No. S150509

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SANTIAGO PINEDA,

Defendant and Appellant.

Los Angeles Co. Sup. Ct.
No. NA051943-01 c/w
NA061271-01

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

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DEATH PENALTY

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SANTIAGO PINEDA, Defendant and Appellant.	No. S150509 (Los Angeles Sup. Ct. No. NA051943-01 c/w NA061271-01)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in appellant's opening brief. In addition, the absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. For the convenience of the Court, the arguments are numbered in conformity with the opening brief.[1]

[1] The record will be cited here in the same manner as in Appellant's Opening Brief: "CT" refers to the Clerk's Transcript and "RT" refers to the (continued...)

ARGUMENTS

I

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR JAMES WILIA REQUIRES REVERSAL OF APPELLANT'S DEATH JUDGMENT

A. Introduction

In his opening brief, appellant argued that the trial court committed reversible *Witt-Witherspoon* error[2] by excusing prospective juror James Wilia despite his willingness to fairly consider the issue of penalty, thereby violating appellant's rights to an impartial jury, a fair capital sentencing hearing, due process of law, and a reliable judgment of death under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. (AOB 106-132.)

Respondent acknowledges, as it must, that a prospective juror may be excused for cause only when his views about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (RB 60, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) However, respondent contends that Wilia's excusal must be upheld because his written questionnaire answers, viewed in light of his answers and demeanor on voir dire, provided substantial evidence for the court's finding that he was disqualified to serve as a juror

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[1](...continued)
Reporter's Transcript. In addition, "AOB" refers to Appellant's Opening Brief and "RB" to Respondent's Brief.

[2] See *Wainwright v. Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510.

in this case. (RB 53-68.) Respondent further asserts that the trial judge expressly found that Wilia was "disqualified both on the general circumstances of the answers that he's given and on his penalty phase answers." (RB 62, fn. 49, citing 7 RT 1180.)

As appellant demonstrates below, respondent's contention is unpersuasive.

B. Contrary To Respondent's Position, The Trial Court's Finding That Wilia Was Disqualified To Serve On The Jury Was Not Supported By Substantial Evidence

Respondent contends that substantial evidence supported the trial court's finding that Wilia was unable to serve in this case. (RB 61.) Specifically, respondent (1) apparently contends that Wilia's questionnaire responses, in and of themselves, showed that he was disqualified (RB 61-63); (2) contends that substantial evidence supported the trial court's findings discrediting Wilia's voir dire responses (RB 63-66); and, (3) disputes appellant's argument that any uncertainty as to Wilia's views was due to the trial court's inadequate voir dire (RB 67). As appellant demonstrates below, respondent's contentions are incorrect.

1. Contrary to Respondent's Apparent Position, Wilia's Questionnaire Responses, In and Of Themselves, Did Not Show That He Was Disqualified

Respondent lists several responses from Wilia's questionnaire purportedly supporting its position that he was disqualified, including responses indicating that he would be unable to vote for the death penalty; that he could not set aside sympathy, bias or prejudice towards a victim, witness or defendant; that he would not consider the prior testimony of an unavailable witness read to the jury in the courtroom; and that, although instructed that the testimony of a single witness is sufficient if believed, he

would require more proof, even if he believed the witness. (RB 61-62, citing 8 CT 1993, 1995-1996, 1998-1999.) However, as respondent acknowledges (RB 62), still other responses in Wilia's questionnaire conflicted or appeared to conflict with some of those statements. (See, e.g., 8 CT 1990 [he would not automatically reject the testimony of an unavailable witness], 1993 [he would neither always vote for nor always vote against the death penalty], 1996 [he "strongly disagree[d]" with the statement that a person who intentionally kills should never get the death penalty], *id.* [indicating that anyone who intentionally kills another person should always get the death penalty, adding "an eye for an eye"].)

While it was indeed the province of the trial court to resolve those conflicts (RB 62, citing *People v. Duenas* (2012) 55 Cal.4th 1, 10, *People v. Clark* (2012) 52 Cal.4th 856, 895, and *People v. Weaver* (2001) 26 Cal.4th 876, 910), a fair reading of the record shows that, on the whole, Wilia's questionnaire responses indicated he could be fair and impartial. (AOB 111-112, 118-119.) However, even assuming Wilia's questionnaire responses were inconsistent, the record as a whole, including Wilia's voir dire responses, belies respondent's position that he was disqualified, as appellant discusses in the following section.

2. Respondent Incorrectly Contends That Substantial Evidence Supported the Trial Court's Findings Discrediting Wilia's Voir Dire Responses

Citing Wilia's demeanor and supposedly confusing voir dire answers, respondent next contends that substantial evidence supported the trial court finding that Wilia was substantially impaired. (RB 63-66.) As appellant demonstrates below, respondent's analysis is flawed.

Respondent incorrectly suggests that the trial court properly disbelieved Wilia's voir dire statements that he could be a fair juror and that

he was willing to vote for the death penalty if appropriate. (RB 63, citing 7 RT 1166, 1168-1171, 1177-1178.) First, unlike Wilia's questionnaire responses, his voir dire responses relating to penalty were informed by the trial court's explanations of the duties of capital jurors in reaching a penalty decision. (See 7 RT 1164 [before commencing its penalty-related voir dire, trial court pointed out that "[t]hese are tough trials, but we need to make sure people that we ask to serve and decide the facts in the case can [make a penalty decision] and do it fairly to both sides"], 1165 [trial court pointed out that "[u]nder the law and under our system of justice, not only you have the right but the obligation of citizenship to make a [penalty] decision . . . if you can do that"].)[3]

Similarly, Wilia's clarification of his views on matters other than penalty followed the court's explanations of relevant legal principles, which were largely if not entirely absent from the questionnaire. (See 7 RT 1161 [when the trial court, following up on Wilia's explanation as to why he had indicated in his questionnaire that he could not set aside any sympathy, bias or prejudice, noted that the verdict must be based on the evidence rather than emotions, Wilia affirmed that he could make a decision in that manner],[4] 1161-1162 [after the trial court explained at length how Raul Tinajero's testimony was to be read into evidence, Wilia assured the trial court that he could try to evaluate the testimony of an unavailable witness

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[3] Wilia's death-qualification voir dire is more thoroughly summarized at AOB 112-115.

