premeditated murder of police officer].) In other instances the second crime was committed to eliminate witnesses to the previous offense. (See, *e.g.*, *People v. De La Plane* (1979) 88 Cal.App.3d 223, 245-246 [evidence of prior robberies admissible to show motive to murder witnesses to those crimes]. In appellant's case, the prosecutor did not establish a direct causal relationship between the past events and the current case that was a prerequisite for admitting evidence of past acts or crimes to show motive. The prosecution never asserted appellant killed Bruni and David in response to his domestic abuse of Clari and Vallerie, to avoid detection, or to escape punishment for abusing them.

The prosecutor speculated the killings, and the prior acts, were all motivated by appellant's desire to maintain power and control. The prosecutor further theorized appellant, having lost control over Clari, killed her mother and brother to punish her for leaving him. A motive of revenge or retribution has occasionally been inferred from evidence of dissimilar past crimes. However, these cases are distinguishable from appellant's case in

several critical respects: the new charges were a response to the prior crime; the motive was specific; and, the past crime was more proximate. In *People v. Daniels*, *supra*, 52 Cal.3d 815, the defendant was shot by police while trying to escape after committing an armed bank robbery in 1980. The shooting left the defendant a paraplegic confined to a wheelchair. He entered a plea and was sentenced to 13 years for the bank robbery, but remained free on bail pending the outcome of an appeal. In 1982 the Court of Appeal affirmed the conviction and set a date for sentencing. Defendant failed to appear and then shot and killed the two police officers who came to his home to take him into custody. One of the officers involved in the pursuit and exchange of gunfire after the bank robbery testified in the guilt phase of the capital trial. This Court held the testimony was highly probative and properly admitted to show motive and intent to kill: "[T]here is a *direct relationship* between the police rendering defendant a paraplegic and defendant murdering the officers in retribution." (*People v. Daniels*, *supra*, at p. 857 [emphasis added]. See also *People v. Rodriguez* (1986) 42 Cal.3d 730, 756-758 [evidence of prior interest in killing law officers admissible to show intent]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1118-1119 [evidence of prior violent struggle between defendant and victim relevant and admissible to show motive for first degree murder].)

Respondent acknowledges the only nexus between appellant's past acts and the capital crimes is the state's theory of motive. [10] The "power and

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In all but one instance, the trial court did not address the specific items of proffered evidence to determine whether and to what extent each was relevant. Where the court did single out two of the past incidents, its remarks indicate confusion regarding the relationship of the proffered evidence to contested facts and issues. The court allowed the prosecutor to introduce Items A and B pertaining to Vallerie Cage (see 2 CT 539-540)

control" motive, however, was stated in such broad terms that it could have been applied to nearly any action taken by appellant directed toward any family member. [11] The prosecutor could have *argued* that appellant was motivated by an intense need to retain power and control, and Clari's testimony about appellant's behavior in the several weeks leading up to the crimes could have supported such an argument. However, the power and control theory was too broadly stated and too speculative to provide a legitimate basis for admitting the highly prejudicial evidence of appellant's remote and unrelated past acts and crimes.

5. The prosecution had other evidence to support its theory of motive, making evidence of the past crimes cumulative and unnecessary.

The proponent's need for the evidence is a significant factor for the trial court in deciding whether to admit evidence of a defendant's past conduct. The probative value of the proffered evidence depends "not only on the evidence seen in isolation but also on the existence of other evidence offered to prove the same fact." (New Wigmore, § 4.5.1, p. 7.) The availability of evidentiary alternatives is, therefore, highly significant. (See

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based, in part, on its finding that this evidence "helps explain why Mrs. Cage was hiding herself and the kids." (3 RT 446.) Setting aside the question of whether these incidents were even probative on that point, Clari's reasons for leaving appellant are not relevant. The prosecution's theory was that appellant was angry because his wife left him, taking their two young children. There was no reason to suppose Clari's motivations for leaving would have altered appellant's response to the loss of his wife and children.

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As appellant has noted, during this same period of 14-15 years there was no indication appellant *ever* acted out against Bruni. (AOB at p. 78.)

Old Chief v. United States (1997) 519 U.S. 172.) California law is in accord: "[E]vidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute; the prejudicial effect of the evidence of the uncharged acts outweighs its probative value to prove intent as it is cumulative regarding that issue." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 406.)

The prosecutor argued appellant's past acts were needed to establish motive and without this evidence the jurors would be unable to make sense of the case. (See 2 CT 540 [Trial Brief]; 3 RT 438-440 [Motion hearing].) Respondent repeats these arguments in its brief but does not explain ***why*** the case would have been confusing without this evidence. (See Resp. Brief at pp. 37, 39.) The prosecution had a simple and straightforward explanation for the crimes, and had testimony to support this theory ***without*** using the past acts: appellant was angry with Clari for leaving and taking his son, and took out his anger on Clari's family. Elsewhere in its brief respondent calls this alternative evidence "overwhelming," and states:

> ***[E]ven excluding evidence of Cage's prior abuse***, there was ample evidence of first degree premeditated murder. Two weeks before the murder, Cage told Jason Tipton that he was upset that Clari took his son away from him and that he was going to put a gun to Bruni's head to find out where Clari had gone. (7 RT 1012-1017.) A few days before the murders, Cage told Tipton that he felt "like doing something to Clari's mom to get my son back." (7 RT 966.) He also stated on several occasions that he wanted to "fuck up" Clari's mom. (7 RT 967.) Cage further told Kevin Neal that he was upset with Bruni because she would not tell him where his children were and called her a "bitch." (7 RT 1012-1017.) Evidence was also presented that Cage concealed the shotgun he used to kill Bruni and David in a basket of clothes he took over to Bruni's house and that, after killing Bruni, Cage walked upstairs and killed David, still in his bedroom.

(Resp. Brief at pp. 41-42 [emphasis added].) By respondent's admission, the prosecution had a motive for the murders and evidence to support that theory *without* introducing the past crimes. Respondent describes this evidence as "ample," to sustain convictions for first degree, premeditated murder, and several times describes it as "overwhelming." (See Resp. Brief at p. 41.) Respondent's assertions beg the question: if the other evidence so conclusively proved first degree murder, why was it necessary to admit evidence of appellant's past crimes? Appellant maintains the past acts were neither necessary nor relevant to motive or intent in this case. Respondent, however, takes two contradictory positions, first claiming the jurors could not understand the case without this background (see Resp. Brief at pp. 25-26, 37 and 39), but next arguing the outcome would have been the same *without* the past acts because there was a "ample evidence of first degree premeditated murder." (See Resp. Brief at p. 41, see also pp. 49-50.) Respondent cannot have it both ways.

For all of the reasons discussed above and in the AOB, the evidence was not sufficient to establish first degree, premeditated, murder. The prosecution overcame the weaknesses in its case by introducing a glut of highly prejudicial evidence that, while not relevant to appellant's intent in the homicides, was designed to encourage the jurors to adopt the prosecution's first degree murder theory without critical evaluation, and to punish appellant to the greatest extent possible in retribution for his longstanding, abusive treatment of this family.

C. The Admission of this Evidence Was a Clear Abuse of the Court's Discretion under Evidence Code Section 352.

Where proffered evidence involves a defendant's past crimes, the

prosecution must demonstrate not only relevance but also a high degree of probative value. (See *People v. Soper*, *supra*, 45 Cal.4th at p. 773.) The prosecution did not meet this burden, and the trial court failed to elicit enough information to make the careful evaluation of prejudice against probative value that Section 352 requires. The lawful admission of evidence likely to damage a defendant's character requires first a precise evaluation of its relevance and then a considered balancing of its probative value and possible prejudice. (See, *e.g.*, *People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 [trial court's discretion to exclude unduly prejudicial propensity evidence under section 352 saves Evidence Code section 1108 from a due process challenge].) In appellant's case, the court abdicated its responsibility and simply acceded to the prosecutor.

The prosecutor sought to admit 19 incidents of appellant's past conduct; 18 were ruled admissible, over defense objections. The court accepted without question the prosecutor's "power and control theory," as well as the accompanying assertion that the past acts were relevant to prove identity and motive. The court's comments reveal its thought processes:

> All of these are prejudicial, obviously. If they weren't the People wouldn't want to get them into evidence. Taken in a vacuum, I would not allow many of them in at all. But to show the motive and identity, which are the two biggies under the enumerated reasons that 1101(b) can come in, the probative value, in this Court's opinion, far outweighs the prejudicial effect

(3 RT 445-447.) As respondent acknowledges, the court excluded only one alleged incident of domestic violence. (Resp. Brief at p. 29.) The court did not allow evidence of appellant "always beating up" Richie Burgos because it felt the testimony might be unduly time consuming and the prosecution had "enough" evidence. (See 3 RT 446-447.)

Appellant's past acts were, at most, minimally probative of motive for all of the reasons discussed here and in the AOB. The potential for inflaming the jury, however, was apparent from the nature of the crimes (prolonged abuse of a young woman and child) and the identities of the victims/witnesses who would testify about those incidents. Although the court mentioned Section 352 in passing (3 RT 447), it undertook no analysis or balancing of prejudice against probative value - either as a whole or with regard to any specific area of proffered testimony.

The court apparently concluded such an evaluation was unnecessary because the evidence was relevant to support the prosecution's power and control theory. The court did not question the prosecutor, and instead moved quickly down the list in the Trial Brief, admitting 18 of the 19 proffered items of evidence. (See 3 RT 445-447.) The court's comments reveal its rulings resulted more from visceral feeling than the careful consideration and analysis due process requires. Once having accepted the "power and control" motive theory, the court was of a mind to allow virtually any supporting evidence. This is reflected in the court's decision to admit testimony about an incident involving appellant's daughter, Vallerie Cage: "And it's just violent - random violence upon another [family] member which helps show the overall picture which goes to the ID and motive." (3 RT 446, see AOB at p. 81.)

The evidence of appellant's past crimes had little, if any, legitimate probative value and was unduly prejudicial and inflammatory. The court's abuse of its discretion under Evidence Code section 352 deprived appellant of his rights to due process of law, a fair trial.

In the AOB appellant explains why the past crimes evidence was particularly prejudicial and inflammatory. Respondent, however, gives little

consideration to the prejudice side of the Section 352 equation. Instead, respondent emphasizes the "highly probative" value of the prior crimes as support for the "power and control" theory of motive. (Resp. Brief at pp. 38-39.) Respondent simply asserts that the relevance of this evidence to appellant's motive and intent "outweighed its potential for undue prejudice." (Resp. Brief at p. 40.) According to respondent, the past acts evidence could not have been unduly prejudicial for several reasons. First, respondent opines that the "prior abuse evidence was no more inflammatory than [the] evidence presented concerning Cage's shotgun murders of Bruni and David." (Resp. Brief at p. 40, citing *People v. Zepeda*, *supra*, 87 Cal.App.4th at p. 1211.) Second, the limiting instruction (CALJIC 2.50) minimized any prejudicial impact. Third, the prosecutor's comments in closing argument "decreased any possibility of prejudice." (Resp. Brief at pp. 40-41, 11 RT 1586.) Finally, respondent claims any error in the trial court's exercise of discretion under Section 352 was harmless. (Resp. Brief at pp. 41-42.) For the reasons set forth below, these contentions do not withstand scrutiny.

1. The trial court failed to consider and appreciate the inflammatory nature of the proffered evidence.

In order to balance the competing interests at issue under Section 352, the court must have sufficient information about the proffered evidence and an adequate understanding of its place in the larger context of the case.

> [T]o determine the admissibility of uncharged misconduct evidence, the court must consider not only whether the evidence *actually* reveals something about the person's character *but also whether the jury is likely to see it that way.*

(New Wigmore, § 8.3, pp. 5-6 [emphasis added].) As appellant pointed out

in the AOB, the trial court simply deferred to the prosecutor. [12] The court did not question the necessity for this evidence and never asked the prosecutor about the availability of less prejudicial alternatives. The court's passivity would have been improper in any case, and is even more remarkable here, given the circumstances of appellant's case.

The Trial Brief described the proffered evidence of appellant's past crimes sufficiently to put the trial court on notice of its inflammatory potential. Appellant's past acts were not generic felonies, *e.g.*, drug crimes, theft, or robbery committed against unknown victims. The conduct here consisted of multiple incidents of appellant's violence and cruelty toward his own wife and young daughter, behavior sure to be morally offensive in the eyes of the jurors and tending "to evoke an emotional bias against the defendant." (*People v. Crew* (2003) 31 Cal.4th 822, 842. See, *e.g.*, *People v. Steger* (1976) 16 Cal.3d 539, 548–549 ["Child-battering is a crime universally abhorred by civilized societies"]; *People v. Sam, supra,* 71 Cal.2d at pp. 205-206 [finding "manifestly harmful" evidence that defendant "was a man who often drank to excess and was frequently drunk; that he was often belligerent and fought with others; that he had been living with a married woman not his wife; that he had struck that same woman with sufficient force to hospitalize her."].) Professor Imwinkelreid suggests the court should consider nine factors in assessing the potential for unfair prejudice,

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The court is not immune to the effects of evidence of uncharged misconduct. As the treatise authors observe. "A factor complicating the proper assessment of probative value and prejudicial effect is that the judge is also subject to misconceptions and a tendency to apply forbidden inferences." (New Wigmore, §4.5.1, citing Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases* (1989) 64 Wash.L.Rev. 289, 347-348.)

the first two of which are: the reprehensible nature of the uncharged crime, and, the sympathetic character of the alleged victim. (2 Imwinkelreid, Uncharged Misconduct Evidence (1998) §8:24.) California law recognizes that criminal behavior is subject to differing degrees of disapprobation. For example, a defendant's habit of leaving the scene of an accident or traffic infraction is less damning than a propensity to commit sexual offenses or violent crimes. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1331 [prejudicial effect of prior rapes]; *People v. Memory* (2010) 182 Cal.App.4th 835, 860-861 [potential prejudice from defendant's gang affiliation].)

The briefest description of the facts made obvious the trial would be an emotional powder keg. Appellant was accused of killing his wife's mother and younger brother, two highly sympathetic victims. Evidence of uncharged misconduct "may be easily affected by passion or prejudice on the part of the witness testifying," thereby compounding "the danger that it may be given undue weight by the jury." (McKelvey, Handbook of the Law of Evidence (1898) §108, p. 149.) The witnesses to the past acts of domestic violence were emotionally involved on several levels. Clari was, at the same time, appellant's wife of some 15 years, a victim of domestic violence crimes, and the grieving surviving victim. In addition to being Bruni's only daughter, she had a special relationship with David. Clari was a teenager when David was born, and she was not only a sister but a surrogate mother to him. Similarly, Vallerie was, appellant's daughter, a victim of and witness to his abusive behavior, and, a surviving victim who had lost her grandmother and David, who was close in age and had effectively been a sibling. Through this he jury heard horrific descriptions of appellant's past crimes from witnesses who elicited enormous sympathy and pity.

2. Respondent's attempts to minimize the prejudice are unavailing.

Respondent contends there was no risk of undue prejudice because appellant's past acts were "not more inflammatory" than the evidence pertaining to the charged murders. (Resp. Brief at p. 40, citing *People v. Zepeda, supra,* at p. 1211). [13] In addition, the limiting instruction (CALJIC 2.50) minimized any prejudicial impact. Finally, the prosecutor's comments in closing argument "decreased any possibility of prejudice." (Resp. Brief at pp. 40-41, 11 RT 1586.) Respondent's arguments manifest a limited understanding of the nature of undue prejudice.

Unduly prejudicial evidence differs from evidence which is merely prejudicial and, therefore, is not subject to the same analysis. Both respondent and, as respondent observes, the trial court, failed to make this vital distinction.[14] Evidence which is merely prejudicial may be quite detrimental to a litigant *without* provoking a reaction strong enough to interfere with the jury's reasoned decision making. [15] As discussed above and

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13 It is difficult to imagine where this would *not* be so in a capital case, where the defendant is accused of aggravated murder and faces the ultimate punishment.

14 Respondent invokes the trial court's reasoning at the motion hearing, and argues: "The mere fact that [the past acts] evidence was also prejudicial does not automatically render evidence of [appellant's] prior abuse against his family inadmissible. As noted by the trial court, 'All of these [prior acts] are prejudicial, obviously. If they weren't the People wouldn't want to get them into evidence'." (Resp. Brief at p. 39, quoting 3 RT 445.)

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in the AOB, appellant's past acts were another matter. The past acts evidence, while not relevant to intent in the homicides, contained two forms of unfair prejudice: "inferential error prejudice" and "nullification prejudice."

> [I]nferential error prejudice occurs when the factfinder misjudges the value of a particular item of evidence. *** As applied to a criminal case in which the government wishes to present evidence of the accused's uncharged misconduct, inferential error prejudice would result from the jury's over-valuation of the uncharged misconduct evidence as proof of the fact it is legitimately offered to prove. The prejudice is not caused by jurors' misunderstanding of the limited purpose for which the evidence is offered or from their refusal to use the evidence legitimately, but from their misjudgment of the probative value the evidence carries for that purpose.

(New Wigmore,§ 4.5.1, pp. 8-9.) Appellant's domestic abuse of Clari and Vallerie did not support an inference of premeditation and deliberation in the murders for all of the reasons discussed here and in the AOB. However, using the past acts evidence and the overly broad motive theory, the prosecutor persuaded the jury to make this inference and, on this basis, to convict appellant of first degree murder. In addition, the evidence of appellant's past acts was clearly likely to cause "nullification prejudice," which "occurs when, on hearing the uncharged misconduct evidence, the jury either (1) applies the forbidden character-propensity inference and concludes on that basis that the accused is guilty, or (2) chooses to ignore the law entirely and convicts the accused simply to punish her for being a bad person or to protect society from her, regardless of whether the jury believes she committed the charged offense." (*Id.*) In appellant's case the prosecution overcame the weaknesses in its case for first degree murder by introducing this glut of irrelevant and highly prejudicial evidence calculated to ensure the jurors would punish appellant to the greatest extent possible in retribution for

his longstanding, abusive treatment of this family.

A fundamental problem with unduly prejudicial evidence is that its effects are insidious and virtually impossible to cure. The impact is felt at an emotional (often subconscious) level not susceptible to rational persuasion. Emotion overtakes reason, making it impossible for jurors to follow a limiting instruction or admonition that runs counter to their strong emotions and moral convictions. As Professor Wigmore states:

> The deep tendency of human nature to punish, not because our defendant is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court.

(1 Wigmore, Evidence in Trials at Common Law (2003, 1984) p. 127.) Where jurors' minds have been won over in this way the fact that the past crimes are not more inflammatory than the current case will be of no consequence.

Respondent's reliance on the limiting instruction is misplaced. The logic behind the "conditional relevance" concept has long been questioned and is the subject of ongoing scholarly debate. [16] Empirical studies show that jurors often do not understand limiting instructions, and fail to follow even those instructions they do understand. [17] Even the United States Supreme

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For persuasive critiques of conditional relevance see, *e.g.*, Allen, *The Myth of Conditional Relevancy* (1992) 25 Loy. L.A. L.Rev. 871, Ball, *The Myth of Conditional Relevancy* (1980) 14 Ga. L. Rev. 435, and, Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources* (2003) Mich. St. L. Rev. 1243.

17

The treatise authors in New Wigmore, § 4.5.1, cite several studies, conducted at various times in the past 45 years, consistently demonstrating that mock jurors presented with certain evidence and later told to disregard

Court, which normally considers limiting instructions to be effective, has held that under some circumstances they are inadequate protection from undue prejudice. (See New Wigmore, § 4.5.1, p. 4, fn. 38, citing *Bruton v. United States* (1968) 391 U.S. 123, 128 [confession admissible against one co-defendant and not the other]; *Gray v. Maryland* (1998) 523 U.S. 185 [redacting the name of the non-confessing co-defendant from statements insufficient protection against unfair prejudice].) The nature of the evidence subject to the limiting instruction is highly relevant. Limiting instructions cannot be relied upon "when the evidence is in some sense horrific and highly likely to inflame the passions of any observer." (Mueller & Kirkpatrick, Federal Evidence (3d ed. 2007) §4.13.) In appellant's case neither the presence of a limiting instruction nor the prosecutor's comments in closing argument could counteract such an excess of unduly prejudicial influences.

Contrary to respondent's contention, the prosecutor's closing argument not only failed to counteract the prejudice but actually *enhanced* the inflammatory effect. Immediately after reviewing the evidence concerning several particularly egregious incidents of appellant's past conduct, the prosecutor stated:

> Why did you hear all of that evidence? Not so that you would think that the defendant is a bad guy or a person of bad

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it found the defendant guilty between 20 and 35 percent more often than the group never exposed to the evidence. See § 4.5.1, p. 4, fn. 31-37, citing Sue, *et al, Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma* (Dec. 1973) 3 J. Applied Soc. Psychol. 354, Kalven & Zeisel, The American Jury (1966) pp. 127-130, 177-180, Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt* (1985) 9 Law & Hum. Behav. 37, 47, and, Hans & Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries* (1975-1976) 18 Crim. L.Q. 235, 242-243.

> character. You can't use it that way. You heard that evidence to help you understand the intent required in this case, to help you understand the premeditation and deliberation; to help you determine the identity of the killer; to help you determine the motive for this crime. That's why you heard all of that evidence. That's how you use all of that evidence.

(11 RT 1586.)

The prosecutor's mention of the limiting instruction in closing argument was an example of ***apophasis***, a rhetorical device whereby the speaker pretends to deny something as a means of implicitly affirming it.[18] This Court has expressed disapproval when prosecutors have resorted to this sort of rhetorical device.[19] In *People v. Wrest* (1992) 3 Cal.4th 1088, the prosecutor repeatedly referred to matters that he "could" discuss but would not, and then discussed them. The Court found: "Repetition of the statement, 'I am not arguing X,' strongly implied the prosecutor was in fact asserting the validity and relevance of X, but, for lack of time, was concentrating on other, presumably more important topics." (*Id.* at p. 1107.)

Apophasis and similar rhetorical techniques are very effective, and therefore highly prejudicial, particularly when applied to emotional topics.

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Authorities distinguish between several related rhetorical devices. (Compare http://en.wikipedia.org/wiki/Apophasis ["praeteritio, also known as paralipsis, preterition, cataphasis, antiphrasis, or parasiopesis, is a rhetorical device wherein the speaker or writer invokes a subject by denying that it should be invoked"], with http://wordsmith.org/words/paralipsis.html [paralipsis is defined as drawing attention to something while claiming to be passing over it].)

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The Court in *Wrest* identified the rhetorical device as paralipsis, *i.e.*, stating one thing but suggesting exactly the opposite. (*People v. Wrest, supra*, 3 Cal.4th at p. 1106.) Apophasis and paralipsis are closely related and are sometimes used interchangeably.

The court in *Grovit v. City of New Haven* (Conn.Super. 1945) 13 Conn.Supp. 179 [1945 WL 555], commented: "[T]he argument of counsel was an insidious appeal to the sympathetic consideration of the jury. In a rather clever manner he argued by way of apophasis, in that though discussing the grief of his client, he expressly disclaimed any intention of relying upon it as a means of arousing any emotion." (*Id.* See also *Cavallaro v. Brooks* (Conn.Super. 1969) 29 Conn.Supp. 20, 21 [269 A.2d 83, 84] [reversing award of damages in personal injury action that, while generous, would not have been so excessive as to require that it be set aside, had it not appeared that the size of the verdict was directly related to an improper argument by plaintiff's counsel].)

The evidence of appellant's past crimes was so unduly prejudicial that, once admitted, no limiting instruction or argument of counsel could have ameliorated the harm. Respected authorities have long held that some bells cannot be un-rung. In such instances neither instructions nor admonitions from the court, or even sincere warnings from the prosecutor, will counteract the prejudice. (See generally, Gershman, Trial Error and Misconduct (1997, 2000) § 6-4, pp. 415-416; *People v. Gibson* (1976) 56 Cal.App.3d 119, 129-130 ["essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect"]. See also, *Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 887 ["If you throw a skunk in the jury box, you can't instruct the jury not to smell it."].) Here, the prosecutor's use of apophasis exacerbated the prejudice inherent in the improper introduction of evidence of appellant's past crimes.

D. Reversal is Required Because the Erroneous Admission of this Evidence Was Not Harmless under Any Standard.

Respondent contends that should this Court find error in the admission of appellant's past acts, "any such error was harmless because it is not reasonably probable that [appellant] would have received a better result in the absence of the error." (Resp. Brief at p. 41, citing *People v. Malone*, *supra*, 47 Cal.3d at p. 22.) In the AOB appellant argues for application of the federal constitutional standard, which requires respondent to demonstrate there is no reasonable possibility the erroneous admission of the prior crimes evidence contributed to the verdicts. (AOB at pp. 91-93; *Chapman v. California* (1967) 386 U.S. 18, 23-24.) However, reversal is required even under the less stringent standard of *People v. Watson*, *supra*, 46 Cal.2d at p. 836.

Where an evidentiary ruling infringes upon a criminal defendant's constitutional rights, the reviewing court must reverse unless it be convinced that the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) The Second Circuit Court of Appeals recently described the harmless error analysis required of the reviewing court:

> The harmfulness of an improperly admitted statement must be evaluated in the context of the trial as a whole and depends upon a host of factors, including "the strength of the government's case, the degree to which the statement was material to a critical issue, the extent to which the statement was cumulative, and the degree to which the government emphasized the erroneously admitted evidence in its presentation of the case . . . "

(*United States v. Okatan* (2nd Cir. 2013) 728 F.3d 111, 120, quoting *United States v. Reifler* (2d Cir. 2006) 446 F.3d 65, 87.) When applied to appellant's case, this analysis demonstrates the importance of the past acts evidence in

the prosecution's case for first degree murder and refutes the claim that its admission was harmless error.

The prosecution's case for first degree murder was not strong, for several reasons discussed here and in the AOB. (See Args. II and III.) While there is little doubt appellant shot Bruni and David on November 9, 1998, the evidence at most supported second degree murder. Clearly, the prosecutor felt the past acts evidence was not only material but essential to persuading the jury these were premeditated and deliberate killings.[20] The prosecutor acknowledged as much in the motion papers and at the pretrial hearing. Not surprisingly, therefore, the case for first degree murder relied heavily upon the past acts evidence.

The prosecutor began her opening statement began with a preview of this evidence, in which she told the jurors how the past acts related to the "power and control" motive theory. (See 6 RT 772-776.) Clari was chosen to be the first witness, and she began her lengthy testimony with a detailed account of the abuse appellant allegedly inflicted on her and her family for over 14 years. (See 6 RT 789-808.) Clari spent more time before the jury than ***any*** other witness, including the senior investigators, percipient witnesses to the crimes, and the DNA expert. [21] She was followed by Vallerie

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In Argument II (here and in the AOB) appellant explains that the evidence was insufficient to prove premeditation and deliberation even with the past acts evidence.

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Clari's guilt phase testimony is more than *twice* as lengthy as the testimony of other significant witnesses, occupying approximately 73 transcript pages (see 6 RT 788-852; 7 RT 901-904; 8 RT 1100-1104), compared to 30 pages of testimony from crime scene investigator Mike Lind (see 8 RT 1105-1130; 10 RT 1371-1376), 31 pages from Chief Investigator Michelle Amicone (see 11 RT 1516-1547), and 36 pages from

Cage, who testified in a similar vein about appellant's violent history. (6 RT 853-862.) Just as she had done in her opening statement, the prosecutor began her closing argument by reviewing not the evidence concerning the murders but appellant's history of domestic violence. At the outset jurors were reminded of the prosecutor's warning about this "gut wrenching" case. (11 RT 1572.) Throughout her argument the prosecutor contrasted the jurors' experience (receiving the evidence in a "sterile courtroom environment") with that of the witnesses who had lived through these terrible events. (See 11 RT 1572-1576.) The prosecutor summarized the testimony pertaining to eight of appellant's most egregious past crimes. (11 RT 1584-1586.) The jurors were constantly reminded of the victims by the prosecutor's interjections, after mentioning a specific violent episode, of comments such as "Vallerie saw that," or "Clari heard that." (See 11 RT 1572-1575.)

The evidence of appellant's brutal abuse of his wife and daughter was calculated to dispose the jurors to punish him to the greatest possible extent. By connecting the past crimes to the homicides through the "power and control" motive theory, the prosecution gave the jurors a way to use the past acts to find premeditation and, on this basis, to convict appellant of the most serious charges, *i.e.*, premeditated, first degree murder, and to find true the special circumstances of lying-in-wait and multiple murder.

Respondent maintains any error in admitting this evidence was harmless because the evidence of intent was "overwhelming" even *without* the past acts. (Resp. Brief at p. 42.) Appellant disagrees. Respondent overlooks a glaring inconsistency in its arguments. Elsewhere respondent argues that appellant's past acts were needed to establish motive, and that

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DNA expert Doctor Ellen Clark (10 RT 1415-1451).

without this evidence of motive the jurors would be unable to make sense of the case. (See Resp. Brief at pp. 37, 39.) Both propositions cannot be true. The past acts evidence was unduly prejudicial for all of the reasons discussed above and in the AOB, and reversal is required even under the less stringent standard of *People v. Watson, supra,* 46 Cal.2d at p. 836.

II.

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE PREMEDITATION AND DELIBERATION NECESSARY TO SUSTAIN THE FIRST DEGREE MURDER VERDICTS.

A. Introduction and Overview.

As discussed above, the trial court admitted an abundance of evidence and testimony concerning appellant's past violent and criminal behavior. The stated justification was that the past crimes were admissible under Evidence Code, section 1101, subdivision (b), as relevant to identity and motive in the two homicides. The evidence also served a more significant function for the prosecution - it was vital to the state's case for first degree, premeditated murder.

In the AOB, appellant explained how the prosecution used the evidence of his past acts to overcome the lack of evidence indicating premeditation. The 14-year history of domestic violence was undoubtedly sufficient to persuade jurors appellant intended to dominate and control his wife and daughter. By assigning the same "power and control" motive to the domestic violence and the two homicides, the prosecutor led the jurors to conclude the killings were premeditated by the following reasoning: appellant intentionally beat and abused Clari and Vallerie for over 14 years in order to

dominate and control them; appellant killed Bruni and David to exert power over Clari; therefore, appellant killed the victims as a means of ensuring his power and control over Clari and Vallerie, and the homicides were premeditated.

With their emotions inflamed by the massive amount of irrelevant "motive" evidence – which was, in effect, improper character evidence – jurors likely accepted the prosecution's interpretation of equivocal facts and ignored the evidence indicating a *lack* of premeditation and deliberation including, *inter alia*, appellant's intoxication. Under California law, an unlawful killing is presumed to be second degree murder. (*People v. Anderson* (1968) 70 Cal. 2d 15, 25.) Although premeditation may be shown by circumstantial evidence, the evidence in appellant's case was not sufficient to overcome this presumption. The evidence of "planning" was weak at best, and the manner of killing was consistent with a spontaneous explosion of rage. (See AOB at pp. 104 -105.) Additionally, the uncontroverted testimony describing appellant's intoxication was strong evidence he *lacked* the intent required for a first degree murder conviction. (AOB at pp. 101, 104.)

Respondent maintains there was ample evidence of premeditation. At the outset, it asserts this Court has only "limited" discretion in reviewing the jury's verdicts. (See Resp. Brief at pp. 44-46.) Next, respondent cites the factors relevant to distinguishing first degree from second degree murder (*People v. Anderson, supra,* 70 Cal.2d 15, 26-27), commenting that the *Anderson* factors are not inflexible or exclusive determinants of premeditation – which appellant does not dispute. (Resp. Brief at pp. 46-47.) Respondent relies first and foremost on motive, contending that the "power and control" motive and the evidence of appellant's past acts "clearly established [appellant's] motive in killing Bruni and David, and thus helped

demonstrate that the murders were deliberate and premeditated." (Resp. Brief at pp. 47-48.) Next respondent finds evidence of planning. The "most telling evidence" of premeditated murder is, according to respondent, appellant's having carried the shotgun into the house in a laundry basket. (Resp. Brief at pp. 48-49.) Additionally, the manner of the killings "support[s] inferences of calculated designs to ensure death." (Resp. Brief at pp. 49-50.) Finally, respondent argues the absence of sufficient evidence of premeditation would in any case be harmless error, as the state had sufficient evidence of first degree murder under a separate theory of lying-in-wait. (Resp. Brief at p. 50.)

For the reasons set forth below and in the AOB, respondent is incorrect.

B. Respondent Improperly Minimizes the Scope of this Court's Review.

Appellant and respondent agree on the basic standard of review applied to sufficiency of the evidence claims. The court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The determination to be made is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-314.) The reviewing court does not determine "whether *it* believes that the evidence at trial establishes guilt beyond a reasonable doubt," but whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 313-314; *People Scott* (2011) 52 Cal.4th 452, 487; *People v. Davis* (1995) 10 Cal.4th 463, 509; *People v. Green* (1980) 27 Cal.3d 1, 62.)

Although jury verdicts are entitled to considerable deference, they are not sacrosanct, and the degree of deference due the fact-finder depends upon the circumstances of the particular case. Even where deference to the decisions of lower courts and/or juries is appropriate, that deference is not equivalent to unqualified acceptance. Writing for a unanimous court in *Fox v. Vice* (2011) 131 S.Ct. 2205, Justice Kagan, after acknowledging the deference due the trier of fact, commented on the duties incumbent upon reviewing courts:

> the trial court must apply the correct standard, and the appeals court must make sure that has occurred. *** And the appeals court must determine whether the trial court asked and answered [the correct] question, rather than some other. ***A trial court has wide discretion when, but only when, it calls the game by the right rules.***

(*Fox v. Vice*, *supra*, 131 S.Ct. at pp. 2216-2217 [emphasis added; citations omitted].) Justice Kagan noted *Koon v. United States* (1996) 518 U.S. 81, 100, where the United States Supreme Court made clear that the considerable discretion invested in the trial court does not make appellate review "an empty exercise." (*Koon v. United States, supra,* 518 U.S. at p. 98.) Instead, "the deference that is due depends on the nature of the question presented," and reviewing courts should not be deterred from reversing erroneous decisions whether the issue is characterized as a question of fact, a mixed question of fact and law, or a purely legal issue. (*Id.* at pp. 99-100.)

Appellate courts must take particular care with claims challenging the sufficiency of the evidence. In *People v. Alkow* (1950) 97 Cal.App.2d 797,

the Court of Appeal remarked on the due process implications of failing to overturn a verdict based on insufficient evidence:

> It is the right of every reviewing court to insist that in the trial of a criminal case the evidence of the People should be the best that is obtainable ...[w]hen presentation of the evidence is unnecessarily incomplete, and the crucial facts of the case are left to inference, the tendency will be to relax the requirement that guilt must be established beyond a reasonable doubt and place emphasis upon mere suspicion.

(*People v. Alkow*, *supra*, 97 Cal.App.2d at p. 802.) When reviewing the sufficiency of the evidence of intent to commit murder, the reviewing court has specific obligations. The evidence is examined in light of the *entire* record, and the reviewing court is not limited to the evidence supporting the prosecution's theory. In *People v. Alcala* (1984) 36 Cal.3d 604, this Court explained the process of review:

> First, we must resolve the issue in light of the *whole record* - i.e., the entire picture of the defendant put before the jury - and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements constituting the higher degree of the crime is *substantial*; it is not enough for the respondent simply to point to "some" evidence supporting the finding . . .