[4] This exchange is discussed further below.

the way he would that of any other witness],[5] 1162-1164 [after trial court explained the definition and purpose of immunity, Wilia stated that he had no problem with the idea of granting immunity to someone bearing a lesser degree of guilt in order to introduce against the person who actually committed the crime][6].)

Second, while respondent claims that Wilia "repeatedly stated – or agreed with defense counsel's suggestions – that he could be fair and open-minded in both phases of the trial" (RB 58), defense counsel's questions were largely neutral and closed-ended (see, e.g., 7 RT 1168 ["And really the question is can you be fair in both [phases]?"], 1170 ["I want to know whether or not we come to the second phase of the trial, which is a trial, whether or not you'd be open minded to consider both options of death and life. [¶] Could you?"], *ibid.* ["Yes, you could be open minded?"], *ibid.*

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[5] Significantly, the two questions regarding the testimony of an unavailable witness appear several pages *before* the brief factual summary of the case, which referred to the allegations that the second murder victim (i.e., Tinajero) testified against appellant in the first preliminary hearing and trial and subsequently was murdered. (See 8 CT 1989-1990, 1993.) Arguably, the questionnaire may have misled prospective jurors such as Wilia to conclude that those questions related to a witness rendered unavailable due to illness, as opposed to death, and hence that they had nothing to do with Tinajero's testimony. (See 8 CT 1989 ["Will you consider along with all of the other evidence presented, the testimony of an unavailable witness (*for example, one who is too ill to come to court*) whose prior testimony is read to you?"], italics added.) Therefore, it cannot be assumed prospective jurors recognized that those questions had any connection to the information regarding Tinajero's testimony and subsequent death. At any rate, to the extent Wilia's questionnaire responses regarding immunity were inconsistent (8 CT 1990), he either misstated his views or simply did not understand the concept of immunity.

[6] The juror questionnaire defined immunity only as "freedom from prosecution." (8 CT 1990.)

["When you came to the second phase?"], 1171 ["And you could follow those [penalty phase] instructions?"], *ibid.* ["Could you just evaluate his background for what it is, make an honest decision about it?"].) To the extent defense counsel *suggested* Wilia could be fair and open-minded, he was simply referring to Wilia's own questionnaire responses. (See 7 RT 1169 ["And whether or not you'd be open minded as to both possibilities, and I think you indicated you would; is that right?"], 1175 ["I think you can be fair; is that right?"]; see also, e.g., 8 CT 1994 [he would neither always vote for nor always vote against the death penalty], 1999 [there was no reason why he would not be a fair and impartial juror for both the prosecution and the defense]).

Third, respondent is incorrect in contending that the trial court properly discredited Wilia's voir dire statements that he could be fair to the prosecution. (RB 64.) As appellant pointed out in his opening brief, this Court frequently relies on prospective jurors' concluding answers in determining whether they were qualified to serve. (AOB 119-120, fn. 45 and cases cited therein.) Here, there were good reasons to rely on Wilia's concluding answers and to dismiss any conflicting questionnaire responses. Again, Wilia's voir dire responses, unlike his questionnaire responses, were informed by explanations of pertinent legal principles. In addition, as appellant points out above, respondent incorrectly suggests that Wilia "repeatedly stated – or agreed with defense counsel's suggestions – that he could be fair and open-minded in both phases of the trial." (RB 58.) Finally, rather than "shift[ing] and lean[ing] in the direction of the prevailing current" (RB 64), Wilia consistently and unequivocally stated on voir dire that he could be fair and impartial, belying the trial court's comment that Wilia "list[ed] in the wind" (7 RT 1179).

Respondent's reliance upon *People v. Bryant* (2014) 60 Cal.4th 335, 401, is misplaced. (RB 63.) There, a prospective juror expressed in her questionnaire a long-standing and well-considered opposition to the death penalty. Among other things, the prospective juror stated that she did not "believe in the death penalty," but instead "believe[d] in life in prison without parole;" that her views were based on her "religious conviction" that "no one has the right to take a life;" that she would not "be able to vote for the death penalty on another person if [she] believed, after hearing all the evidence, that the penalty was appropriate;" that she would "automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole;" and, that her views on the death penalty had not changed in the last 10 years. (*People v. Bryant*, *supra*, 60 Cal.4th at p. 401.) However, during voir dire the prospective juror stated that she did not want to serve on the jury, but now believed that, despite her religious views, she could vote for the death penalty "[i]f it was required under the law." She initially stated that she did not think she could be a fair juror because of the child victim, but when asked again whether she was biased, she claimed that she could be fair. When pressed, she stated that although she still did not believe in the death penalty, she could impose it in light of her "civic duty" even if she would not be "overjoyed" in doing so. Under those circumstances, the trial court plainly had reason to find that her in-court statements were "simply incredible in light of the decisiveness of the opposite views she had expressed in her questionnaire answers," this despite her claim that the change from her answers on the questionnaire were based on the trial court's "little speech this morning about weighing the good and the bad and the evidence that comes in before that." (*Ibid.*) (*Ibid.*)

In contrast, Wilia's questionnaire responses merely reflected uncertainty, even confusion, with respect to his views on the death penalty. (See, e.g., 8 CT 1992 [describing his general feelings about the death penalty as "[a]n eye for an eye"], 1993 [philosophically neutral with respect to death penalty], *ibid.* [would refuse to vote for guilt of first degree murder or to find special circumstance to be true, no matter what evidence showed, to keep case from going to penalty phase], 1994 [he would not always vote for or against death]; 7 RT 1165 [asked to explain his "eye for an eye" statement, he responded, "Well, you know, I thought about that question, and I had mixed emotions about it. And I wasn't sure whether I have the right to prosecute a person as an eye for an eye, and, you know, I really didn't know how to answer that question"], *ibid.* [explaining he had indicated he was neutral about the death penalty because he had been "undecided"].) This was not a stark about-face, as in *Bryant*. Instead, the voir dire in this case reflected the manner in which Wilia, a layperson suddenly confronted with the possibility that he would be required to make a penalty decision in a capital case, considered and resolved his views on the matter.[7]

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[7] Although respondent does not specifically discuss the challenges for cause at issue in *People v. Clark*, *supra*, 52 Cal.4th 856, that case is similarly distinguishable. There, the trial court found that prospective juror L.C.'s declaration that he could apply the law fairly and impartially was contradicted by his equivocal responses and his demeanor; among other things, it appeared to the court at several points that L.C. "might lose emotional control over himself," and it noted that he had difficulty swallowing and was "visibly upset and nervous." (*Id.* at pp. 896-897.) The trial court remarked that prospective juror A.K.'s responses were equivocal and conflicting, and that it had the "definite impression" she would be unable to truthfully and impartially apply the law; although she wrote in her

(continued...)