(*People v. Alcala*, *supra*, 36 Cal.3d at p. 631, citing *People v. Bassett* (1968) 69 Cal.2d 122, 138; *People v. Holt* (1944) 25 Cal.2d 59, 69-70] [italics in original].) This Court has directed appellate courts not to be unduly deferential in such situations: "We recognize that every relevant and tenable presumption is to be indulged in favor of sustaining the judgment of the trial court; but when a proper case appears we do not hesitate to modify the judgment to murder of the second degree and affirm it as modified." (*People v. Cruz* (1980) 26 Cal.3d 233, 244, quoting *People v. Wolff* (1964) 61 Cal.2d

795, 818-819 [citations omitted].)

For the reasons discussed below and in the AOB, the evidence in appellant's case was insufficient to sustain the verdicts of premeditated murder. The jury's verdicts of first degree murder likely resulted from the unduly prejudicial influence of the erroneously admitted past acts evidence rather than a careful evaluation of the evidence of appellant's intent. This Court should, therefore, reverse the verdicts.

C. The Evidence Does Not Establish a Plan to Commit Murder.

Respondent finds the "most telling evidence" of premeditation to be the fact that appellant "went over to Bruni's house with his loaded shotgun hidden in a basket of laundry." (Resp. Brief at p. 48.) The prosecutor (and now respondent) mischaracterized the evidence in a slight but significant way that makes appellant's conduct appear stealthy and premeditated. Appellant's use of the laundry basket is described as "[A] ruse [appellant] had used earlier to hide his weapons from Clari." (Resp. Brief at p. 48; citing 6 RT 833-836, 842-843, 878-879; 7 RT 918-919, 922, 931; 8 RT 1112-1113; 11 RT 1579.) [22]

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Respondent's string of record citations creates the misleading impression of an abundance of evidence establishing appellant's previous use of a laundry basket as a "ruse" to hide a gun. In fact, only one instance (6 RT 834-836 [testimony of Clari Burgos]) concerns appellant's transporting guns in a laundry basket. Respondent has cited the record wherever either the basket or stray items of laundry are mentioned. (See 6 RT 842-843 [testimony of Clari Burgos identifying articles of clothing in laundry basket as hers and appellant's]; 6 RT 878-879 [testimony of Carmen Burgos stating she did not see a laundry basket in the foyer when she left Bruni's home at 9:00 p.m. on the night of the murders]; 7 RT 918-919, 922 [testimony of Steven Phipps, stating he did not see a laundry basket in the foyer when he and Ritchie left to go out earlier in the evening]; 7 RT 931 [testimony of Curtis Wilhousen stating he saw a red

Appellant's repeated use of this "ruse" is, for respondent, conclusive evidence of premeditation in the killings of Bruni and David. The actual testimony belies respondent's interpretation, and the case law does not support its reasoning in regard to premeditated intent.

Clari testified appellant had once or twice carried a rifle between his car and their apartment in a laundry basket full of clothes. (6 RT 834, 835.) Her testimony reveals this was not a stratagem of appellant's to hide the guns or otherwise deceive her.[23] On the contrary, Clari's testimony indicates appellant did ***not*** use stealth or deception on the previous occasions. He simply used the basket to carry the gun across the apartment complex's parking lot. Once inside the apartment appellant showed the rifle to Clari. He did not startle or threaten Clari with the gun on either occasion, and she

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article of clothing in the driveway of Bruni's home]; 8 RT 1112-1113 [testimony of Clari Burgos identifying articles of clothing found in laundry basket at the crime scene as hers]; 11 RT 1579 [prosecutor's closing argument].)

[23] Clari's testimony provides in pertinent part:

> Q. And what happened when the defendant brought the shotgun into the apartment and pulled it out of the laundry basket? How did you react to that?
>
> A. I freaked out. And I told him that you cannot have that in the house. We have kids. I do not want that in the house. And he put it back in the laundry basket and took it outside and he put it in his car and drove away.

(6 RT 834-835.)

testified appellant took the gun away immediately when she expressed concern for the children's safety. That appellant once or twice used a laundry basket to carry a rifle in a public place was hardly sinister and probably prudent, since openly carrying a large weapon in public could cause alarm. Whatever appellant's reasons for transporting the rifle in this fashion, Clari's testimony established his actions as habit, not ruse. There was no suggestion appellant ever used a laundry basket *as a ruse to hide a gun in order to take advantage of another person.*

Respondent suggests the necessary intent for first degree murder is shown any time a defendant carries a weapon and subsequently uses that weapon to kill someone. (See Resp. Brief at p. 48, citing *People v. Steele* (2002) 27 Cal.4th 1230, and, *People v. Miranda* (1987) 44 Cal.3d 57.) Neither case supports this assertion. In *Steele,* and in *Miranda,* the Court noted the evidence of premeditation in *all three* of the *Anderson* categories. (See *People v. Steele*, *supra*, 27 Cal.4th at p.1250; *People v. Miranda*, *supra*, at pp. 86-87.) In *People v. Steele,* this Court found it particularly significant that the defendant "had once before killed a young woman of somewhat similar appearance," using in both instances a distinctive manner of killing that included numerous stab wounds and manual strangulation. (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1230, 1238-1239.) The Court did not rely solely on the defendant's carrying a knife to find premeditation, but rather, held the totality of the evidence "supports the inference of a calculated design to ensure death, rather than an unconsidered explosion of violence." (*Ibid* [citations omitted].) In *People v. Miranda*, *supra,* 44 Cal.3d 57, the defendant was charged with shooting two clerks (one fatally) while robbing an AM-PM mini-mart. The jury found true a robbery murder special circumstance alleged under the 1978 death penalty law, and additionally

made special findings that the killing was willful, deliberate and premeditated. This Court upheld the jury's special findings. However, although the defendant's gun possession was a factor, it was neither the sole nor the strongest evidence of premeditation and deliberation. (See *People v. Miranda, supra*, at p. 87.) [24]

As additional evidence of planning, respondent notes that in the days leading up to the murders, appellant allegedly made several threats to confront and/or hurt Bruni. [25] Clearly appellant was angry with Clari for leaving him, and became angry with Bruni because he suspected her of

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The surviving victim testified at trial as an eyewitness. Video and audio recordings from inside the AM-PM captured defendant telling the clerk: "This is a holdup, man ... give me all your money in a bag ... right now, I'll shoot ... fast," followed by gunshots. (*People v. Miranda, supra*, at p. 74.) A few minutes before the AM-PM shooting, the defendant and co-defendant had tried to purchase beer at a nearby 7 Eleven but the clerk refused the sale because it was after 2:00 a.m. The defendant displayed a gun in his waistband and broadly hinted at robbery, but gave up the idea and left when the clerk told him someone in the back of the store had a shotgun. (*People v. Miranda, supra*, at p. 82.)

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Respondent states:

> [Appellant] told Jason Tipton he was upset that Clari took his son away from him and that he was going to put a gun to Bruni's head to find out where Clari had gone. (7 RT 965-966.) [Appellant] told Tipton that he felt "like doing something to Clari's mom to get my son back." (7 RT 966.) He further stated on several occasions that he wanted to "fuck up" Clari's mom. (7 RT 967.) [Appellant] also told Kevin Neal that he was upset with Bruni because she would not tell him where his children were and called her a "bitch." (7 RT 1012-1017.)

(Resp. Brief at p. 48.)

withholding information as to Clari's and the children's whereabouts. Appellant's comments are more consistent with general complaining and sounding off than with a plan to kill. To the extent this testimony suggests any type of plan, a confrontation was the likely object and not a murder. (See AOB at pp. 100-101.) Respondent overvalues this evidence while simultaneously ignoring strong evidence negating planning and premeditation.

There was strong evidence negating intent. (See AOB at pp. 100-101.) It was undisputed appellant was highly intoxicated at the time of the murders. On November 9, 1998, appellant spent most of the day and all of the evening using drugs, drinking heavily, and playing dominoes with friends. (See 7 RT 970-971 [testimony of Jason Tipton]; 1001-1002 [testimony of Kevin Neal].) Appellant's friend, and Bruni's neighbor, J.D. Sovel, stopped by appellant's apartment at some point in the evening, but there was no indication Sovel was expected or that appellant had previously arranged a ride to Bruni's. When the domino game broke up appellant, aware that Sovel lived only three or four blocks away from Bruni, took advantage of the unexpected opportunity and asked Sovel for a ride to Bruni's house. (See 8 RT 1091-1092; 1 CT 57-66.)

Planning may occur quickly, in a brief period of time. However, the impulse of a highly intoxicated and unstable person does not indicate a "plan" reflecting premeditated intent to kill. Under these circumstances, the fact that appellant went to Bruni's house with the shotgun in the laundry basket does not necessarily establish first degree murder. "[U]se of a deadly weapon is not always evidence of a plan to kill . . . [and] not all "planned" conduct with the victim is "actively directed toward, and explicable as intended to result in, [a] killing ...." (*People v. Alcala*, *supra*, 36 Cal.3d at p. 626, citing and

quoting *People v. Anderson, supra*, 70 Cal.2d 15, 21-22.)

Appellant did carry a gun inside a laundry basket once or twice before November 9, 1998, but there was no evidence of his having done so secretly for a nefarious purpose. To the contrary, Clari's testimony indicated appellant did *not* use stealth or deception on the previous occasions, but simply used the basket to carry the gun across the apartment complex's parking lot. Evidence of a defendant's past use of particular means or methods may sometimes indicate premeditated intent, typically when the method has been used in connection with a prior crime – circumstances not present in appellant's case. The jurors could reasonably infer that appellant brought the shotgun to Bruni's house in a basket of laundry. Clari's testimony suggested this was appellant's usual means for moving a rifle. However, as her testimony also established, appellant had never before used the laundry basket *as a ruse*. Accordingly, premeditation may not be inferred simply because appellant had twice before performed a lawful act (transporting the rifle) using the same innocuous method (the laundry basket) unconnected to any crime or wrongdoing.

D. Premeditation May Not Be Inferred from the Manner of Killing.

Respondent observes that premeditation is sometimes shown by the manner of killing alone (Resp. Brief at p. 49, citing and quoting *People v. Memro* (1995) 11 Cal.4th 786, 863-864), and argues that in this case premeditation and deliberation may be inferred from "the manner in which Cage killed Bruni and David." (Resp. Brief at p. 49.) Respondent overreaches in its interpretation of the record, and the cases on which it relies are distinguishable. Respondent summarizes the evidence with regard to Bruni Montanez as follows: "[h]ere, as soon as Cage entered Bruni's house,

in rapid succession he shot her in the shoulder, chest, and then, putting his shotgun at or near Bruni's mouth, shot her in the face." (Resp. Brief at p. 49, citing 8 RT 1145; 10 RT 1466-1476.) The description respondent offers implies a coolly carried out, execution-style killing. The facts, however, are not so clear as respondent suggests.

Forensic and other evidence established Bruni suffered three gunshot wounds, all of them inflicted at close range. The least serious of the injuries was a "through-and-through" gunshot wound to her right shoulder. (See 10 RT 1466.) Either of the other two wounds, one a facial wound and the other a chest wound, would have been rapidly fatal. (*Id.*) It is undisputed the wound to Bruni's face was made at close-range. To support its argument for premeditated murder, respondent implies this was a contact wound, deliberately made "execution style." However, the evidence this was a contact shot was not definitive. The pathologist, Doctor Garber, testified certain features of the wound were consistent with a "contact" shot, *i.e.*, one where the gun was held at or near Bruni's mouth (10 RT 1472-1473), but he acknowledged the extent of the destruction to Bruni's face prevented a firm conclusion about the gun's position. (10 RT 1473.) The three shots were made in rapid succession, but their order could not be determined. Doctor Garber "*imagined*" that the third and final shot was to Bruni's head, but allowed the sequence of injuries *could not be determined* from the evidence. (10 RT 1466 [emphasis added].) [26]

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[26] Respondent makes similar assertions with respect to David Montanez: "[After walking upstairs to David's room], Cage got within a foot of David and, with David raising his arm in defense, shot him once in the arm and then again in the chest." (Resp. Brief at p. 49, citing 10 RT 1456-1465.) Here too, the evidence is inconclusive. Dr. Garber testified he could not determine the order of David's injuries. The evidence suggested

Respondent makes it appear appellant methodically advanced upon the victims to carry out these killings in a calm and measured fashion. Omitted from respondent's description are numerous details indicating these shootings were a sudden rampage fueled by drugs, alcohol, and irrational fury. The door to David's room had been kicked in and also had a large hole made by a shotgun blast. (7 RT 921; 8 RT 1121.) Slugs were removed from the wall and from the top of the television cabinet in David's room, indicating a frenzied shooting rather than a precise, execution-style killing. (*Id.*) As discussed in the AOB, a series of shots fired in rapid succession is consistent with a shooting carried out in an explosive fit of blind rage. (See AOB at pp. 104-107.)

Respondent correctly notes the manner of killing alone may sometimes support an inference of premeditation and deliberation. (Resp. Brief at pp. 48-49.) However, the cases respondent cites are distinguishable because there the of killing was combined with other strong evidence of premeditation. In *People v. Alcala*, this Court summarized the evidence of premeditation:

> [D]efendant met and photographed [the young female victim], devised and executed a scheme to abduct her, kept her in his car by force or fear, drove her a considerable distance from urban surroundings to a rural area, then took her on foot away from the road to an even more secluded spot where others were unlikely to intrude. The jury could conclude he carried a knife with him to the death scene and used it to kill [the victim]. [A witness] testified that [the victim's] body was "all cut up." A Kane Kut knife containing human blood, and a towel with "wipe" stains of type A blood, were found nearby. There was a set of similar knives at defendant's home.

David's arm was raised slightly, as opposed to hanging at his side, but the pathologist did not characterize this as a defensive, self-protective gesture.

(*People v. Alcala*, *supra*, 36 Cal.3d at p. 626. In *People v. Caro* (1988) 46 Cal.3d 1035, the manner of killing (close range gunshot to the head) was far from being the only evidence of premeditation. In its analysis of the *Anderson* factors, the Court noted substantial evidence of planning: defendant armed himself, followed the two 15-year-old victims in his pickup truck, and walked or ran into the orchard and stalked the victims, following an irregular course for approximately 200 feet. The male victim was shot in the face and left in the orchard. The body of the female victim was found days later a few miles away, the apparent cause of death being a gunshot wound to the head. Evidence in the penalty phase included two prior murders where the defendant stalked teenaged female victims and took them to an orchard, where they were discovered bound and shot in the head. (See *People v. Caro, supra,* 46 Cal.3d at pp. 1050-1051.) (See also, *People v. Memro*, *supra*, 11 Cal.4th at pp. 863-864 ["[a] rational jury could also have found [the victim's] killing premeditated and deliberate. It could have concluded that defendant used masking tape to tie [the victim's] hands behind his back and then strangled him. It could have concluded that these deeds required reflection and consumed some time. It could also have determined that [the victim] was killed to prevent him from later identifying defendant as his captor and sexual exploiter, a motive requiring calculation and reflection."]. See also, *People v. Cruz, supra,* 26 Cal.3d at p. 245 ["all three types of evidence specified in *Anderson* are present here to support a finding of premeditation and deliberation. And the objective circumstantial evidence is sufficient also to support a finding of malice."].)

E. Respondent Ignores the Evidence of Appellant's Intoxication.

As discussed above, the reviewing court has particular responsibilities where the challenge is to the sufficiency of the evidence establishing a defendant's intent to kill. (See *People v. Cruz, supra,* (1980) 26 Cal.3d 233, 244, quoting *People v. Wolff* (1964) 61 Cal.2d 795, 818-819.) The entire evidentiary picture must be examined, not just the evidence (or interpretation thereon) supporting the judgment. The court's approach is unchanged even where the facts about the killing and the defendant's conduct are undisputed. (See *People v. Alcala, supra,* 36 Cal.3d 604; *People v. Cruz, supra,* 26 Cal.3d at p. 244 [necessary to consider "other related facts and circumstances," particularly evidence of mental illness and psychiatric testimony about defendant's capacity to entertain the requisite intent for first or second degree murder].)

Intoxication may negate premeditation and deliberation, as well as specific intent to kill. (See, *e.g., People v. Hughes* (2002) 27 Cal. 4th 287.) The uncontroverted testimony of multiple witnesses established that appellant was highly intoxicated when he arrived at Bruni's home on the evening of November 9th. (See AOB at pp. 101, 104.) Respondent ignores this evidence, although it is central to the question of intent. Established California law holds diminished capacity or unconsciousness due to voluntary intoxication may negate the elements of intent or malice, thereby precluding a murder conviction. (See *People v. Cruz, supra,* at p. 233; *People v. Balderas* (1985) 41 Cal. 3d 144.) In such circumstances the reviewing court's duty under California law is clear: "If we find indisputably established facts as to lack of intent that, as a matter of law, overcome inconsistent inferences drawn from other evidence, we must hold that intent is not proved. But if we find

merely a substantial conflict in the evidence, the jury's determination of the degree is controlling." (*People v. Cruz*, *supra*, at pp. 244-245, citing *People v. Holt* (1944) 25 Cal.2d 59, 69-70; *People v. Bassett, supra*, 69 Cal.2d 122 at pp. 137-138.) There was no conflict in the evidence of appellant's intoxication. According to multiple witnesses, appellant was highly intoxicated when Bruni and David were killed. (See 1 CT 57-63 [testimony of J.D. Sovel]; 7 RT 970-971, 1001-1002 [testimony of Kevin Neal]; 7 RT 959-994 [testimony of Jason Tipton].) Appellant's intoxication, particularly in view of the lack of evidence implying planning, suggests these were not planned killings but the sudden rage of an unstable person fueled by an excess of drugs and alcohol. Given the state of the evidence regarding appellant's intent, this Court should set aside the jury verdicts of first degree, premeditated murder.

F. The Prosecution's Reliance on Two Theories Still Does Not Make the Evidence Sufficient.

According to respondent, even if there were insufficient evidence of premeditation, the error was harmless error because the state had sufficient evidence of first degree murder under a separate theory of lying-in-wait. (Resp. Brief at pp. 50-51, citing *People v. Seaton* (2001) 26 Cal.4th 598, 645; *People v. Geier* (2007) 41 Cal.4th 555, 592; and *People v. Scott* (1991) 229 Cal.App.3d 707, 718.) However, these cases hold that where the prosecutor argues two theories to the jury, reversal is not required if the evidence fails to support ***one*** of the theories. (*Id.*) In appellant's case, the evidence supported ***neither*** theory.

In Argument III, appellant demonstrates the insufficiency of the evidence to support lying-in-wait - either as a theory of first degree murder or as a special circumstance. Respondent answers that even if the evidence does

not establish lying-in-wait, harmless error applies because "there was more than ample evidence of premeditated, deliberate murder." (Resp. Brief at p. 58.) Respondent's reasoning is circular. Two theories unsupported by substantial evidence cannot be combined to satisfy the standard for sufficient evidence. The error was not harmless, and reversal is required.

III.

THE EVIDENCE OF LYING-IN-WAIT WAS INSUFFICIENT AS EITHER A THEORY OF FIRST DEGREE MURDER OR A SPECIAL CIRCUMSTANCE.

A. Introduction and Overview.

Appellant was charged with two counts of first degree, premeditated murder in the deaths of Bruni and David. The jurors were instructed on premeditated and deliberate murder (CALJIC 8.20), and also first degree murder pursuant to a lying-in-wait theory (CALJIC 8.25). Lying-in-wait special circumstances (Pen. Code §190.2, subd. (a) (15)), and multiple murder special circumstances were also alleged as to each murder count. [27] In the AOB, appellant contended the evidence was insufficient to establish lying-in-wait, either as a special circumstance or as a theory of first degree

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27 The crimes at issue in appellant's case occurred in November of 1998. At the time of the homicides, this sub-section made a defendant death eligible if "[t]he murder was committed while the defendant was lying-in-wait." (Former Pen. Code §190.2, subd. (a) (15) [Stats. 1998].) In 2000, Section 190.2, sub-division (a) (15), was amended to state that this special circumstance requires that the murder occur "by means of lying-in-wait." The 2000 amendment did not apply to appellant. (AOB at p. 109, fn 36.)

murder. (AOB at pp. 109-126.)[28] There was no evidence the shootings were preceded by any period of "watchful waiting," an essential feature of lying-in-wait. (AOB at pp. 117-122.) Even if the supposed "laundry basket ruse" might be considered a "plan," mere concealment of purpose will not establish lying-in-wait. (AOB at pp. 122-125.) Because the evidence of lying-in-wait was insufficient to sustain the jury's verdicts, appellant was deprived of his rights to due process of law and a fair trial under both the state and federal constitutions. (U.S. Const., Amends. V, VI and XIV; Cal. Const., art I, §§ 5, 15 and 16.)

Respondent argues the evidence of lying-in-wait was "more than sufficient" to support the two first degree murder verdicts and the special circumstances. (Resp. Brief at pp. 51.) The element of concealment purportedly is satisfied by evidence that appellant brought the gun to Bruni's house in the basket of laundry, thereby concealing his "true intent and purpose." (Resp. Brief at pp. 56.) The second element, a "substantial period of watchful waiting," purportedly is met by evidence of appellant's conduct in the weeks leading up to the crimes. (Resp. Brief at pp. 56-57.) The third element, a surprise attack on the victim from a position of advantage, is purportedly met because "after gaining entry to Bruni's house through his laundry basket ruse, [appellant] was able to surprise Bruni by pulling out his gun and shooting the unsuspecting woman, who did not have a chance to defend herself." (Resp. Brief at p. 57.) Lastly, respondent asserts reversal is not warranted even if the evidence of lying-in-wait was insufficient to sustain the special circumstances, because the jury found true the multiple murder

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Unless otherwise noted, for purposes of this discussion the phrase "lying-in-wait" refers to both the special circumstances and the lying-in-wait theory of first degree murder.

special circumstance. (Resp. Brief at pp.58-59.)

For all the reasons set forth below and in the AOB, respondent is incorrect.

B. Concealment of Purpose Alone Does Not Establish Lying-in-wait.

For respondent, appellant's placing the shotgun in the laundry basket is sufficient evidence of "concealment of purpose" to satisfy the first element of lying-in-wait. (Resp. Brief at p. 56.) As discussed above, the "laundry basket ruse" is a creation of the prosecutor's (and now respondent's) imagination and indicates the degree to which neutral facts have been mis-portrayed twisted to imply a nefarious purpose. (See Section II.) Even assuming, *arguendo*, that the element of concealment is satisfied, more is needed to establish lying-in-wait. (See, *e.g.*, *People v. Lewis* (2008) 43 Cal.4th 415, 508.)

Lying-in-wait requires that a defendant intentionally murder another person under circumstances that include: (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage. (See, *e.g.*, *People v. Lewis*, *supra*, 43 Cal.4th at p. 512; *People v. Hillhouse* (2002) 27 Cal.4th 469, 501.) Sufficient evidence must support each of the three elements. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 512.) As discussed below and in the AOB, there was no evidence of the "watchful waiting" necessary to establish lying-in-wait.

C. Respondent Has Not Established the "Watchful Waiting" California Law Requires.

This Court has made clear the killing must either be contemporaneous with or "follow directly on the heels of the watchful waiting." (See, *e.g.*,

People v. Morales (1989) 48 Cal.3d 527, 558; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149 ["The killing [must] take place *during the period of concealment and watchful waiting*" [emphasis in original].) The Court recently observed that "the parameters of a murder committed 'during the period of concealment and watchful waiting,'" have not been defined. (*People v. Streeter* (2012) 54 Cal.4th 205, 251.) Guidance may, however, be found in the language of CALJIC No. 8.81.15 (1989 rev.), portions of which are particularly relevant:

> '[F]or a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. [¶] If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.'

(*People v. Streeter, supra,* at p. 251, quoting *People v. Lewis*, *supra*, 43 Cal.4th at p. 512.) This close temporal connection and uninterrupted flow of events is missing in appellant's case.

That the evidence in this case falls short of this requirement is readily apparent even from respondent's discussion. According to respondent, "A rational jury could certainly infer that Cage was watching Bruni, monitoring her whereabouts for a substantial period, at least several weeks, and waiting for an opportune time to act." (Resp. Brief at p. 57.) Respondent offers insufficient evidence to support this inference. [29] Respondent's evidence may

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Respondent states:

> Clari testified that she found a note in the pocket of Cage's

be summarized as follows:

> 1) several days after Clari disappeared with the children, appellant placed two telephone calls to his mother-in-law's office number; [30]
>
> 2) Bruni's office number was written on a small piece of paper which was later found in the laundry basket in the back pocket of a pair of appellant's jeans; and,
>
> 3) Bruni's neighbor, Steve Phipps, once saw appellant drive through the neighborhood about a month after Clari left.

Even with the benefit of hindsight, these actions of appellant's cannot be reasonably characterized as "watching and waiting" for an opportune time to kill. Appellant's behavior was not suspicious or menacing. (Compare, *People v. Livingston* (2012) 53 Cal.4th 1145, 1172 [defendant drove car around apartment complex during evening before shootings waiting to find four

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> jeans in the laundry basket that had Bruni's work information on it in Cage's handwriting. (6 RT 844-845; 8 RT 1101-1103.) In addition, a phone bill from the apartment Cage shared with Clari showed two calls from the apartment phone to Bruni's work in Mira Loma made *after* Clari left the country, one on October 22 at 5:45 p.m. and one on October 24 at 10:38 p.m. (6 RT 826-827; 7 RT 902-903.) Furthermore, Steve Phipps, a neighbor of Bruni, testified that he saw Cage driving his car in his neighborhood during the time between when Clari left for Puerto Rico and Cage committed the murders.

(Resp. Brief at p. 57.)

30 The timing of these calls, which were well past office hours, is consistent with other evidence of appellant's rapid mental deterioration after Clari left. (See AOB at pp. 44, 15 RT 2130-2131 [testimony of Emily Farmer].)

apartment security guards together, and immediately after learning their location attacked from a position of advantage at the door of the guard shack where the guards were gathered]; *People v. Arellano* (2004) 125 Cal.App.4th 1088, 1094 [defendant warned former wife for months he was going to "smoke her"].) Under the circumstances, appellant's actions were unremarkable and understandable. Clari left without warning on Thursday, October 15, 1998. (See 6 RT 816-817.) She did not leave a note or otherwise let appellant know where she had gone. After waiting a few days, appellant called his mother-in-law, the person most likely to have information about her whereabouts. There is nothing unusual about someone jotting down a telephone number and keeping the note handy for later use. Moreover, there is no evidence Bruni received an unusual number of calls on her office line during the relevant time period, or that appellant harassed Bruni at work. Steve Phipps testimony is noteworthy because its implications run counter to respondent's theory. [31] Phipps was Bruni's next-door neighbor. In the 25

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Steven Phipps testified:

Q. (By Ms. Danville): At some point were you aware of the situation that was going on between the defendant and his wife?

A. Yes, ma'am.

Q. Were you aware that [Clari] was not around?

A. Yes, ma'am.

Q. Where did you think [Clari] was?

A. I thought she was in LA.

People v. Marks (2003) 31 Cal.4th 197, 232.) With respect to the lying-in-wait special circumstances, respondent argues the penalty need not be reversed because the jury found true the multiple murder special circumstances and appellant does not challenge that finding. (*Id.*) Respondent's analysis is illogical. As discussed above and in the AOB, the prosecution relied on the same evidence to prove premeditated, deliberate murder and murder while lying-in-wait, and that evidence was insufficient under either theory. If the evidence was insufficient to support a theory of first degree murder, the lying-in-wait special circumstances fail as well.

Respondent draws the wrong conclusion from appellant's failing to include a challenge to the multiple murder special circumstance in the AOB. Appellant does not dispute that two people were killed. Rather, he contends the evidence was insufficient to sustain any charge above second degree murder, a crime which is not death-eligible. Accordingly, appellant's sentence of death is invalid. (*People v. Lewis*, *supra*, 43 Cal.4th 415.)

IV.

THE LYING-IN-WAIT JURY INSTRUCTIONS WERE FLAWED AND CONSTITUTIONALLY INADEQUATE.

A. Introduction and Overview.

In Argument IV of the AOB, appellant contends his state and federal constitutional rights were violated as the result of multiple flaws in the jury instructions pertaining to lying-in-wait. The special circumstance instruction, CALJIC 8.81.15, was confusing and internally inconsistent. In addition, it employed definitions of premeditation and deliberation that conflicted with other guilt phase instructions, in particular CALJIC 8.20. (AOB at pp. 127-130.) Appellant also noted that CALJIC 8.81.15 and CALJIC 8.25 (on the

lying-in-wait theory of first degree murder) used identical language to describe the temporal elements of the crimes. This misstatement of the law left jurors with no meaningful way to separate lying-in-wait first degree murder from the lying-in-wait special circumstance. (AOB at pp. 131-133.)

Respondent asserts appellant's claims were forfeited by defense counsel's failure to object to either CALJIC 8.81.15 or CALJIC 8.25. (Resp. Brief at p. 61, citing 11 RT 1492-1494; *People v. Rogers* (2006) 39 Cal.4th 826, 877; *People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Medina* (1990) 51 Cal.3d 870, 902.) Respondent also asserts appellant's claims must be denied because this Court has rejected similar claims in other cases. (See Resp. Brief at pp. 61-62.) Respondent further contends any error resulting from the use of identical language to define the temporal element of lying-in-wait was obviated by the prosecutor's closing argument. (Resp. Brief at p. 62.) Lastly, respondent argues any error in the lying-in-wait jury instructions was necessarily harmless for two reasons: first, because the jury was also instructed on first degree, premeditated murder and this theory was supported by sufficient evidence, and, second, because the jury also found true the multiple murder special circumstance . (Resp. Brief at pp. 62-63.) For the reasons set forth below and in the AOB, respondent is incorrect.

B. This Court Should Consider Appellant's Claim.

Counsel's failure to object is not always fatal to an appellate claim. Trial courts have duties and obligations that exist irrespective of the actions or inactions of counsel. Instructional errors are reviewable, even without an objection, if they affect a defendant's substantial rights. (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) No rights are more substantial than those at

issue here. The flawed instructions on lying-in-wait deprived appellant of his rights to due process of law, a fundamentally fair jury trial, and a reliable penalty determination, as guaranteed by the state and federal constitutions. (U.S. Const., Amends. V, VI and XIV; Cal. Const., art I, §§ 5, 15 and 16.) For all of the reasons stated above and in the AOB, this Court should consider appellant's claim.

C. Respondent Does Not Dispute That the Temporal Elements Were Incorrectly Stated.

Respondent notes this Court has repeatedly upheld the CALJIC 8.25 instruction on the elements of lying-in-wait murder. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1244, citing, *People v. Moon* (2005) 37 Cal.4th 1, 23; *People v. Hardy*, *supra*, 2 Cal.4th 86, 161-163.) In *People v. Russell,* however, the instructions addressed only the murder theory, not the lying-in-wait special circumstance. (*People v. Russell, supra,* 50 Cal.4th at p. 1244, fn. 3.) Appellant urges this Court to reconsider its previous decisions in this area. Assuming, *arguendo*, the language of CALJIC 8.25 correctly stated the elements of murder by means of lying-in-wait, the instructions still did not distinguish the temporal elements of the lying-in-wait special circumstance from lying-in-wait as a first degree murder theory.

A constitutional sentence requires that jurors be given standards by which they may meaningfully distinguish a first degree premeditated murder from a death-eligible, special circumstances killing. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427; *People v. Holt* (1997) 15 Cal.4th 619, 697.) The temporal element is the critical distinction between lying-in-wait as a means of committing first degree murder and lying-in-wait as a special circumstance. This element creates a "thin but meaningfully

distinguishable line between first-degree murder by means of lying-in-wait and capital murder with the special circumstances of lying-in-wait." (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 908; see also, *People v. Morales, supra,* 48 Cal.3d at p. 557; *People v. Moon, supra,* 37 Cal.4th at pp. 22, 32.) In appellant's case the jury instructions stated the temporal element in the same terms, leaving the jurors no basis for making such a distinction.

Respondent stops short of contending the temporal element of lying-in-wait was correctly stated in the instructions, instead arguing the error in the jury instructions was remedied by the prosecutor's closing argument. (Resp. Brief at p. 62, citing *People v. Kelly* (1992) 1 Cal.4th 495, 526-527.) [33] The prosecutor's argument occupied approximately 20 transcript pages. (11 RT 1572-1588; 11 RT 1601-1604.) Her passing mention in a lengthy argument of a subtle distinction between the relevant legal elements is not, without more, likely to have been noticed. *People v. Kelly* holds only that counsel's arguments are relevant to determining whether jurors misunderstood the instructions. (*People v. Kelly, supra,* 1 Cal.4th at pp. 526-527.) In this case, the jurors received incorrect instructions on a key

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[33] After discussing the overlap in the elements of first-degree murder by means of lying-in-wait and the lying-in-wait special circumstance, the prosecutor added:

> So what do you need? Well the instruction says you need more than just a concealment of purpose. You also need a substantial period of watching and waiting, which we have in this case, and immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage.

(11 RT 1584.)

element of a special circumstance. Appellant knows of no case in which an argument of counsel was held to overcome an erroneous instruction.

D. The Instructional Error Was Not Harmless.

Respondent next argues, "Even if the jury was given improper instructions on lying-in-wait, any error was harmless. The jury was instructed on premeditated, deliberate murder and the evidence was sufficient to sustain the verdicts on this theory." (Resp. Brief at pp. 62-63, citing *People v. Guiton*, *supra*, 4 Cal.4th at p. 1130; *People v. Marks*, *supra*, 31 Cal.4th at p. 232.) Respondent's argument is unavailing. As appellant contends in the AOB, an incorrect jury instruction on the elements of a special circumstance and theory of first degree murder cannot be considered harmless error. Reversal is necessary because it is impossible to determine whether the jurors applied the correct instruction or the incorrect statement of the law. (See AOB at p. 133, *People v. Rhoden* (1972) 6 Cal.3d 519, 526.)

V.

THE GUILT PHASE TESTIMONY DESCRIBING THE SURVIVOR'S RESPONSES TO THE CRIMES WAS IRRELEVANT AND HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE.

A. Introduction and Overview.

In Argument V of the AOB, appellant challenges a particular aspect of the prosecution's evidence in the guilt phase of trial: the testimony describing Clari's and Richie's reactions to the crimes. This testimony was, in reality, victim impact evidence. (AOB at p. 134; *People v. Smith* (2005) 35 Cal.4th 334; *Payne v. Tennessee* (1991) 501 U.S. 508; *People v. Haskett*

(1982) 30 Cal.3d 841.) As such, it was not relevant for any legitimate guilt phase purpose and constituted an improper appeal for sympathy of the type this Court has repeatedly found to be "out of place during an objective determination of guilt." (*People v. Jackson* (2009) 45 Cal.4th 662, 691.) In combination with the other prejudicial features of this trial, prevented the jurors' from making a reasoned, dispassionate evaluation of the evidence pertaining to the critical issue - appellant's mental state. Reversal is required because appellant was denied his constitutional rights to due process of law (*Hicks v. Oklahoma* (1980) 447 U.S.343, 346), to a fundamentally fair trial (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and a reliable determination of penalty (*Beck v. Alabama* (1980) 447 U.S. 625, 638). (U.S. Const. Amends. V, VI, VIII and XVI; Cal.Const., art I, sections 7, 15 and 17.)