Respondent's reliance upon *People v. Gonzalez* (2012) 54 Cal.4th 1234 is similarly misplaced. (RB 63-64.) Although the prospective juror in that case stated on voir dire that she could be objective and consider the death penalty, she also made several statements on voir dire indicating opposition to the death penalty. (*People v. Gonzalez, supra*, 54 Cal.4th at pp. 1282-1284.) Significantly, her opposition to the death penalty was at least partly grounded in her belief that her uncle had been unjustly convicted of murder (*id.* at p. 1285), a circumstance wholly unlike any present in the instant case.

Respondent incorrectly suggests that appellant's argument is predicated on the assumption that this Court must accept Wilia's voir dire statements uncritically. (RB 64.) Rather, appellant argues that the trial court's comment that Wilia "list[ed] in the wind" was at odds with what Wilia actually said during voir dire. (Cf. *People v. Bryant, supra*, 60 Cal.4th at p. 401.) Moreover, while evaluation of a juror's demeanor indeed may be inherent in the voir dire process (RB 65), this Court has recognized at least some distinction between verbal responses and demeanor. (See, e.g., *People v. Clark, supra*, 52 Cal.4th at p. 895 [stating that "[t]he trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's

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[7](...continued)
questionnaire that she supported the death penalty, during voir dire her responses were quite equivocal as to whether she could actually vote to impose the death penalty. (*Id.* at p. 898.) Finally, prospective juror P.Y. provided "lengthy, rhetorical, and sometimes cynical responses" to many of the death-qualification questions on the questionnaire. (*Id.* at p. 899.) Unlike these prospective jurors, Wilia made clear on voir dire that he could be fair and impartial, and nothing in his demeanor rose to anywhere near the levels noted by the trial court in *Clark*.

demeanor and verbal responses"]; italics added.) Here, the trial court's findings focused on Wilia's verbal responses. In particular, the court's comments that Wilia "lists in the wind" and that he "is so inexact in his answers" (RB 65) implicate the substance and logic of his responses rather than his demeanor.

Respondent next disputes appellant's argument that the trial court was incorrect in stating that Wilia was "so inexact in his answers." (RB 65.) According to respondent, Wilia displayed a pattern of circuitous, non-responsive answers to several of the court's voir dire questions. For instance, respondent notes, Wilia indicated in his questionnaire that his son had been the *victim* of a battery, but on voir dire he explained that his son actually went to jail for the incident. (RB 65, citing 8 CT 1983 and 7 RT 1160.) However, these conflicting responses show only that he was initially confused about his son's role in the incident, not that he was biased or otherwise unfit to serve as a juror.

Moreover, Wilia's only non-responsive voir dire statement on the topic[8] – to wit, he responded "Yes" when the trial court asked, "Who went to jail for 90 days?" (7 RT 1160) – suggested that he was again confused as to his son's role in the incident. Alternatively, he simply may have misheard the court, thinking it had asked, "He [rather than "Who"] went to jail for 90 days?" In any event, he clarified the matter immediately, explaining that it was his son who had gone to jail for 90 days. (7 RT 1160.)

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[8] One of the written questions asked, "Have you, a close friend, or relative ever been a VICTIM of a crime?" Wilia replied that his son had been the victim of a battery. A follow-up question asked, "What happened?" Wilia wrote, "90 days in jail." (8 CT 1993.)

Contrary to respondent's suggestion (RB 65-66), Wilia also satisfactorily explained what he meant when he stated in his questionnaire that he could not set aside any sympathy, bias or prejudice toward a victim, witness, or defendant because "[y]ou need to be honest." (See 8 CT 1989.) Specifically, Wilia told the court: "Oh, probably because of the circumstances as to how the trial is going to be run, whether, you know, if I try to set myself aside and say, okay, I think he's not guilty or he is guilty. [¶] I would have to have a little bit more information as far as what I need to say or what I need to do." (7 RT 1161.) Even if this response was inartful, it is obvious he simply was trying to say he needed more information as to how the guilt-phase verdict was to be reached.

Similarly, even if Wilia's explanation of the "eye for an eye" statement in his written questionnaire[9] was "roundabout [or] imprecise" (RB 66, citing 7 RT 1164-1165), it did not support the trial court's finding that he was disqualified. Again, Wilia explained, "Well, you know, I thought about that question, and I had mixed emotions about it, and I wasn't sure whether I have the right to prosecute a person as an eye for an eye, and, you know, I really didn't know how to answer that question." (7 RT 1165.) Moreover, as noted above, the trial commented as to how jurors were to approach the penalty decision, information that was largely if not entirely absent from the jury questionnaire. (See 8 CT 1991-1996.)

Respondent is also incorrect in contending that Wilia gave non-sequitur, unhelpful responses in explaining his questionnaire statements regarding his religious views. (RB 66.) A review of the exchange

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[9] One of the written questions asked, "What are your general feelings about the death penalty?" Wilia responded, "An eye for an eye." (8 CT 1992.)

demonstrates that his answers were in fact appropriate and responsive. In particular, Wilia's responses explained directly, if (again) inartfully, why he had come to decide he could vote for death if he believed it to be the appropriate sentence:

> [Court]: On page 18 I asked about the view, if any, of your religious organization concerning the death penalty, and you said, "Only God has the right." [¶] And then I asked if you are obligated to accept that view, and you said yes. [¶] Is that your view that only God has the right to impose the death penalty?
>
> [Wilia]: Well, at the time I answered that question I had my mind fixed, but as it turns out, if I were in the same predicament, I would want – I would want to be tried fairly so that, you know –
>
> [Court]: You want to be tried fairly? [¶] Would you say that again. Mr. Patton couldn't quite hear you.

Respondent points out that the trial court asked Wilia to repeat his answer (RB 66) but fails to mention that it did so because defense counsel did not hear him.

The exchange continued as follows:

> [Wilia]: If I were in the same predicament, I would want to be tried fairly.
>
> [Court]: What does a fair trial mean in that predicament? What do you mean?
>
> [Wilia]: Excuse me.
>
> [Court]: What are you saying? What do you mean by saying you'd want to be tried fairly?
>
> [Wilia]: Well, if I was facing the same predicament and there was someone in the jury, I would want him to judge me fairly.
>
> [Court]: Yes. And that means what about the death penalty between death and life without parole, which is your

only choice, the only two choices you have if we get into the penalty phase. [¶] What does it mean about being tried fairly?

[Wilia]: If it's a death penalty, I deserve to have death penalty, but if there's some circumstances in there that says, Well, maybe I wasn't totally within my own faculty, you know, when I did something, then I'm sorry I did it, but I did it anyway.

[Court]: All right. Thank you.

(7 RT 1166-1167.) Respondent speculates that the trial court asked multiple follow-up questions because it was "apparently puzzled" about what being "tried fairly" had to do with the question the court had asked. (RB 66.) Yet the record shows that the trial court was not puzzled at all and did not view Wilia's responses as non-sequiturs. Instead, the court's questions were plainly intended to determine whether Wilia's notion of a fair juror comported with the *Witherspoon-Witt* standard, and, had the court properly considered his responses, would have found that it did. Thus, contrary to respondent's contention (RB 66), Wilia's responses were neither puzzling nor unhelpful.

Finally, contrary to respondent's contention (RB 62, fn. 49), substantial evidence did not support the trial court's finding that Wilia was also disqualified "on the general circumstances of the answers that he's given." (RB 62, fn. 49, citing 7 RT 1180.) Respondent's reliance upon *Clark* is misplaced, as the prospective juror in that case (1) gave equivocal, conflicting, nonresponsive, and confusing answers when asked about his ability to set aside his personal views and follow the law, and (2) "expressed a deeply cynical and presumptuous view of his fellow jurors, suggesting among other things that few individuals, perhaps himself included, were capable of setting aside their own personal prejudices."

(*People v. Clark*, *supra*, 52 Cal.4th at p. 900.) Here, as noted above, Wilia's responses as to matters other than the death penalty did not show him to be "unable to follow jury instructions or to fulfill the juror's oath." (*Id.* at p. 901.)

3. Any Uncertainty As to Wilia's Views Was Due to the Trial Court's Inadequate Voir Dire

In his opening brief, appellant argued that any uncertainty as to Wilia's views regarding the death penalty was due to the trial court's inadequate voir dire. (AOB 128-129.) According to respondent, the trial court made several unsuccessful attempts to elicit from Wilia clearer answers as to whether he now believed in the death penalty (7 RT 1165-1166). (RB 67.) Respondent further contends that the trial court was not required to persist in a "quixotic quest for 'unmistakable clarity,'" relying on *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424-426. (RB 67.) However, no quixotic quest was necessary. Significantly, the trial court repeatedly expressed apparent understanding of, and at a minimum did not express any misunderstanding of, Wilia's views before moving on from one topic to another. (See 7 RT 1161 [after Wilia discussed the battery case involving his son, court asked him to explain his questionnaire response indicating that he could not set aside feelings of sympathy, bias or prejudice], *ibid.* [after Wilia affirmed that he could decide the case rationally based on the evidence, court changed the subject to the allegations in the case], 1162-1163 [after Wilia assured the trial court that he could try to evaluate the testimony of an unavailable witness as he would that of any other witness, court moved on to subject of immunity], 1164 [after Wilia assured the court he had no problem with the concept of immunity, court began asking his views with respect to the penalty decision], 1167 [after Wilia explained

what he meant by being tried fairly, court replied, "All right. Thank you" and turned the voir dire over to counsel].) Moreover, the voir dire of Wilia did not consume an inordinate amount of time. Accordingly, if the trial court still harbored uncertainty as to Wilia's views, it should have continued its voir dire.

Thus, for the reasons set forth in appellant's opening brief and above, respondent is incorrect in contending that substantial evidence supported the trial court's finding that Wilia was disqualified as a juror.

C. Conclusion

In sum, contrary to respondent's position, the record in this case does not support the trial court's decision to excuse prospective juror Wilia for cause. Thus, its ruling was erroneous and appellant's death sentence must be reversed. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660; *People v. Heard* (2003) 31 Cal.4th 946, 966.)

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II

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE DETERMINATION OF GUILT BY PERMITTING THE PROSECUTION TO INTRODUCE IRRELEVANT, INFLAMMATORY EVIDENCE, FAILING TO GUIDE THE JURY'S CONSIDERATION OF THAT EVIDENCE, AND ALLOWING THE PROSECUTION TO URGE THE JURY TO DRAW IMPROPER INFERENCES FROM IT

A. Introduction

In his opening brief, appellant argued that the trial court erred in admitting evidence of the following: (1) appellant's December 19, 2003, escape attempt; (2) his March 13, 2003, possession of a shank in jail; (3) his July 13, 2004, possession of a razor and a syringe; (4) his failure to wear a wristband on October 13, 2004, and November 5, 2004; (5) his June 17, 2005, possession of an altered paper clip; (6) his July 30, 2005, escape from a locked shower; and, (7) his letters and phone calls to Irma Limas. (AOB 133-176.)

Respondent contends that the evidence relating to those acts was relevant to the issues of knowledge and opportunity – specifically, appellant's knowledge of jail operations and lapses in jail security, and his opportunity to murder Raul Tinajero – and that it was therefore properly admitted. Respondent further contends that appellant has forfeited his contention regarding evidence of his communications with Limas. (RB 68-99.) Contrary to respondent's position, none of the evidence described above was relevant to either knowledge or opportunity.[10] Because of the

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[10] In admitting evidence of incidents which took place after the murder of Raul Tinajero, the trial court commented, "Whether it's 1101(b), (continued...)

trial court's error, the prosecutor was permitted to introduce into evidence an array of irrelevant, inflammatory, and inherently prejudicial evidence.