Respondent asserts the claim is forfeited because defense counsel did not object to the testimony (Resp. Brief at pp. 63-64), and in any event should be denied because appellant was not prejudiced. (Resp. Brief at p. 64.) Respondent is incorrect.

B. Appellant's Claim Is Cognizable on Appeal.

Contrary to respondent's contentions, forfeiture is not the invariable consequence of a failure to object. An appellate claim survives where an objection would have been futile. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1189, fn. 27.) Similarly, a claim is not waived if an objection and a timely admonition would not have cured the harm. (*People v. Green, supra,* 27 Cal.3d at p. 62; *People v. Pitts* (1990) 223 Cal.App.3d 606.) Both of these exceptions apply here to excuse counsel's failure to object to the

evidence. [34]

In appellant's case defense objections would surely have fallen on deaf judicial ears. The court's unwillingness to restrain the prosecutor was apparent even before the start of trial. Defense objections were disregarded throughout the trial, particularly where the objection pertained to the prosecution's evidence. As discussed herein and in the AOB, the court improperly failed to hold the prosecution to its burden to establish the relevance and admissibility of appellant's past crimes. Over defense objections, the court admitted evidence and testimony regarding 18 of the 19 proffered bad acts. (See AOB, Arg. I.) Defense attempts to curtail the number of autopsy and crime scene photographs received similar treatment. The judge acknowledged the photographs were "gory" but directed counsel to negotiate a solution rather than engaging in a specific evaluation of this prejudice and probative value of the evidence. (2 RT 302-305.) Even after defense counsel made concessions in a good faith effort to reach a balanced presentation, the court admitted all of the remaining photographs to which objections were maintained. (See AOB, Arg. VI; see also 2 RT 316-321.) Had defense counsel timely objected, in the unlikely event the objection would have resulted in an admonition to the jury, it would have been an empty exercise. This evidence was so inflammatory that irrevocable prejudice was ensured the moment the court admitted the testimony.

Reviewing courts have considerable discretion to address even forfeited claims. "An appellate court is generally not prohibited from

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To the extent any claims are forfeited by counsel's failure to object, that failure constitutes ineffective assistance of counsel which may be addressed in a petition for writ of habeas corpus.

reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161, 162, fn 6.) This Court has encouraged this exercise of appellate discretion. The reviewing court may consider a claim, despite the lack of an objection, when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8; see also *Orr v. Orr* (1979) 440 U.S. 268, 275 fn. 4 [a state court may decide a federal constitutional question even where it might legitimately find the claim forfeit under state law].) Claims implicating constitutional rights frequently survive waiver. (See *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061 [appellate court considered important constitutional claims despite defendant's forfeiture]; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 [although defendant did not object, appellate court may consider the merits of the claim and reverse when substantial rights are affected].) Additionally, the merits of the claim should be reached where the asserted error fundamentally affected the validity of the judgment or where important issues of public policy are at stake. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.) All of these concerns are implicated in appellant's case.

Accordingly, this Court should consider appellant's claim on the merits. For all of the reasons set forth below and in the AOB, the Court should reverse appellant's convictions and sentence.

C. The Specific Testimony Underlying Appellant's Claim.

Given the circumstances of these crimes, some degree of pathos and emotion in the guilt phase testimony was probably unavoidable. In recognition of this reality, appellant does not complain about *all* of the

testimony touching on the understandable grief, shock, and horror experienced by family members. Clearly the State was entitled to the testimony of percipient witnesses, as well as police investigators and other law enforcement professionals who processed the crime scene. Much of this testimony was legitimate, despite its emotionally evocative aspects. The testimony appellant complains of, however, contributed nothing to the jurors' understanding of the facts or the legal issues. Much of it was irrelevant; its real usefulness to the prosecution lay in its emotional appeal. Two specific areas of testimony are at issue in this claim: Clari's lengthy account of receiving the news in Puerto Rico (see AOB at pp. 134-137; 6 RT 826-831); and the testimony of witnesses describing Richie Burgos's hysteria following his discovery of the crime scene. The testimony on these points was not only irrelevant but highly prejudicial.

The objectionable portions of Clari's testimony are set forth in the AOB. (See AOB at pp. 134-138; 6 RT 826-832.) Clari began by describing her last telephone conversation with Bruni. (6 RT 824-825.) She then gave a lengthy account of how she received the news in Puerto Rico. (See AOB at pp. 134-137; 6 RT 826-831.) Respondent tries to minimize its inflammatory effect by quoting a few words from Clari's testimony. Respondent states, "Clari gave a detailed account of how she learned of the deaths of her mother and brother, including testifying that she 'lost it' in response to the news and was 'emotional.'" (Resp. Brief at p. 64.) These carefully selected, conclusory words do not begin to capture the tenor of Clari's testimony. Clari's story of that morning in Puerto Rico, and her confusion, and her increasing anxiety and dread, occupies several transcript

pages. (6 RT 826-831.) The narrative is compelling, and the jurors, all of whom knew there would not be a happy ending, could not help but identify with Clari on an emotional level. Notably, respondent makes no attempt to argue this testimony was relevant to any guilt phase issues. (See AOB at pp. 144-145.) The prosecutor elicited this testimony solely to gain sympathy for the survivors and to invoke enmity toward appellant.

Appellant does not contend all of the evidence and testimony revealing Richie's responses to the crime was improper. As noted in the AOB, Richie discovered the crime scene, and the prosecution was entitled to present his testimony even though he became quite emotional at trial. (See AOB at p. 133, fn 42.) Other witnesses testified about the discovery of the crime scene and the immediate aftermath. Some description of Richie's emotional upset was contained in the testimony of next-door neighbors Sarah and Steve Phipps.[35] While this aspect of Steve's and Sarah's testimony was not relevant, it was not unduly prejudicial in and of itself.

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Sarah Phipps heard Richie's first "blood-curdling scream." (8 RT 1064.) Steve Phipps testified that Richie could be heard screaming continuously for five minutes before emerging from the house, his entire body covered with blood. (7 RT 914-915.) He described how he and cab driver Curtis Wilhousen tried to calm Richie before the police arrived:

> He – Richie came out to the car where we were and said that his mom is dead, his brother is dead. And he just kept saying, "Why? Why? Why?" *** We sat there. I tried to – I just talked to him. And he kept – you know, there was no talking to him. He just kept crying.

(7 RT 915-916.) Richie remained hysterical even after police arrived and placed him in the back of the patrol car. (*Id.*)

Appellant's contentions are based on portions of the testimony elicited from two law enforcement witnesses. Officer Ronald Heim described finding Richie, who was covered with gore and crying hysterically, in the front yard. (See AOB at pp. 139-140; 9 RT 1230-1233.) After Heim testified about the initial encounter and his impressions of Richie, the prosecutor posed further questions about Richie's distress. The purpose of this questioning was not to elicit relevant information, but to maximize sympathy for Richie and for the family. (See AOB at pp. 139-141; 9 RT 1234-1235.) This tactic was used to even greater effect during the testimony of lead investigator Michele Amicone, the last witness to testify in the guilt phase. (11 RT 1516-1547.) Amicone testified about arriving at Bruni's and beginning her investigation of the crime scene. (11 RT 1516-1526.) The prosecutor then posed a series of questions about Richie. What followed was a detailed description of Richie's hysteria and his gruesome appearance after handling the bodies. Amicone told jurors how she hugged Richie and tried to comfort him. (See 11 RT 1526-1529.) The emotional high point was Amicone's testimony (for the ostensible purpose of clarifying a prior inconsistent statement of Richie's), "[Richie] told us in the interview that he was saying 'Mommy, wake up. Mommy, wake up.'" (11 RT 1529.)

D. Respondent's Analysis of Prejudice Is Unpersuasive.

Respondent does not claim the areas of testimony of which appellant complains were relevant to the guilt phase trial. Instead respondent urges that no prejudice resulted from this testimony because it imparted no new information to the jurors. According to respondent, jurors were aware from

"undisputed proper testimony" that Clari and Richie were close to Bruni and David. (Resp. Brief at p. 65.) Jurors likewise knew about the "horrific nature of both the nature of the crime scene and the manner in which Bruni and David were murdered." (*Id.*) Additionally, Richie's own unchallenged testimony revealed he had been very upset upon discovering his murdered mother and brother. (*Ibid.*) Respondent therefore concluded; "Given this properly admitted testimony, any additional 'improper' testimony informing the jury that Clari was very upset upon learning of the deaths of her mother and brother and in shock when she saw the crime scene, and that Richie was hysterical and screaming and crying after discovering his murdered mother and brother, was harmless." (Resp. Brief at p. 65, citing *People v. Wallace* (2008) 44 Cal.4th 1032, 1058.) Respondent further relies on CALJIC No. 1.00, advising the jurors not be to influenced by sympathy, passion or prejudice. (Resp. Brief at p. 65, citing *People v. Doolin* (2009) 45 Cal.4th at p. 439.)

Respondent's assessment demonstrates a fundamental failure to understand the effects of unduly prejudicial material. The jury in a capital trial "should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." (*People v. Lucero* (1988) 44 Ca1.3d 1006, 1023.) "[T]he presumption of prejudice from jury contact with inadmissible evidence is...strong [ ] in the context of a capital case." (*Id.*) Victim impact evidence is potentially very prejudicial, and plainly irrelevant to a determination of guilt. The guilt phase of appellant's trial was dominated by irrelevant and highly emotional evidence (much of it presented during Clari's testimony) as discussed above and in the AOB.

The inclusion of this testimony, combined with the other prejudicial features of the trial, prevented the jury from meaningfully assessing the relevant evidence of appellant's intent in the crimes. Accordingly, reversal is required.

VI.

RESPONDENT FAILS TO DEMONSTRATE THAT THE INFLAMMATORY PHOTOGRAPHS WERE RELEVANT AND ADMISSIBLE, OR THAT THE TRIAL COURT'S ABUSE OF DISCRETION WAS HARMLESS.

A. Introduction and Overview.

The evidence in the guilt phase included a number of gruesome photographs taken at the crime scene and during the autopsies. Defense counsel objected to many of them under Evidence Code section 352, on the grounds they were gory and disturbing, cumulative, and unduly prejudicial. Four objectionable pictures were taken during Bruni's autopsy. (2 RT 320-321; People's Exh. Nos. 69, 70, 71 and 73.) [36] In addition to the autopsy photographs, the proffered evidence included photographs of the victims as they were found at the crime scene. Three photographs showed Bruni lying

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Counsel also objected to two photographs taken during David's autopsy. One was a view of the chest with a probe showing the entry and exit path of the fatal wound. (2 RT 317-318; People's Exh. No. 83.) The other was a photograph showing the wounds to the chest and elbow, and large areas of stippling and gun powder residue. (See 2 RT 319; People's Exh. No. 85.) The prosecutor agreed not to offer the two duplicative photos, and the trial court admitted the remaining five photos. (2 RT 321.)

in the entryway of her home. Blood, brain matter, and tissue can be seen spreading out into the living room of the house. (See 2 RT 323-325; People's Exh. Nos. 33, 34, and 35.) Three other photos showed David Burgos where he was found in his upstairs bedroom. (See 2 RT 325-327; People's Exh. Nos. 39, 40, and 41.) Defense counsel objected that these photographs from the crime scene, in addition to being gruesome, were cumulative and unduly prejudicial. (*Id.*) With respect to all of the photographs, counsel noted these inflammatory effects would be amplified when the images were viewed on the Riverside court system's "tremendous" graphic display system. Aided by this technology, jurors would see every detail of the horrific images on a large screen monitor. (See 2 RT 330-332.) The trial judge acknowledged the photographs were "gory" and "very graphic." Those of Bruni were especially gruesome because the massive facial wounds were clearly visible. (See 2 RT 329-331.) Nevertheless, it overruled defense objections and admitted all of the photographs to which the defense objected. (See 2 RT 322, 330-331.)

In Argument VI of the AOB, appellant contended the trial court abused its discretion in admitting these photographs. Many of them were not relevant because they lacked a probative connection to disputed issues. (AOB at p. 153; *People v. Turner* (1984) 37 Cal.3d 302, 321; *People v. Ramos* (1982) 30 Cal.3d 553, 578.) Where the defense does not dispute the point to which the picture supposedly pertains, the exhibit has no relevance and should not be admitted. (*People v. Hendricks* (1987) 43 Cal.3d 584, 594.) Here the trial court admitted without question any photographs which might be used in connection with the testimony of the forensic pathologist.

(See 2 RT 330-332.) This was not an adequate basis for the court's rulings. The photographs imparted no new information, as the jury heard detailed and thorough testimony from several law enforcement agents, forensic experts and the pathologist. Although the photographs were largely irrelevant, they were unusually gruesome and disturbing. Any marginal usefulness was vastly outweighed by the clear likelihood these exhibits would cause shock and horror. In the context of this already emotionally charged case, the admission of this evidence was inflammatory.

Respondent contends the trial court's rulings were entirely appropriate. The trial court has, respondent notes, broad discretion to determine both the relevance of crime scene and autopsy photographs, and to balance the probative value of the proffered evidence against any potential prejudice. (Resp. Brief at pp. 68-69.) In appellant's case, respondent argues, the contested photographs were relevant to prove the homicides were premeditated and deliberate murders and not the result of an "explosion of violence," (Resp. Brief at pp. 69-70), so the trial court made the correct assessment under Evidence Code section 352. These photographs were, respondent allows, "somewhat disturbing," but not "excessively bloody or gruesome." The photos were properly admitted because they were comparable to evidence allowed in similar cases. (Resp. Brief at pp. 70-71.) Finally, respondent claims any error was harmless. (Resp. Brief at pp. 72-73.)

For the reasons discussed below and in the AOB, respondent is incorrect.

B. The Photos Were Not Relevant Because Appellant Did Not Dispute the Means by Which the Victims Were Killed or the Manner of Their Deaths.

The proponent of evidence has the burden of establishing its relevance to disputed issues. Although the trial court has considerable discretion to admit crime scene and/or autopsy photographs, its rulings are subject to this fundamental rule of evidence. (See, *e.g.*, *People v. Turner, supra,* 37 Cal.3d at p. 321; *People v. Ramos, supra,* 30 Cal.3d at p. 578.) Where the defense does not dispute the point the photograph supposedly illustrates, the exhibit has no relevance and should not be admitted. (*People v. Hendricks*, *supra*, 43 Cal.3d at p. 594.) As discussed in the AOB, there was no dispute concerning the cause or manner of death for either victim. Both David and Bruni were killed by shotgun wounds inflicted at close range. Defense counsel did not challenge this evidence. (See 10 RT 1476.) In the AOB appellant observed that the trial court admitted without question any photographs that might be used in conjunction with the testimony of the forensic pathologist. (See AOB at pp. 153-156; 2 RT 330-332.) A valid exercise of discretion requires more from the trial court, which must carefully analyze the relevance of the photographs to disputed, material issues. (See *People v. Poggi* (1988) 45 Cal.3d 306, 322-323.) In addition, the court must undertake a thoughtful weighing of the competing interests under Section 352. (*People v. Gibson, supra,* 56 Cal.App.3d at pp. 133-134.) Here, the trial court did neither before admitting the gruesome photographs. (See AOB at pp. 152-156.)

Respondent contends the photographs were relevant to establish that the shootings were committed with premeditation and deliberation: "The admitted photographs [ ] showed the shotgun wounds suffered by Bruni and

David, including the relationship and distance of the wounds to each other, and the position of the bodies when they were found." (Resp. Brief at p. 69.) Respondent does not, however, explain ***how*** the photographs bear on the question of premeditation. (Compare *People v. Schied* (1997) 16 Cal.4th 1, 16-17 [photographs used to establish murder occurred during a robbery]). In appellant's case the photographs added nothing to the State's theories of first degree murder and should have been excluded. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1137 [photographs not revealing the manner of death were improperly admitted]; *People v. Turner*, *supra*, 37 Cal.3d at p. 321 [photographs of victim not relevant to issues presented]; *People v. Marsh* (1985) 175 Cal.App.3d 997, 998 [autopsy photographs irrelevant where coroner's testimony was uncontradicted and cause of death undisputed].)

C. Respondent Understates the Gruesome Quality of this Evidence.

In its discussion of Evidence Code section 352, respondent scrupulously avoids describing the contested photographs. Instead, respondent simply opines that these photographs were "somewhat disturbing," but not "*excessively* bloody or gruesome." (Resp. Brief at p. 70 [emphasis in original].) Respondent cites a number of California cases rejecting challenges under Section 352 based on the admission of "similar" photographs. (Resp. Brief at pp. 70-71.) In only one instance does respondent make an express comparison with another case. Referring to the eight contested photographs, respondent states, "There was no 'revolting portraiture displaying horribly contorted facial expressions that could conceivably inflame a jury.'" (Resp. Brief at p. 70, quoting *People v. Scheid* (1997) 16 Cal.4th 1, 19.) While the first part of respondent's

statement is correct, its conclusion is not. This assertion reveals a lack of understanding about normal human responses and the duties of the trial court with respect to graphic, disturbing evidence.

The photographs of Bruni did not capture her facial expression because what remained was far worse. Dr. Garber, the forensic pathologist, explained that the shotgun blast "triggered a massive explosion" which "destroyed most of [Bruni's] head." (10 RT 1465.) One of the photographs showed what was essentially a headless woman covered with gore in the form of blood, brain matter, bone fragments and fleshy tissue. All that remained of Bruni's face was part of the chin and lower jaw. (10 RT 1472.) As noted in the AOB, these photographs were extraordinarily horrific. Two of the investigators (each with more than 20 years of experience) commented this was *the most* bloody and gruesome crime scene they had *ever* seen. There is little doubt of the effect this evidence had on the jurors, who, unlike the police and experts, were unaccustomed to seeing the bloody aftermath of a homicide. (See Douglas, *et al.*, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Beh. 485, 491-492.) That respondent does not find the evidence unduly disturbing is of not dispositive. The relevant inquiry is the effect the photographs had on the jurors. Gruesome photographs are among the types of evidence "most likely to inflame the passions of the jurors and cause them to vote guilty regardless of the evidence." (*People v. Scheid, supra,* 16 Cal.4th at p.19; *People v. Turner, supra,* 37 Cal.3d at pp. 320- 321.)