B. Respondent's Analysis Regarding the Admissibility of Other-Acts Evidence to Show Knowledge and Opportunity Is Incorrect

It is well-settled that "[t]he defendant must be tried for what he did, not who he is." (Romney, *Statutes That Are Internally Contradictory: The Collision of An Irresistible Force With An Immovable Object* (2003) 31 W.St.U.L.Rev. 99, 128.) Thus, the rule excluding evidence of criminal propensity is over three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647, cited in *People v. Falsetta* (1999) 21 Cal.4th 903, 913, and *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.)[11] Indeed, the propensity rule is in effect in every jurisdiction in the United States. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 392; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381 & fn. 2 [citing statutes and cases codifying or adopting the rule]; *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) As Witkin has explained:

The reasons for exclusion are: '*First*, character evidence is of slight

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[10](...continued)
we're still talking about the method, *motive* and opportunity to move around that jail freely, and he did that even after the homicide in the case, so it tends to suggest, though less persuasively, that it occurred before the homicide." (4 RT 741, italics added.) In his opening brief, appellant argued that the evidence was also inadmissible to show motive. (AOB 159, 161, 163-164.) Because that argument was adequately raised in his opening brief but not addressed by respondent, appellant does not further argue the point here.

[11] *People v. Alcala*, *supra*, 36 Cal.3d 604 has been superceded by statute on another ground as stated in *People v. Falsetta*, *supra*, 21 Cal.4th at p. 911.

> probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.' [Citations.]

(1 Witkin Evid. (4th ed. 2000) § 42, p. 375, italics original.)

Evidence of other crimes is admissible when relevant for a non-character purpose – that is, when it is relevant to prove some fact other than the defendant's criminal disposition, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake of fact or accident." (Evid. Code, § 1101, subd. (b); *People v. Lindberg* (2008) 45 Cal.4th 1, 22; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.) "'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.'" (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 22; accord, *People v. Nible* (1988) 200 Cal.App.3d 838, 847.)

The critical inquiry in assessing the materiality of evidence concerning uncharged misconduct is the nature and degree of similarity between the uncharged misconduct and the charged offense. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.) Moreover, "[t]he court must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong." (*People v. Thompson* (1980) 27 Cal.3d 303, 316.)

Here, the trial court *admitted* the evidence on the ground that it was "probative on the issue of [appellant's] knowledge, his sophistication, the ability to move around the jail and to do what was necessary to elude the authorities there" (4 RT 740),[12] but *instructed the jury* pursuant to CALJIC No. 2.50[13] that it could consider the evidence "only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them" (5 CT 1263; 21 RT 3618).

In contending that the trial court did not abuse its discretion in admitting the evidence, respondent states that the specific knowledge in this case did not depend upon a high degree of similarity, if any at all, between the charged and uncharged acts. (RB 79-80, 88.) As appellant demonstrates below, respondent's position is incorrect.

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[12] Although the prosecution also asserted that the other-acts evidence was relevant to show intent and identity, the trial court did not admit it for those purposes. (4 RT 734-737; 5 CT 1132-1133.)

[13] CALJIC No. 2.50, as provided to the jury in this case, reads as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.

(5 CT 1263.)

1. Contrary to Respondent's Position, Other-Acts Evidence May Not Be Admitted To Prove Knowledge Absent Sufficient Similarity Between the Uncharged and Charged Acts

In his opening brief, appellant discussed *People v. Hendrix* (2013) 214 Cal.App.4th 216, which remains the only published California decision specifically discussing the degree of similarity, if any, necessary to admit other-acts evidence to prove knowledge.[14] (AOB 155-156.) There, the

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[14] Appellant is aware of only one relevant decision published since *Hendrix*, namely, *People v. Jefferson* (2015) 238 Cal.App.4th 494, 498. There, the defendant was charged with carrying a concealed firearm within a vehicle (Pen. Code, § 25400, subd. (a)(1); count one) and carrying a loaded firearm on one's person in a city (Pen. Code, § 25850, subd. (a); count two) on January 18, 2012. With respect to each count, it was alleged that the firearm was stolen and that the defendant knew or had reasonable cause to know it was stolen. (*Ibid.*) Pursuant to Evidence Code section 1101, subdivision (b), the trial court admitted evidence that, on the date of the charged offenses, the defendant was found in possession of a legally-registered firearm, partly on the ground that it was relevant to show his knowledge that the charged firearm was stolen. The trial court also admitted, over defense objection, evidence regarding a 2013 incident in which the defendant was, while in the same vehicle (specifically, a Bentley) involved in the charged offenses, again found to be in possession of a legally-registered firearm. (*Id.* at pp. 497-504.) On appeal, the People argued in part that the gun found in the 2013 incident was used to show the defendant knew about the legal requirements of registering a gun and therefore would have known that the gun that he had hidden in the Bentley in 2012 was not properly registered to him. (*Id.* at p. 505.) However, the court of appeal held that, absent information about firearm laws, the jury was left to speculate about the significance of the defendant's prior possession of registered firearms. (*Id.* at p. 506.) Although the court did not discuss its holding explicitly in terms of the similarities – or lack thereof – between the two incidents (*id.* at pp. 506-507), its analysis plainly rested on the premise that evidence of uncharged crimes may be admitted only if the charged and uncharged crimes are sufficiently similar (*id.* at pp. 504-505).

court stated that "[w]hether similarity is required to prove knowledge and the degree of similarity required depends on the specific knowledge at issue and whether the prior experience tends to prove the knowledge defendant is said to have had in mind at the time of the crime." (*People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 241.)

Respondent contends that, unlike in *Hendrix*, the knowledge at issue in this case was not akin to absence of mistake but instead pertained to appellant's ability to carry out the crime. (RB 79.) However, the logic underlying the holding in *Hendrix* – that "to establish knowledge when that element is akin to absence of mistake, the uncharged events must be sufficiently similar to the circumstances of the charged offense to support the inference that what defendant learned from the prior experience provided the relevant knowledge in the current offense" (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-243) – applies in this case as well. That is, an inference that appellant gained "knowledge of jail procedures and rules as well as methods to overcome them" requires that the previous experiences be sufficiently similar to the circumstances presented in the charged case.[15] (See *id.* at p. 242.)

As appellant discusses in Section C, *post*, the uncharged acts are not sufficiently similar to the murder of Tinajero to merit admission of evidence relating to those acts under section 1101, subdivision (b).

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[15] While neither appellant nor respondent is aware of any decision by this Court specifically applying a similarity requirement to evidence offered under section 1101, subdivision (b), to show opportunity or knowledge (AOB 155; RB 78), appellant submits that a similarity requirement is indeed appropriate with respect to those issues.

2. Respondent Incorrectly Conflates The Issues of Knowledge And Opportunity

Respondent suggests in a footnote that the People's "'knowledge' theory of admissibility can perhaps more accurately be described as 'opportunity,' a theory which the People likewise asserted and which the trial court adopted." (RB 79, fn. 59.) Conceding that the limiting instruction did not contain the word "opportunity," respondent asserts that the concept was "fairly encompassed by the charge that the jury may consider the evidence to show 'knowledge of jail procedures and rules as well as methods to overcome them.'"[16] (*Ibid.*) Perhaps attempting to bolster its argument that admission of the other-acts evidence did not depend on a showing of similarity between the charged and uncharged acts, respondent conflates knowledge and opportunity, two related but nevertheless separate issues. "Opportunity" is not the equivalent of such knowledge, but a potential inference to be drawn therefrom.

Under these circumstances, it cannot be said that the concept of "opportunity" was fairly encompassed by the jury instruction. However, even assuming that the limiting instruction somehow encompassed the concept of "opportunity," appellant demonstrates in the following sections that the other-acts evidence was not relevant to show either opportunity (cf. *People v. Thomas* (1992) 2 Cal.4th 489, 520 [testimony that defendant claimed to enjoy playing game he called "stalk," the object of which was to sneak up on people and then sneak away without their ever being aware of his presence, demonstrated that he was capable of coming into contact with the victims without their awareness, which was relevant to show

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[16] Tellingly, respondent cites no cases in support of these contentions.

opportunity]) or knowledge (see *People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-243).

C. The Trial Court Erred in Admitting The "Other-Acts" Evidence

1. The Trial Court Abused Its Discretion in Admitting Evidence Relating to Appellant's December 19, 2003, Escape Attempt

In his opening brief, appellant argued that evidence relating to his December 19, 2003, escape attempt was erroneously admitted under Evidence Code section 1101, subdivision (b), to show his "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder." Appellant argued in pertinent part that evidence regarding his escape attempt lacked probative value because the circumstances surrounding that incident were too dissimilar to those surrounding the murder of Tinajero to permit admission of that evidence under section 1101, subdivision (b). (AOB 158-159, citing 4 RT 740-741.)

Respondent contends that evidence of appellant's escape attempt was relevant to demonstrate his knowledge and ability to use a ruse to move through checkpoints from one secure area of the jail to another, which, in turn, supported the conclusion that appellant had the opportunity to gain access to Tinajero's cell and murder him. (RB 75-76.) According to respondent, the knowledge at issue – which it characterizes as appellant's knowledge of "the lapses in security that would enable an inmate to use another inmate's identity or pass to get out of one's own module and floor, the manner in which inmates proceed to the Inmate Reception Center and ultimately back to the housing modules, and the feasibility of going from

the Inmate Reception Center to a different floor" – did not depend upon a high degree of similarity between the escape and the murder. (RB 79.) Respondent further contends that, unlike in *Hendrix*, that knowledge is not akin to absence of mistake, but instead pertained to appellant's ability to carry out the crime. (RB 79.)

Respondent's suggestion that admission of evidence relating to the escape attempt did not depend upon "a high degree of similarity" between that incident and the murder should be rejected. (RB 79.) The admonition that the court "look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 316) is particularly crucial here because respondent lists several "important common features" shared by the escape attempt and the murder of Tinajero (RB 80), implicitly attempting to establish that appellant had a modus operandi common to both incidents.[17] However, evidence of other acts is admissible to show modus operandi only if it "disclose[s] common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1316.)

As appellant noted in his opening brief (AOB 236), the escape attempt was a relatively uncomplicated matter: on the morning of the escape attempt, Luis Montalban, who was housed in the same dorm as appellant, was called for trusty duty; appellant took his wristband and left in his place, i.e., appellant apparently proceeded to the court line at the Inmate

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[17] Modus operandi, of course, refers to "[a] method of operating or a manner of procedure; esp. a pattern of criminal behavior so distinctive that investigators attribute it to the work of the same person." (Black's Law Dict. (8th ed. 2004) p. 1026, col. 1.)

Reception Center (hereafter, "IRC"), and from there he was sent to a sheriff's station for trusty duty; and, after appellant was sent back to the IRC from the station, a deputy determined his actual identity.[18] (15 RT 2698-2708; 16 RT 2774-2784.) With respect to the murder of Tinajero, on the other hand, the prosecution presented evidence that, among other things, appellant enlisted a friend to find out where Tinajero was housed (14 RT 2484-2485); obtained permission from someone higher up in the jail hierarchy to retaliate against Tinajero (17 RT 3043-3044; 18 RT 3161-3162); borrowed a "homie's" court pass and reported to the IRC (17 RT 3044-3045); made his way to an entirely different module, where Tinajero was being housed as a "keep-away," and passed a control booth manned by deputies (13 RT 2337, 2341-2345; 17 RT 2980-2988, 2990-3038); waited in the "laundry room," a large room used as a waiting room for inmates leaving from or returning to the module (14 RT 2388-2390, 2492); met Tinajero's cellmate, Gregory Palacol, in the laundry room and asked him where he was housed and whether someone named Smoky (Tinajero's nickname) from West Side was also housed there; and, accompanied Palacol to the cell he shared with Tinajero. (12 RT 2128-2129; 13 RT 2216, 2280-2281, 2290-2291; 14 RT 2389-2393).