Trial courts have a duty to shield jurors from photographs that may "sensationalize an alleged crime, or are unnecessarily gruesome." (*People v. Ramirez* (2006) 39 Cal.4th 398, 453.) This duty was not discharged in

appellant's case. The trial court's admission of this evidence was an abuse of its discretion under Evidence Code section 352 and violated appellant's constitutional rights to due process of law and a fair trial. (See AOB at pp. 157-158; *Lisenba v. California* (1941) 314 U.S. 219, 228; *People v. Partida* (2005) 37 Cal.4th 428, 434-435.)

E. The Error Was Highly Prejudicial and Reversal Is Required.

Respondent contends any error in admitting these highly disturbing images was harmless, and that reversal is not required as it is not reasonably probable appellant would have received a more favorable outcome in the absence of the error. (Resp. Brief at pp. 72-73, citing *People v. Watson, supra*, 46 Cal.2d at p.836; *People v. Scheid, supra,* 16 Cal.4th at p. 21.) According to respondent, the photographs revealed no information not already received in the testimony and were no more graphic or inflammatory than the accounts of several prosecution witnesses. (Resp. Brief at pp. 72-73.) Respondent concludes that the outcome of both the guilt and penalty phases would have been no different had the photographs been excluded. Jurors are, respondent asserts, able to tolerate unpleasant facts and photographs, and any tendency toward passion or prejudice was eliminated by the giving of CALJIC No. 1.00. (Resp. Brief at p. 73, 2 CT 359.)

Respondent is incorrect. As appellant noted in the AOB, in the context of a capital case where the mental state of the perpetrator was challenged by the defense, the erroneous admission of irrelevant and prejudicial evidence may deprive the defendant of a reliable adjudication of

both the guilt and penalty phases. [37] (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama, supra*, at p. 638.) In appellant's case, it is at least reasonably probable that without this evidence the jury would have reached a different conclusion about the degree of murder and made different findings with regard to the special circumstances. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Appellant's convictions and sentence of death must, therefore, be reversed.

VII.

THE TRIAL COURT'S USE OF CALJIC 2.51 REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS AND SENTENCE.

In the AOB appellant argued he was denied a fair trial and deprived of his constitutional rights by the trial court's use of CALJIC 2.51 (Motive). (AOB pp. 158-166.) The instruction bolstered the prosecution's theory of motive. The "power and control" theory was legally unsound, and its apparent acceptance by the jury likely resulted from the inflammatory effects of the past acts evidence rather than their exercise of logic or reason. (See Arg. I.) CALJIC 2.51 compounded the problem by allowing the jury to determine guilt based solely on the faulty motive theory. (AOB pp. 159-163.) By encouraging jurors to conclude that motive could be substituted for proof of specific intent to kill, CALJIC No. 2.51 lessened the state's burden to prove beyond a reasonable doubt that appellant had committed deliberate and premeditated murder. (AOB pp. 163-165.) Another effect of

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[37] See Arguments I and II.

this instruction was to improperly shift the burden to appellant to show a *lack* of motive. (AOB at p. 165.) The use of this instruction deprived appellant of his rights to due process, a fair trial, and reliable jury determinations on guilt, special circumstances, and penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal.Const., art I, §§ 7, 15, 16 and 17.)

This Court has upheld CALJIC 2.52, and rejected similar claims in other cases. (Resp. Brief at pp. 73-76; see also *People v. Moore* (2011) 51 Cal.4th 1104; *People v. Lee* (2011) 51 Cal.4th 620.) For the reasons discussed in the AOB, appellant respectfully asks the Court to reconsider its prior rulings and reverse his convictions and judgment of death.

VIII.

THE TRIAL COURT DENIED APPELLANT A FAIR TRIAL BY INSTRUCTING THE JURY WITH CALJIC 2.52

A. Introduction and Overview.

The trial court instructed the jury with CALJIC 2.52 (flight following the commission of a crime). This instruction should not have been given. (See AOB pp. 166-183.) CALJIC 2.52 allowed the jury to draw an irrational permissive inference without sufficient support in the evidence. (AOB at pp. 175-182.) The instruction was argumentative and improperly duplicated other instructions on circumstantial evidence. (AOB at pp. 167-175.) Additionally, the facts and disputed legal issues in appellant's case made this permissive inference instruction highly prejudicial. (See AOB at pp. 175-183.) The use of CALJIC 2.52 compounded the prejudicial effects of other guilt phase errors, and deprived appellant of his rights to due process, a fair trial, a jury trial, equal

protection and reliable jury determinations on guilt, special circumstances, and penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal.Const., art I, §§ 7, 15, 16 and 17.) (See AOB at pp. 182-183.)

Respondent, however, contends appellant's claim is forfeited by counsel's failure to object. (Resp. Brief at pp. 77-78.) Respondent notes (and appellant acknowledges) this Court has upheld CALJIC 2.52, rejecting claims in other cases similar to those raised in the AOB. (Resp. Brief at p. 77, citing *People v. Lynch* (2010) 50 Cal.4th 693, 761; *People v. Taylor* (2010) 48 Cal.4th 574, 630.) Respondent also argues that even if giving CALJIC 2.52 was error, appellant could not have been prejudiced thereby. (Resp. Brief at pp. 82-83.) For the reasons stated below and in the AOB, respondent is incorrect.

B. Appellant's Claim Is Preserved for Review.

A failure to object does not forfeit a claim that the evidence did not warrant the instruction. (See Resp. Brief at p. 78, *People v. Smithey* (1999) 20 Cal.4th 936, 982, fn. 12; AOB at p. 167.) Trial courts have a duty to refuse to deliver argumentative instructions. (See AOB at pp. 168-169, *People v. Sanders* (1995) 11 Cal.4th 475, 560.) Among its other shortcomings, CALJIC 2.52 is argumentative. (AOB at pp. 168-175.) Moreover, instructional errors are reviewable, even without an objection, if they affect a defendant's substantial rights. (Pen. Code, § 1259; see *People v. Flood, supra,* 18 Cal.4th 470, 482, fn. 7; *People v. Jones, supra,* 17 Cal.4th 279, 312.) For all of the reasons stated above and in the AOB, this Court should consider appellant's claim.

C. The Flight Instruction Was Especially Prejudicial in the Context of Appellant's Case.

In the AOB, appellant discussed several reasons why the Court ought

to reconsider its approval of CALJIC 2.52. (See AOB at pp. 166-183.) Those arguments need not be repeated here. However, there are specific reasons for this Court to examine the propriety of the flight instruction given in appellant's case. The evidence in this case did not support a flight instruction because appellant made no effort to avoid capture. A neighbor, Mr. Valdez, saw a man (whom he could not identify) walking away from Bruni's house at a time close to the estimated time of the shootings. The man, presumably appellant, exchanged a brief greeting with Mr. Valdez and continued walking. Valdez saw the man break into a run a few moments later when an "alarm type" sound was heard. (7 RT 947-948.) Appellant often walked or rode a bicycle to and from his apartment and Bruni's house via a shortcut along a bridle path. (6 RT 842, 849.) Within a few hours after the crimes were reported, investigators found the Mossberg shotgun crudely concealed under a bush alongside this trail. (See 8 RT 1133-1134.) Appellant evidently walked home to his apartment, where police arrested him the next morning without incident. (See 9 RT 1193-1200; 11 RT 1532.) There are a number of instances where flight or efforts to evade law enforcement indicates consciousness of guilt. (See, *e.g.*, *People v. Lewis* (2006) 39 Cal.4th 970 [testimony that defendant seemed to be trying to avoid arrest by jumping fences].) However, simply leaving a crime scene does not, without more, constitute flight or suggest consciousness of guilt. (Compare *People v. Hoang* (2006) 145 Cal.App. 4th 264, 266-267 [instruction properly given where defendant argued he "merely returned to his residence," but evidence established he went to his residence only to change his clothes before departing to the home of a confederate].)

The evidence was sufficient to conclude appellant was the shooter responsible for the deaths of Bruni and David. The central issues for the

jury concerned appellant's mental state, *i.e.*, whether sufficient evidence proved that appellant committed the crimes with premeditation and deliberation, acting intentionally but not according to a pre-existing plan, or killed his family members in a frenzied, drunken rampage. To the extent that "flight" may be inferred from appellant's having run at the sound of an alarm, it cannot indicate whether appellant was conscious of having committed manslaughter, second degree murder, or first degree murder as charged. The improper instruction, particularly in combination with the prosecutor's argument and the use of appellant's prior acts to establish motive, encouraged the jury to use the consciousness-of-guilt evidence to infer not only that appellant killed the victims, but that he had done so according to a premeditated plan. This inference is contrary to law. Consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, but it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As the Court explained:

> [E]vidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*People v. Anderson*, *supra*, 70 Cal.2d. at p. 33.) [38]

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Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.

(continued...)

D. Reversal is Required.

The Court has previously rejected claims that the consciousness-of-guilt instructions permit irrational inferences to be drawn concerning the defendant's mental state. (*People v. Russell, supra,* 50 Cal.4th at pp. 1253-1254.) [39] Appellant respectfully asks this Court to reconsider its previous decisions. The use of CALJIC 2.52 in appellant's case was uniquely prejudicial and warrants reversal of the verdicts and sentence of death.

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 296.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen, supra,* 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting the United States

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[38](...continued)
(2 LaFave, Substantive Criminal Law (2nd ed. 2003) § 14.7(a), pp. 481-482 [original italics, fn. omitted].)

[39] (See also *People v. Hughes, supra,* 27 Cal.4th at p. 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 and 2.52]; and *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 and 2.52].)

Supreme Court has required "substantial assurance that the inferred fact is more likely than not to flow from the proved fact on which it is made to depend."].) This test is applied to the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

CALJIC 2.52 enabled the jurors to draw consciousness-of-guilt inferences from appellant's actions after the crimes. The evidence of appellant's alleged "flight" was simply not probative of whether he harbored the mental state for first degree premeditated murder at the time of the shooting. There was no rational connection – much less a link more likely than not – between appellant's alleged flight and his consciousness of having committed the homicides with (1) premeditation; (2) deliberation, (3) malice aforethought, or (4) a specific intent to kill. The fact that appellant was startled by the sound of an alarm and left the crime scene (at any speed) to return home cannot reasonably be deemed to support an inference that he had the requisite mental state for first degree murder. Appellant therefore respectfully asks this Court to hold that, in this case, instructing his jury with CALJIC 2.52 was reversible constitutional error under either *Chapman v. California*, *supra*, 386 U.S. 18, or *People v. Watson*, *supra*, 46 Cal.2d at p. 836.

IX.

SEVERAL GUILT PHASE INSTRUCTIONS IMPERMISSIBLY UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

In Argument IX of the AOB, appellant contended that several guilt phase jury instructions deprived him of his fundamental constitutional rights. The instructions on circumstantial evidence (CALJIC Nos. 2.90, 2.01, 8.83 and 8.83.2) undermined the requirement of proof beyond a reasonable doubt. (AOB at pp. 185-190.) Other instructions (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, and 2.52) further diluted the reasonable doubt standard. (AOB at pp. 190-194.) The use of these instructions deprived appellant of his constitutional rights to due process of law (U.S. Const., Amend.XIV; Cal. Const., art. I, §§ 7 and 15), trial by jury (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17); see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama, supra*, 447 U.S. at p. 638.) Reversal of the guilt and penalty verdicts is therefore required.

Respondent states (and appellant acknowledges) that this Court has rejected similar claims. (Resp. Brief at pp. 83-86.) For the reasons discussed in the AOB, appellant respectfully urges this Court to reconsider those rulings.

X.

PENAL CODE SECTION 190.2 (a) (15), THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE, IS UNCONSTITUTIONAL.

In the AOB, appellant urges the Court to reconsider its previous decisions regarding the constitutionality of the lying-in-wait special circumstance and to set aside the jury's "true" findings in this case. (AOB at pp. 199-207.) California's lying-in-wait special circumstance has been so far expanded that it fails to perform the narrowing function required by the Eighth Amendment and to distinguish "in a meaningful way the category of defendants upon whom capital punishment may be imposed." (AOB at pp. 206-207, quoting *Arave v. Creech* (1993) 507 U.S. 463, 476 [statutory factors making a defendant eligible for the death penalty "must provide a principled basis for doing so"].) The elements of this special circumstance have been construed so broadly that murder eligible for the death penalty on the basis of "lying-in-wait" is largely indistinguishable from any premeditated murder. (AOB at pp. 201-205.)

Respondent correctly notes this Court has upheld the constitutionality of the lying-in-wait special circumstance and rejected arguments similar to appellant's. (Resp. Brief at pp. 87-89.) Respondent relies on the Court's prior decisions without advancing new arguments. (*Id.*) For all the reasons discussed in the AOB, appellant respectfully asks the Court to reconsider its previous rulings on this point.

XI.

INFLAMMATORY VICTIM IMPACT EVIDENCE DENIED APPELLANT A FAIR AND RELIABLE SENTENCE.

A. Introduction and Overview.

In Argument XI of the AOB appellant challenges the prosecution's victim impact presentation, specifically noting aspects of the testimony that were improper under existing law. [40] Appellant acknowledged the quantity of the evidence presented in this case was not unusually large in comparison to other California cases. (AOB at pp. 207-208, fn. 63.) Nevertheless, the victim impact testimony was unduly prejudicial and contributed to an already inflammatory atmosphere in the penalty phase. As a result, appellant was denied his constitutional rights to a fair and reliable sentencing determination.

Respondent asserts the claim is forfeit because defense counsel did not object to the testimony (Resp. Brief at pp. 91-92), and in any event appellant's claim should be denied because his specific contentions are without merit. (Resp. Brief at pp. 94-106.) Respondent concludes that even if the victim impact evidence is found to have been unduly prejudicial, any error was harmless. (Resp. Brief at pp. 107-108.) For the reasons discussed below and in the AOB, respondent is incorrect.

B. Appellant's Claim Is Cognizable on Appeal.

This Court may consider appellant's claim despite defense counsel's

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40 Two prejudicial features of the victim impact evidence (the victims' life stories and family histories [AOB at pp. 236-239], and the impact of the crimes on Richie Burgos [AOB at pp. 245-250]) are not addressed here because appellant believes the discussion in the AOB is sufficient.

failure to object to the victim impact testimony. (See Arg. V, *supra*, *People v. Williams, supra,* 17 Cal.4th at pp. 161, 162, fn 6; see also, *People v. Andersen, supra,* 26 Cal.App.4th at p. 1249 [although defendant did not object, the appellate court may consider the claim's merits and reverse when substantial rights will be affected]; *People v. Marchand, supra*, 98 Cal.App.4th at p. 1061 [appellate court considered important constitutional claims despite defendant's forfeiture].)

C. Respondent's Analysis of the Victim Impact Testimony Is Superficial and Self-serving.

Respondent's discussion of three areas of testimony specified in the AOB attempts to recast the evidence so it appears to fit within the parameters of appropriate victim impact evidence. Respondent's efforts are unavailing.

1. Clari calling appellant "the devil."

One highly improper aspect of the victim impact evidence was Clari's referring to appellant as "the devil." The testimony came in Clari's response to the following question by the prosecutor:

> Q. Do you think that if your brother and your mom were to die in a car accident like you had originally thought, do you think that would have had a different affect [sic] on you?
>
> A. Oh, yeah, definitely.
>
> Q. Can you tell us why?
>
> A. Well, how would you feel if you brought the devil to your mom's house and he did it to her?

(15 RT 2092.) [41] As discussed in the AOB, Clari's testimony was an unequivocal statement of her opinion and a powerful negative characterization of appellant. Testimony of this sort has long been recognized to be unduly prejudicial, and is constitutionally prohibited under *Payne v. Tennnessee.* [42]

Respondent disagrees, contending the testimony was entirely proper and did not constitute an opinion or characterization. Moreover, even if this Court finds Clari's testimony to have been improper, it was not unduly prejudicial. Respondent's contentions are meritless, for several reasons.

First, respondent tries to circumvent the constitutional rule with an alternate, self-serving, characterization of the evidence. According to respondent, the "devil" remark was simply a metaphor Clari used to express her feelings and was not, therefore, an improper opinion about appellant. (Resp. Brief at p. 95.) Respondent states, "The fact that Clari was not impacted merely by the fact of the deaths of her mother and brother, but also by the knowledge that she is the one responsible for bringing Cage into

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The prosecutor followed up on Clari's answer:

> Q. Are you telling us that you're feeling like you're responsible for this?
> A. I'm – I'm – I'm telling you, I'm old enough to know that I'm not responsible, that I couldn't have stopped it, but I still feel some guilt because I brought him to the house. I introduced him to the family. If it wasn't for that – my mom treated him like a son because of me.

(15 RT 2092.)

42 *Payne v. Tennnessee, supra,* 501 U.S. 508.

their lives and home is not an opinion on the murders or the defendant but rather evidence of the impact of the crime on her." (Resp. Brief at p. 95, citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1182.) Respondent also reasons that, because Clari's comment displayed her guilt about bringing appellant into the family, this testimony was a circumstance of the crime and, therefore, properly admitted under Section 190.3. "That Clari was left with guilt over having in effect brought the 'devil' into her mother's home as a result of Cage's crime, is a circumstance of the crime, as opposed to opinion about a defendant or the defendant's crime." (Resp. Brief at p. 95.)