The prosecution's own evidence established that court line is handled differently from other types of inmate movement. (17 RT 2981-2988, 2991.) Therefore, it is unlikely appellant could have used the

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[18] The deputy testified that, after determining appellant's actual identity, he and his partner walked to the Men's Central Jail and contacted Montalban. (16 RT 2782-2783.) Although the record is silent as to whether they escorted appellant to the jail, it is reasonable to infer that they did so.

knowledge he gained during the escape attempt – which he carried out by taking the place of another inmate called for trusty duty – "to observe how feasible it would be to go from the IRC to a floor or module other than his own" (RB 80).

This Court, in decisions relating to the denial of motions for severance pursuant to Penal Code section 954, has described the requisite degree of similarity required to admit other-acts evidence to show modus operandi. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1314; *People v. Jones* (2013) 57 Cal.4th 899, 924; see also *People v. Grant* (2003) 113 Cal.App.4th 579, 589.) Specifically, this Court has explained that "the first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1315-1316.) *People v. Grant*, *supra*, 113 Cal.App.4th at p. 589 is illustrative. There, the evidence on both counts involved computer equipment stolen from a school. As to count 1, the evidence showed that late in the evening on May 1, 2001, a school room door was pried open, a computer was removed from the room, and other computers were unplugged. As to count 2, the evidence showed that, three years earlier, computer equipment was stolen from a school after school hours, and the defendant admittedly possessed the stolen equipment. Entry was apparently obtained through an open window. The court held that the evidence on each count, though "considerably similar," did *not* share common marks sufficient to support a strong inference that defendant committed both crimes, and therefore was not cross-admissible. (*Ibid.*)

Under these circumstances, a fair reading of the record demonstrates

that evidence concerning the escape attempt and the murder of Tinajero did not share common marks sufficient to permit admission of the former under section 1101, subdivision (b). (See *People v. Grant*, *supra*, 113 Cal.App.4th at p. 589.) That is, because the two incidents were not sufficiently similar to support an inference that what appellant learned during the escape attempt provided the knowledge he needed to make his way to Tinajero's cell, the trial court abused its discretion in admitting evidence relating to the escape attempt. (See *People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-243.)

For similar reasons, even if respondent is correct that the People's "knowledge" theory can more accurately be described as "opportunity"[19] (RB 79 and fn. 59), evidence concerning the escape attempt was not probative to show appellant's opportunity to murder Tinajero. Indeed, the opportunity to murder Tinajero would have required, among other things, that appellant find a way to leave the 3800 module, where he was housed (16 RT 2892); proceed with an escort from the third floor to the court line, located on the first floor, and from there to the IRC (17 RT 2986-2987, 2991, 3044-3045); proceed from the court line to the 2200 module on the second floor, where the 2100, 2300, 2400, 2500, 2600, 2700, 2800 and 2900 modules are also located (17 RT 2987); enter the module through a sallyport where a deputy is stationed (17 RT 3030-3031); enter and wait in a laundry room before being sent to a cell (17 RT 2998-2999); and, manage to enter the particular cell where Tinajero was being housed. Although the

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[19] "Opportunity" has been defined as "the means and likely prospect of achieving concrete benefits by the means alleged." (*Hockey v. Medkehar* (N.D. Cal. 1998) 30 F.Supp.2d 1209, 1223, quoting *Shields v. Citytrust Bancorp, Inc.* (2nd Cir. 1994) 25 F.3d 1124, 1130.)

prosecutor presented evidence generally concerning how an inmate might have opportunities to move from one module to another (see AOB 56-60), she presented no evidence that appellant in fact knew how to do so. However, the evidence actually presented – i.e., that appellant left for trusty duty in place of another inmate – did not support an inference that he therefore knew how to get from his own module to a locked cell in a separate "keep-away" module, much less that he had the "means and likely prospect" (*Hockey v. Medkehar*, *supra*, 30 F.Supp.2d at p. 1223) of doing so. Moreover, respondent speculates that appellant would have been in a position to observe how feasible it would be to go from the Inmate Reception Center to a floor or module other than his own (RB 80), but cites nothing in support of its assertion.

Thus, evidence relating to the escape attempt was irrelevant to prove any fact other than appellant's criminal disposition. (See Evid. Code, § 1101, subds. (a), (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.) For this reason, even assuming the escape attempt was theoretically relevant to corroborate Irma Limas's testimony regarding appellant's correspondence and telephone conversations with her (RB 81-82, 89-93), it was not admissible on that ground. (See *People v. Pitts* (1990) 223 Cal.App.3d 606, 835 [prior act evidence "is not admissible solely to corroborate or bolster a witness's credibility. [Citations.]"].)

2. The Trial Court Abused its Discretion in Admitting Evidence Relating to Appellant's Possession of a Shank, a Syringe, a Razor Blade and an Altered Paperclip

In his opening brief, appellant argued that evidence regarding his possession of a shank, a syringe, a razor blade, and an altered paper clip

was inadmissible because those incidents bore no similarities to the circumstances surrounding the murder of Tinajero, and therefore lacked probative value to show "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder" (4 RT 740-741). (AOB 160-161.)

Respondent contends that the trial court did not abuse its discretion in admitting this evidence because appellant's possession of contraband demonstrated that he was well-versed in prison culture and most likely in contact with others who would give him information on how to "work the jail system." (RB 83, citing 5 CT 1132.) Respondent concedes that none of these items were used to commit the murder but argues that the evidence was probative of appellant's knowledge and opportunity insofar as it demonstrated his connections and sophistication regarding both the "official" administration of the jail by the sheriff's deputies and the "unofficial" operations of the inmate hierarchy. (RB 84.) Respondent's position is incorrect.

First, to the extent that *any* degree of similarity is required to permit the authorization of other-acts evidence to prove knowledge or opportunity, the trial court abused its discretion in admitting evidence of appellant's possession of the contraband. The prior acts were wholly unlike the circumstances surrounding the murder of Tinajero. (AOB 160.)