Respondent's argument is unpersuasive. As appellant pointed out in the AOB, this testimony speaks for itself. (AOB at pp. 230-231.) The prejudice evaluation does not depend upon speculation on what a witness may have meant by the testimony but, rather on what the jury actually heard. Clari may have been expressing a range of thoughts and feelings as respondent contends. Nevertheless, whatever else it may have been, the remark was a damning characterization of appellant and a powerful statement of Clari's opinion of him. This was not merely a negative characterization along the lines of calling a defendant a drunk, a liar or a wife abuser. By describing her husband as "the devil," Clari invoked a powerful cultural association, identifying appellant as the personification of pure evil. [43] This testimony was not only an improper opinion but an especially derogatory and inflammatory characterization of appellant that had to have affected the jury's penalty determination. After all, for whom

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The Devil (from Greek: Ὄφις, or Latin, diábolos = slanderer or accuser) is believed in many religions, myths, and cultures to be a supernatural entity that is the personification of evil and the enemy of God and humankind. http://en.wikipedia.org/wiki/Devil.

is the death penalty intended if not for the devil?

Respondent next argues that even if the testimony was an opinion and/or characterization, there was no possibility of undue prejudice. According to respondent, that Clari would think of appellant as the devil could not have surprised the jurors in view of his history of mistreating her and the callousness of the murders. (Resp. Brief at pp. 95- 96, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1246.) Given the other, properly admitted, evidence, respondent sees "no reasonable possibility that the jury would have returned a different sentence but for Clari's reference." (Resp. Brief at p. 96, citing *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.) Such reasoning, this Court has recognized, is directly contrary to established decisions of the United States Supreme Court.

In *People v. Robinson* (2006) 37 Cal.4th 592, Justice Moreno wrote a separate concurrence to emphasize the distinction between types of victim impact evidence made admissible by *Payne,* and those the decision does not allow. Even after *Payne*, certain forms of victim impact testimony are strictly excluded under *Booth v. Maryland* (1987) 482 U.S. 496. The *Payne* Court, Justice Moreno observed, expressly retained *Booth v. Maryland*'s holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*People v. Robinson, supra*, 37 Cal.4th at p. 656.) Justice Moreno quoted a portion of the Supreme Court's opinion in *Booth* explaining the need for the absolute ban on this form of victim impact:

> One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. *But the formal presentation of this information by the State can serve no*

other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.

(*People v. Robinson*, *supra*, at p. 656, quoting *Booth v. Maryland, supra,* 482 U.S. at p. 508 [emphasis added].) As this passage makes clear, respondent's harmless error argument was twice considered and twice rejected by the United States Supreme Court: first in *Booth* and then by the Court's express retention of this holding in *Payne*. Whether or not the jury is "surprised" by Clari's feelings about appellant is irrelevant. (Resp. Brief at p. 95.) As *Booth* establishes, opinions and characterizations of the defendant are without probative value and unduly prejudicial, and are among the types of victim impact evidence prohibited by the Eighth Amendment.

2. Lupe Quiles' macabre and disturbing testimony.

Another inflammatory feature of the victim impact evidence appeared in the testimony of Bruni's younger sister, Lupe Quiles. Ms. Quiles first described the shock and horror of receiving the news in Puerto Rico, how she flew to Los Angeles, met Clari, and drove with her to Bruni's house. The prosecutor then asked: "And when you got to Bruni's house, did it impact you what had happened there?" (14 RT 1941-1942.) The witness's answer (delivered in a long and nearly unbroken narrative) included detailed descriptions of the blood and gore inside the house. (*Id*, see AOB at pp. 241-242.) Quiles then related how she and other family members organized the clean up, becoming so distraught at this point that the court intervened and declared a recess. (14 RT 1942.) When court resumed, Quiles testified:

Q. After you and Lydia finished cleaning, what do you do next?

A. As I was sweeping the floor and – you know, sweeping all the bones and everything, I sweep it out the door. I opened the door to clean. I saw this piece of bone that I thought, you know – maybe I think it's her nose. And I don't want to get rid of that, throw it on the floor. And I keep that piece of bone because I'm – I didn't even tell nobody, not even my family about this. Now they know that this piece of bone I still had at my house, I think, somewhere so my husband won't find it, hid somewhere because I think I had a piece of her with me. I had this piece. I think is her nose. Because she had no face left. And there was bone all over. And I feel so sad sweeping that floor and sweeping bone from her to the ground. So this – I noticed the big one. I just took it with me and I hide it.

Q. And you still have that?

A. I still have that piece of bone. And I had to hide it so nobody know – my kids, nobody, my husband knows I have it.

(14 RT 1944.) Quiles's testimony was inflammatory due to both its lurid content and to Quiles's emotional presentation. (AOB at pp. 244-245.) As appellant noted in the AOB, the trial court took no counter measures to lessen its prejudicial impact. (*Id.*)

Respondent, however, contends this was appropriate victim impact, stating "There was nothing *unduly* (sic) inflammatory or emotional about Lupe Quiles' testimony." (Resp. Brief at p. 102 [emphasis added].) According to respondent, Quiles testimony "reflected a normal human response," of the sort "the jury would reasonably expect a close relative to experience." (*Id.* at p. 103.) Quiles' testimony fulfilled the purposes of victim impact, *i.e.*, to "give a face to the "faceless stranger" of the victim and demonstrate the degree of harm caused by the defendant. Because this

testimony showed "how and why the survivors were affected," Quiles' account of how she kept her dead sister's bones was relevant as a circumstance of the crime. (*Ibid.*)

The implication of respondent's analysis is that ***any*** response to a murder is admissible victim impact evidence, no matter how weird, disturbing, or shocking the testimony might be to the jurors; the survivors' reactions are a relevant circumstances of the crime, and the question of undue prejudice simply does not arise. Respondent states: "Where a defendant causes great harm or loss, *there is no rational reason for limiting evidence* that demonstrates that harm." (Resp. Brief at p. 103 [emphasis added].) Continuing, respondent observes, "In criminal law, the appropriate penalty is often based on the degree of harm caused by the defendant." (*Id.* at p. 103, citing *Payne v. Tennessee, supra,* 501 U.S. at p. 819.) Even assuming the testimony was improper, respondent asserts any error was harmless because "Quiles's testimony reflected a response that the jury would reasonably expect a close relative to experience." (Resp. Brief at p. 103.) For all of the reasons discussed below and in the AOB, respondent is incorrect.

Appellant submits that Quiles' actions were far outside the bounds of "normal" behavior. [44] Appellant knows of no other case in which a distraught relative testified about making a secret keepsake of a bone fragment from the nose of a murdered loved one. This bizarre and unsettling testimony surely was highly disturbing to the jurors and not

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"Normal" has been defined as: "A form or state regarded as the norm; standard," (Webster's Third New International Dictionary (1961, 2002) p. 1540); "Conforming to the standard or the common type; usual; not abnormal; regular; natural," (www.dictionary.com).

conducive to the reasoned moral judgment the jury is expected to exercise in the penalty phase. [45]

3. Speculation and comparisons to extraneous facts.

Three times the prosecutor posed questions to the victim impact witnesses that called for speculation and/or required comparisons to irrelevant, extra-record facts. The basic question, though stated somewhat differently in each instance, asked the witnesses how they would feel if Bruni and/or David had died under different circumstances. As appellant noted in the AOB, the question was plainly improper because it called for speculation and, in each instance, elicited testimony that was irrelevant and unduly prejudicial. (AOB at pp. 231-235.) As discussed above, Clari responded by calling appellant "the devil", an improper opinion and an inflammatory characterization. Bruni's elderly mother, Celena Rodriguez, became so emotional the prosecutor asked if she needed to take a break before continuing her testimony. [46] Bruni's younger sister, Lupe Quiles,

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As appellant noted in the AOB, the trial court took no counter-measures to combat the inflammatory effect and did not monitor the jury for outward signs of distress. (AOB at pp. 244-245.)

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The prosecutor posed the question to Bruni's mother, Celena Rodriguez, in this fashion:

> Q. Can you tell us if the death of Bruni being taken at the hands of another impacted you differently than losing a child in a different way?
>
> A. Well, I don't think so. I think death is the same, but – well, she didn't deserve to die in that manner.

(14 RT 1932-1933.)

gave a lengthy and emotional response. [47] As noted in the AOB, this

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Lupe Quiles was asked to compare Bruni's death to the recent loss of another sister following a long illness:

> Q. Has the impact of Bruni's death on you, because [of] the way in which she died, has this been different than losing your other sister, Lydia's twin?
>
> A. Yeah, you see, when you have – my sister [Lydia's twin] was sick.
>
> ***
>
> And you expect her – you, you know, to die. When you have a relative that – somebody that hadn't been sick and you expect that person to die, it doesn't affect [sic] you that much. If you have a sister that is healthy trying to get her life together – she bought a beautiful house, Bruni. And, you know, she was so happy with this brand new house. She had never had a house like this before. You know, with her hard work and she got this, and then taken away from this earth is just something that affects them so much. Not only me, but the rest of the family because we didn't expect her – she was only 50 years old. David was only 16. A young boy, full of ambition. He wanted to study. He's not like Richie. My sister was so proud of that boy. He was so neat, so clean, you know, that she said this is – you know, from my three kids, this is the one that's going to be – you know, be something in life.
>
> And taken away from this earth that way, it just impacts the whole family. It's just – it's not the same like when Bombo – we call her Bombo Maria. Clari died. It's sad, but she die. We know that she needed to go rest. But Bruni, she was full of health and ambition. She was just happy. A happy person. But, you know, I don't understand why this person have to

(continued...)

testimony had little or no probative value; it contained no information about the victims as individuals and was not logically related to the circumstances of the crime. Its only effect was to heap more prejudice onto an already inflammatory body of evidence and improperly place a thumb on death's side of the scale. (See AOB at pp. 231-235.)

Respondent contends the question was entirely appropriate, and the testimony elicited was relevant and admissible victim impact evidence:

> Here, as '[t]he circumstances of the crime of which the defendant was convicted' (§ 190.3, subd. (a)) include, by definition, the *way* in which the victims died, any testimony regarding the impact those deaths had, even in the context of comparing it to the impacts other types of deaths may have had, was entirely proper.

(Resp. Brief at p. 97.)

Respondent rests its argument on *People v. Pollock, supra,* 32 Cal.4th 1153, 1182, but its reliance is misplaced because the case concerned a different type of victim impact testimony. The witnesses in *Pollock* were not asked to speculate about hypothetical circumstances, or compare the facts of the case to extraneous events. In *Pollock,* the victim impact witnesses testified their "grief was exacerbated by knowledge of the 'savage' manner in which" the victims were killed "and the pain they must have experienced during their final minutes." (*People v. Pollock, supra,* at p. 1166.) [48] The testimony was speculative in the sense that the witnesses

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[47](...continued)

take her away. And I couldn't go away.

(14 RT 1953-1954.)

[48]

(continued...)

were imagining the victims' experiences, but their testimony was premised on undisputed facts established at trial. (See also *People v. Collins* (2010) 49 Cal.4th 175, 230 [prosecutor's argument imagining victim's last moments was not unduly prejudicial where based on facts established at trial].) This Court has allowed victim impact witnesses to express their thoughts and feelings about the way in which the victim died. (See, *e.g.*, *People v. Martinez* (2010) 47 Cal.4th 911 [victim's sister and brother testified they thought about the victim's suffering and the brutal manner of her death].) However, victim impact witnesses have not been free to imagine how they might feel under hypothetical circumstances.

Although respondent chides appellant for "fail[ing] to cite *any* authority in support of his position that such testimony is improper." (Resp. Brief at p. 97) [49], respondent offers no authority, and appellant knows of

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[48](...continued)

A friend of the victims' described her shock at the couple's death and "the brutal manner in which they died," and the couple's surviving son testified about how "the circumstances of his parents' deaths made it impossible for him to remember his parents, or his own childhood, without in some manner imagining the suffering of their final minutes." (*People v. Pollock*, *supra*, at p. 1182.)

[49]

Respondent contends two cases cited in the AOB fail to support, and in fact counter, appellant's argument. (Resp. Brief at p. 97, fn. 29, citing AOB p. 235, *Young v. State* (Okla. 1999) 992 P.2d 332, 341-342, and *Copeland v. State* (2001) 343 Ark. 327, 334 [37 S.W.3d 567, 572].) However, the *Young* and *Copeland* cases were cited only for comparative purposes. In each case a written victim impact statement included a *single* comment suggesting the capital crimes indirectly brought about the death of an another family member. In concluding the comments did not create undue prejudice, the courts in *Young* and *Copeland* observed that the victim impact statements were otherwise unemotional and conformed to specific guidelines codified in each state. Appellant's case is distinguishable by the

(continued...)

none, holding that victim impact testimony properly includes unbridled speculation or witnesses' comparisons to extra-record facts. To the contrary, this Court has repeatedly held speculation and conjecture are to be avoided. Questions calling for a conjectural lay opinion are generally not "[h]elpful to a clear understanding of the witness's testimony." (See Evid.Code, § 800, subd. (b); *People v. Houston* (2012) 54 Cal.4th 1186, 1221-1222; *People v. Thornton* (2007) 41 Cal.4th 391, 453.) This rule applies equally to victim impact testimony. A victim impact witness's testimony that the defendant's crime caused or hastened the death of a third person is improper speculation. (*People v. Abel* (2012) 53 Cal.4th 891, 938 [improper for the victim's mother to testify that the crime brought about her other son's untimely death from heart disease]; *People v. Brady* (2010) 50 Cal.4th 547, 577-578 [improper for the victim's sister to testify their mother had given up on life six months after the murder]; *People v. Carrington* (2009) 47 Cal.4th 145, 197 [trial court correctly told a witness it was improper to speculate the capital crime may have contributed to the death of the victim's mother].)

D. Respondent Does Not Meaningfully Assess the Prejudicial Effects of the Victim Impact Evidence.

Respondent does not analyze the prejudicial effect of the victim impact evidence, apparently believing this to be unnecessary because "even if the victim impact evidence should have been excluded *entirely*, any error

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[49](...continued)
degree of emotion, the presence of multiple inflammatory items of victim impact evidence, and California's lack of specific statutory or judicial guidance in this area.

was harmless." (Resp. Brief at p. 108 [emphasis in original].) [50] According to respondent, the balance of evidence was "overwhelming" in favor of the death penalty. Respondent here notes appellant was convicted on two counts of first degree murder with personal use of a firearm and two special circumstances. Whereas appellant presented only "some limited" mitigating evidence in the penalty phase, "in both the guilt phase and the penalty phase, the jury heard Cage's long history of committing violent acts against his family." Any error in admitting the victim impact was, therefore, harmless beyond a reasonable doubt. (Resp. Brief at p. 108.) Respondent is incorrect.

Respondent flatly states the balance of evidence supports the penalty verdict but offers no analysis or explanation for its conclusion. Any evaluation of victim impact evidence in a particular case must take into consideration: the general purpose of victim impact, the uniquely prejudicial character of this type of evidence, and, the specific circumstances of the defendant's trial. The United States Supreme Court has consistently held, in *Payne*, *Booth* and *Gathers,* that capital sentencing decisions must be arrived at through reasoned judgment and should be free, to the greatest extent possible, of excess emotion. This Court has advised caution in admitting victim impact evidence in order to ensure that capital sentencing decisions are made in the atmosphere of fairness and rationality required by the Fifth, Eighth and Fourteenth Amendments. (See *People v. Haskett, supra,* 30 Cal.3d 841, 864, and *People v. Edwards* (1994) 54

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In its discussion of each complained-of item of victim impact evidence, respondent states only that any error was harmless "given the other properly admitted evidence." (Resp. Brief at p. 97, see also pp. 96, 101-102, 103-104, 106-107.)

Cal.3d 787.) By removing the ban on victim impact evidence, the *Payne* majority sought to balance the scales between the prosecution and the defense where, in the capital context, the defendant has "virtually no limits" in terms of the evidence admissible in mitigation. (*Payne*, *supra*, at p. 822.) The legitimate purposes of victim impact evidence are preventing the victim from becoming a "faceless stranger," and allowing the state the full moral force of its evidence. (*Payne*, *supra*, at p. 825 [citations omitted].) *Payne*, however, retained limits on victim impact evidence, and various members of the Court expressed concerns about its misuse or overuse causing undue prejudice.

The legitimate purposes of victim impact evidence were served in appellant's case long before the start of the penalty phase. In the guilt phase, jurors heard testimony about Bruni and David as individuals. As discussed elsewhere and in the AOB, the trial atmosphere was emotional, which probably was unavoidable given the family relationships of the witnesses and appellant. The past crimes evidence admitted in the guilt phase turned the situation from emotional to inflammatory, and the penalty phase victim impact hopelessly biased the jurors in favor of death and against a sentence of life without possibility of parole. [51]

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Respondent's argument reveals the weakness of the prosecution's case for first degree murder. As discussed here and in the AOB, the evidence of appellant's past acts was essential for the state to convict appellant of first degree murder and obtain a death verdict. (See AOB Args. I and II.) Respondent elsewhere contends the past acts were properly admitted in the guilt phase and were, in any case, not unduly prejudicial. (See Resp. Brief Args. I and II.) In discussing victim impact, however, respondent does acknowledge the importance of the past acts evidence. Respondent here contends the past acts, combined with the first degree

(continued...)

XII.

RESPONDENT FAILS TO JUSTIFY THE TRIAL COURT'S REFUSAL TO MODIFY THE STANDARD VERSION OF CALJIC 8.88 IN CONFORMITY WITH EXISTING LAW.

A. Introduction and Overview.

In Argument XII of the AOB, appellant contends the court's refusal to modify CALJIC 8.88 denied him his constitutional rights to due process of law and a reliable penalty determination. [52] Appellant explained the necessity of modifying CALJIC 8.88 in the AOB. As given, the instruction was susceptible to misunderstanding. The emphasis on the "totality of the aggravating circumstances" and "the totality of the mitigating circumstances," gave the misleading impression that jurors were expected

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[51](...continued)
murder convictions, created an "overwhelming" case for death without the need for *any* victim impact evidence. (Resp. Brief at p. 108.)

[52]

Defense counsel requested three changes to the standard version of CALJIC 8.88. First, counsel asked for the following additional language:

> In weighing the aggravating and mitigating factors, you are not merely to count numbers on either side. You are instructed, rather, to weigh and consider the factors. You may return a verdict of life imprisonment without possibility of parole even though you should find the presence of one or more aggravating factors.

(13 CT 3596.) The second request was to remove the term "totality" from CALJIC 8.88. (13 CT 3597.) The third request was for the following additional language: "One mitigating circumstance may be sufficient for you to return a verdict of life imprisonment without possibility of parole." (13 CT 3598.)

to sentence based on a quantitative evaluation. Compounding this misapprehension, jurors were *not* informed that a single mitigating factor may justify a sentence of life without possibility of parole. (AOB at pp. 253-255.) Defense counsel's proposed modifications were correct statements of established law (see *People v. Hayes* (1990) 52 Cal.3d 577, 642; *People v. Visciotti* (1992) 2 Cal.4th 1, 64; *People v. Cooper* (1991) 53 Cal.3d 771, 845 [one mitigating factor may outweigh numerous factors in aggravation]), and this Court has commented favorably on instructions similar to appellant's modified version of CALJIC 8.88, noting they "significantly reduced the risk of juror misapprehension." (AOB at pp. 253-256; *People v. Sanders, supra,* 11 Cal.4th 475, 557; see also *People v. Webb* (1993) 6 Cal. 4th 494, 534 [instruction eliminated any possibility jury might not understand its sentencing discretion].)

Respondent acknowledges the correctness of the defense-requested changes and this Court's approval of similar alterations to CALJIC 8.88. (Resp. Brief at p. 111.) Respondent nevertheless contends the court properly denied appellant's requests because the proposed modifications "were duplicative to what was already stated in CALJIC 8.88." (Resp. Brief at p. 109.) Additionally, respondent observes there is no duty to give special instructions that are repetitious,[53] or "defense-requested pinpoint instructions which simply repeat or paraphrase the applicable CALJIC instructions." (Resp. Brief at p. 111, citing *People v. Sanders, supra,* 11 Cal.4th at pp. 560-561.) Should this Court find error, respondent contends no prejudice to appellant resulted. Respondent is incorrect, for the reasons

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Resp. Brief at p. 111, citing *People v. Benson* (1990) 52 Cal.3d 754, 805, fn. 12, and *People v. Wright* (1988) 45 Cal.3d 1126, 1134.

discussed below and in the AOB.

B. Respondent Fails to Refute Arguments Made in the AOB.

Respondent does not directly address appellant's analysis of CALJIC 8.88, or the utility of the proposed modifications. Instead, respondent simply states its contentions (essentially rephrasing the court's responses to the defense request) without explaining *how* the modified instruction would have been repetitious or argumentative. (See Resp. Brief at pp. 110-111.) Respondent concludes the proposed modifications were unnecessary because this Court has found CALJIC 8.88 constitutionally adequate in other cases. (Resp. Brief at p. 111, citing *People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Butler* (2009) 46 Cal.4th 847, 873-875; *People v. Geier, supra,* 41 Cal.4th at pp. 618-619.) This analysis is insufficient to establish harmlessness.

Appellant's proposed modifications to CALJIC 8.88 accurately reflected the law and were neither repetitive nor argumentative. Upon request the trial court is obliged to modify an otherwise proper instruction to ameliorate its deficiencies and tailor it to the facts of the case. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110.) This duty is heightened in capital sentencing, where due process and the Eighth Amendment require "specific and detailed guidance" be given jurors. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189; *Proffitt v. Florida* (1976) 428 U.S. 242, 253; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303.) Instructions that clarify the capital sentencing process should be given upon a defendant's request. (AOB at p. 255, citing *Simmons v. South Carolina* (1994) 512 U.S. 154, 172 [conc. opn. of Souter, J.], citing *Gregg v. Georgia, supra,* 428 U.S. at p. 190.)

C. Reversal Is Required.

The trial court erred by denying the defense request, and that error

cannot be considered harmless. Given the normative decision inherent in penalty deliberations, the presence of one mitigating factor may be enough to warrant life without parole even if it is substantially outweighed by the aggravation. (See *People v. Johnson, supra,* 3 Cal.4th at p. 1250.) As appellant noted in the AOB, there was mitigating evidence concerning appellant's diagnosis of schizophrenia, his brain abnormalities, and his long history of bizarre behavior in the form of sudden, irrational violence. This Court cannot assume a death verdict would have been imposed had the jury been instructed as appellant requested. (*Chapman v. California, supra,* at p. 24.) The penalty verdict must be reversed because respondent has not shown "beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Mil* (2012) 53 Cal.4th 400, 417.)

XIII.

RESPONDENT FAILS TO ADDRESS THE CONSTITUTIONAL INFIRMITIES OF CALJIC 8.88 AND INCORRECTLY STATES THAT SOME OF APPELLANT'S CLAIMS ARE NOT PRESERVED FOR REVIEW.

A. Introduction and Overview.

In Argument XIII of the AOB, appellant argued the trial court's use of the standard version of CALJIC 8.88 violated California law (Pen. Code § 190.3) and deprived appellant of his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and corresponding sections of the California Constitution. Specifically, this instruction failed to accurately describe the weighing process the jury must apply in capital sentencing, thereby depriving

appellant of the individualized consideration the Eighth Amendment requires. CALJIC 8.88 was improperly weighted toward death. The definition of mitigating circumstances was incomplete and failed to inform the jury of the full scope of evidence which they could consider in mitigation. The instruction indicated a death judgment could be returned if the aggravating circumstances were "substantial" in comparison to mitigating circumstances. In addition, CALJIC 8.88 in effect informed the jury that a single mitigating factor was not a sufficient basis for life imprisonment rather than a sentence of death. Appellant also notes that the instruction's reference to "life without parole" rather than "life without *the possibility* of parole" was misleading. Reversal of the death judgment is required because these instructional defects undermined appellant's constitutional rights.

Respondent disagrees, but declines to address the substance of appellant's arguments. Respondent initially asserts that appellant "references several other potential contentions in his 'Introduction and Overview' for this claim" but that appellant actually makes only two arguments, which respondent addresses in its brief. According to respondent, appellant's "perfunctory assertions of error" are "not properly presented" and must be ignored. (Resp. Brief at p. 112, fn 32.) Next, respondent reiterates appellant's contentions, stating only what appellant had already acknowledged - that this Court has rejected similar claims in other cases. (Resp. Brief at pp. 112-115.)

Respondent is incorrect with respect to the preservation of the arguments. As for the substance of appellant's claims, for all the reasons set forth below and in the AOB, appellant asks this Court to reconsider its prior decisions.

B. Appellant's Contentions Are Preserved for Review, and this Court Should Reconsider its Approval of CALJIC 8.88.

Appellant's contentions are stated clearly and supported by sufficient authority. Nothing prevents this Court from considering these arguments. In the introduction to Argument XIII of the AOB, appellant identifies several ways in which the defects in CALJIC 8.88 impacted the jury's penalty phase determination. (AOB at pp. 256-257.) The effects of the various flaws in the instruction are inter-related and cannot be neatly categorized. The discussion in the AOB, however, is organized into two basic components. In Section B of Argument XIII, appellant discusses the ways in which CALJIC 8.88 reduces the prosecution's burden of proof. First, the instruction omits the mandatory language of Penal Code section 190.3, which states that after considering aggravating and mitigating factors, the jury "***shall impose***" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances" (AOB at pp. 258-259, citing *Boyde v. California* (1990) 494 U.S. 370, 377; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) Second, the language of CALJIC 8.88 suggests the jury must perform a quantitative analysis, considering the "totality" of the mitigating circumstances and weighing these against the totality of the aggravating circumstances. The potential for prejudice lies in the removal of *qualitative* considerations, thereby weighting the scales in favor of death. (AOB at p. 259.) Thirdly, the term "substantial" is not defined. As CALJIC 8.88 is phrased, this allows imposition of death whenever aggravating circumstances were merely "of substance" or "considerable," *even if* they were outweighed by mitigating circumstances. (See AOB at pp.

259-261.)

In Section C appellant demonstrates that CALJIC 8.88 incorrectly describes the process by which jurors are to weigh and balance the evidence in aggravation and mitigation. First, as noted above (and in Section B of the AOB at pp. 260-264), CALJIC 8.88 suggests a quantitative analysis under which the totality of the mitigating circumstances are weighed against the totality of the aggravating circumstances. The instruction thus contradicts long-established California law holding that a single mitigating factor may trump all evidence in aggravation. (See AOB at pp. 260-261, citing *People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5; *People v. Hayes, supra,* 52 Cal.3d at p. 642; *People v. Cooper, supra,* 53 Cal.3d at p. 845.) Second, CALJIC 8.88 tells jurors what warrants death, but does not tell them what warrants life without the possibility of parole." (AOB at p. 262.) Finally, the definition of mitigation [54] was inadequate to inform the jury of the full scope of evidence to be considered in determining the appropriate sentence and was likely to be understood as a limitation on mitigating evidence. (AOB pp. 262-264.)

Only one point mentioned in the AOB's Introduction to Argument XIII is not discussed in either Sections B or C. Appellant there noted that CALJIC 8.88 does not define and distinguish the terms "life without parole" and "life without the possibility of parole." (AOB at p. 257.) It is true, as respondent notes, that this particular criticism of CALJIC 8.88 is

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CALJIC 8.88 provides in relevant part: "[a] mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty."

not discussed elsewhere in Argument XIII, but the conclusion respondent draws is incorrect. Appellant did not address this specific defect because the language of the instruction speaks for itself. Additionally, the failure to define life without parole/life without the possibility of parole is merely one of several problematic aspects of CALJIC 8.88, to be considered *in toto*.

Respondent offers no defense of CALJIC 8.88 apart from the Court's past decisions upholding this instruction. Clearly, this Court is entitled to reconsider the propriety of this defective instruction. Appellant respectfully asks the Court to do so in this case, as the use of CALJIC 8.88 denied him his constitutional rights to a fair trial, due process of law, and an individualized consideration of penalty. (See AOB at pp. 257-264.) For all of the reasons discussed above and in the AOB, reversal of the penalty is appropriate.

XIV.

THE LACK OF PARITY BETWEEN CALJIC 8.85 AND CALJIC 8.87 SKEWED THE INSTRUCTIONS TOWARD A DEATH VERDICT, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

In Argument XIV of the AOB, appellant argues that the lack of parity between the CALJIC instructions on jury non-unanimity (CALJIC Nos. 8.85 and 8.87) weighted the proceeding in favor of a death verdict. (AOB at pp. 266-268.) The instructional disparity promotes the random and arbitrary imposition of death, and the use of these instructions violated appellant's constitutional rights to be free from cruel and unusual punishment, to due process, and to equal protection. (U.S. Const. Amends. VIII, XIV; *Sochor v. Florida* (1992) 504 U.S. 527; *Gregg v. Georgia,*

supra, 428 U.S. 153.) Respondent contends the instructions given were appropriate. (Resp. Brief at pp. 118-119.) The issue is joined and no further discussion is necessary unless this Court requests further briefing. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 [standard claims challenging death penalty considered fairly presented to the Court].)

XV.

THIS COURT SHOULD RECONSIDER ITS PREVIOUS DECISIONS AND REQUIRE TRIAL COURTS TO GIVE A PRESUMPTION OF LIFE INSTRUCTION IN A CAPITAL CASE.

In the AOB appellant contends that just as jurors in any criminal case are instructed on the presumption of innocence, a presumption of life instruction should be given to jurors in the penalty phase of a capital case. (AOB at pp. 268-270.) Appellant submits the trial court's failure to instruct on the presumption favoring life violated his right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishment, and his right to equal protection under the Fourteenth Amendment. (*Id.*)

Respondent notes (and appellant acknowledges) that the Court has rejected this contention in other cases. (Resp. Brief at p. 119, citing *People v. Howard, supra,* 51 Cal.4th 15, 38-39; *People v. Jennings* (2010) 50 Cal.4th 618, 689; and *People v. Arias* (1996) 13 Cal.4th 92, 190.) Additionally, respondent contends appellant's claim was forfeited by counsel's failure to object to the omission of such a presumption of life instruction from the penalty phase instructions. (Resp. Brief at p. 120, citing

People v. Rogers, supra, 39 Cal.4th at p. 877; *People v. Delgado, supra,* 5 Cal.4th at p. 331; and *People v. Medina, supra,* 51 Cal.3rd at p. 902.) Finally, respondent argues appellant's claim should be rejected on its merits, noting that no other state or federal court has required such an instruction, the criminal justice system of the United States has not recognized a presumption of life as a fundamental principle similar to the presumption of innocence, and appellant has not offered legal authority or reasoned arguments sufficient to justify a change in existing law. (Resp. Brief at pp. 120-121.) For all of the reasons stated in the AOB, appellant disagrees and respectfully asks this Court to reconsider its resolution of this claim.

XVI.

APPELLANT'S CONVICTIONS AND SENTENCE MUST BE REVERSED DUE THE CUMULATIVE EFFECTS OF THE ERRORS AT TRIAL.

In the AOB appellant argued the cumulative effect of the errors in this case requires reversal of both the guilt and penalty judgments. (AOB 270-271.) Respondent contends any error that may have occurred was inconsequential and a result more favorable to appellant would not have been obtained. (Resp. Brief at pp. 122-123.) For the reasons discussed here and in the AOB, a variety of highly prejudicial errors prevented appellant from receiving a fair trial and a reasoned determination of the penalty. Even if this Court disagrees and finds only some of appellant's claims to be valid and insufficiently prejudicial when viewed in isolation, reversal is required due to the cumulative effects of those errors. (See *People v. Holt* (1984) 37 Cal.3d 436, 459.) To satisfy due process and the Eighth

Amendment, the accumulation of errors must be viewed in the context of the entire trial. "A balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.) The errors in appellant's case, viewed individually and cumulatively, deprived appellant of his constitutional rights to a fair trial before an objective jury, the right to present a meaningful defense, and the right to a fair and reliable determination of guilt and penalty, as guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Reversal is therefore required.

XVII.

A DEATH SENTENCE IS DISPROPORTIONATE TO APPELLANT'S CULPABILITY IN THIS CASE.

In the AOB appellant contends that because a death sentence penalty is disproportionate to appellant's culpability in this case, its imposition would violate the state and federal constitutions. Although this Court has previously held that proportionality analysis is not *required* (see, *e.g.*, *People v. Mendoza* (2011) 52 Cal.4th 1056, 1098; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), it does have the inherent discretion to conduct an intra-case proportionality analysis in the interests of justice. (See *People v. Lang* (1989) 49 Cal.3d 991, 1043.) Appellant respectfully urges the Court to exercise its discretion in this case. In addition, appellant urges the Court to reconsider its decisions holding that proportionality analysis is not required in capital cases.

XVIII.

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

In the AOB appellant argued California's death penalty statute is unconstitutional in several respects, both on its face and as applied in this case. Appellant acknowledges this Court has rejected these claims in other cases, but asks the Court to reconsider. (AOB at pp. 278-298.) Respondent maintains the State's death penalty laws are constitutional, resting its arguments on the Court's previous decisions. (See Resp. Brief at pp. 125-131.) The issue is joined, and no further discussion is necessary unless this Court requests further briefing. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304 [standard claims challenging the death penalty considered fairly presented to the Court].)

CONCLUSION

For all of the foregoing reasons, as well as those stated in the AOB, appellant's convictions and sentence of death must be reversed.

Dated: December 21, 2013

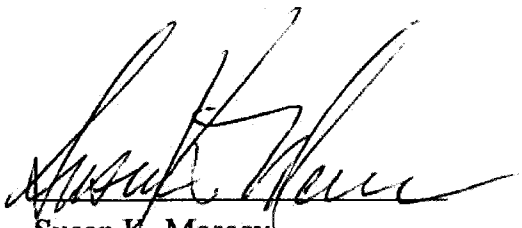
Respectfully submitted,

Susan K. Massey
Attorney for Appellant

CERTIFICATION OF WORD COUNT

Appellate counsel certifies that this Appellant's Reply Brief uses a 13 point Times New Roman font and contains 32,318 words as calculated by the WordPerfect software in which it was written.

Dated: December 21, 2013



Susan K. Massey

AMENDED DECLARATION OF SERVICE BY MAIL

Case Name: People v. Micky Ray Cage
Case Number: Crim. SO120583
Riverside County Superior Court No. RIF-083394

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 9462 Winston Drive, Brentwood, Tennessee 37027.

On December 11, 2013, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Brentwood, Tennessee, with postage thereon fully prepaid.

Michael Millman
California Appellate Project
101 Second Street, 6th Floor
San Francisco, CA 94105

Micky Ray Cage
San Quentin State Prison
P.O. Box V-13961
San Quentin, CA 94974

Theodore M. Cropley
Office of the State Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

W. Samuel Hamrick, Jr.
Court Executive Officer
Superior Court of Riverside County
4100 Main Street
Riverside, CA 92501

Paul Zellerbach
District Attorney
3960 Orange Street
Riverside, CA 92501

Hon. Dennis McConaghy
c/o Office of the Clerk
Superior Court of Riverside County
4100 Main Street
Riverside, CA 92501

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

Executed on December 11, 2013, at Brentwood, Tennessee.

Susan K. Massey

DECLARATION OF SERVICE BY MAIL

Case Name: People v. Micky Ray Cage
Case Number: Crim. SO120583
Riverside County Superior Court No. RIF-083394

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 9462 Winston Drive, Brentwood, Tennessee 37027.

On December 21, 2013, I served the attached

APPELLANT'S REPLY BRIEF

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

Executed on December 21, 2013, at Brentwood, Tennessee.

Susan K. Massey