Second, as appellant has pointed out (AOB 160), there is nothing to suggest that, because he possessed these items, he gained any knowledge as to how to gain access to Tinajero and commit the charged offense. (See *People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-243.) Respondent speculates that appellant's ability to obtain contraband demonstrated his

connections within the jail and sophistication regarding jail operations. However, even assuming appellant committed these infractions, little if any sophistication or connection to other inmates was needed to do so. For instance, he likely could have fashioned the shank and altered paper clip from items found within or near his cell; the shank was merely a piece of metal bar sharpened to a point at one end and the paper clip simply had been broken in half. (15 RT 2643; 16 RT 2791, 2793.)

The lack of probative value is even clearer with respect to the items found in appellant's possession *after* the murder of Tinajero, that is, the razor, syringe and altered paper clip. As noted in Section B.1, *ante*, admission of other-acts evidence to show knowledge presupposes that what the defendant learned from his experiences provided the knowledge relevant to the charged offenses. (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-243.) However, this logic does not hold with respect to the admissibility of other-acts evidence to show common design or plan or intent, which rests on the similarities between incidents regardless of the sequence in which they occurred. Therefore, respondent's reliance on *People v. Balcolm* (1994) 7 Cal.4th 414, *People v. Taylor* (1986) 180 Cal.App.3d 622, and *People v. Williams* (1970) 10 Cal.App.3d 638 – cited in support of its position that the trial court properly admitted evidence relating to incidents which occurred after the charged offense – is misplaced. (RB 84-85, fn. 62.) In *People v. Balcolm*, *supra*, 7 Cal.4th at p. 425 and *People v. Taylor*, *supra*, 180 Cal.App.3d at p. 636, other-acts evidence was held to be relevant to common design or plan. In *People v. Williams*, *supra*, 10 Cal.App.3d at p. 643, other-acts evidence was properly admitted to show intent. Indeed, it may be reasonable to infer that because a defendant employed a certain scheme or plan on one occasion, evidence

that he employed a similar scheme or plan on another occasion is relevant. (See *People v. Balcolm*, *supra*, 7 Cal.4th at p. 424; *People v. Taylor*, *supra*, 180 Cal.App.3d at pp. 636-637.)[20] Similarly, it may be reasonable to find that because a defendant harbored a particular intent on one occasion, he harbored a similar intent on another.[21] (See *People v. Williams*, *supra*, 10 Cal.App.3d at p. 643.) For this reason, the trial court erred in finding that the post-offense acts were relevant, if less persuasive. (4 RT 741.)

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[20] In *People v. Balcolm*, *supra*, 7 Cal.4th at p. 424, this Court noted that the defendant's uncharged offenses shared features in common with the charged offenses sufficient to support the inference that the uncharged acts and the charged offenses were manifestations of a common design: in both instances he wore dark clothing and a cap, went to an apartment complex in the early morning, sought out a lone woman unknown to him, and gained control over her at gunpoint; in both instances, he initially professed only an intention to rob the victim, waiting until he had moved the victim to the location where the rape would occur before expressly announcing his intention to rape her, forcibly removing her clothing, and committing a single act of intercourse; in both instances, he stole the victim's ATM card, obtained her PIN, and escaped in her automobile. (*Ibid.*) In *People v. Taylor*, *supra*, 180 Cal.App.3d at pp. 636-637, where the defendant, an orderly at a school for handicapped students, was prosecuted for the rape of a mentally incompetent person, this Court held that evidence of an uncharged act against the victim's roommate was admissible as evidence of a common scheme or plan, even though it had been wrongly admitted on the issue of intent. (*Id.* at pp. 635-636.) In *People v. Williams*, *supra*, 10 Cal.App.3d at p. 642, the trial court admitted evidence that the defendant brandished a kitchen knife later the night of the charged murder. Unlike the instant case, where the prosecutor argued that the other-acts evidence was probative to show knowledge, in the cases cited above the probative value of the other-acts evidence did not require that the uncharged act pre-date the charged act.

[21] The Court of Appeal acknowledged that the trial court may have erred in admitting the evidence to show intent, given that the chief issue to be resolved was identity, but concluded that any error was harmless. (*People v. Williams*, *supra*, 10 Cal.App.3d at p. 643.)

Evidence that appellant possessed contraband items inside his cell (15 RT 2641, 2643-2645, 2647-2648, 2656-2657; 16 RT 2789-2790, 2797, 2802-2804, 2807-2808, 2826-2828) did not support an inference that he therefore knew how to get from his own module to a locked cell in a separate "keep-away" module, much less that he had the "means and likely prospect" (*Hockey v. Medkehar*, *supra*, 30 F.Supp.2d at p. 1223) of doing so. Thus, the evidence was not probative to show opportunity. (*People v. Thomas*, *supra*, 2 Cal.4th at p. 520.)

Contrary to respondent's position, it cannot be said that the evidence was relevant to show (1) appellant's supposed knowledge that he could rely on the silence and non-interference of other inmates and the inattentiveness of deputies; and, (2) appellant's communication and connections within the jail. (RB 84.) The prosecution presented no evidence that appellant procured the contraband items by relying on the silence and/or cooperation of other inmates, or the inattentiveness of jail deputies. Again, even assuming appellant fashioned the shank and altered paper clip, it would have required little if any sophistication or connection to the inmate hierarchy to do so.

Thus, evidence relating to the contraband was irrelevant to prove any fact other than appellant's criminal disposition. (See Evid. Code, § 1101, subds. (a), (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.)

3. The Trial Court Abused Its Discretion in Admitting Evidence That Appellant Removed His Wristband on Three Occasions

In his opening brief, appellant argued that the trial court abused its discretion in admitting evidence that on three occasions – in early October 2004, and on October 13, 2004, and November 5, 2004 – he was found

without his identification wristband. (AOB 161-163.)

Respondent contends that the evidence was relevant both to appellant's general knowledge and ability to evade jail security rules and to the circumstances of Tinajero's murder, during which Tinajero's wristband was removed. (RB 85-87.) In particular, respondent asserts that: (1) in shedding his identity during the October 13, 2004, incident, "appellant might have been hoping to blend in with the court-bound inmates, a situation similar to his merging with both a court line and an inmate transfer line on the day of the Tinajero murder" (RB 86); (2) evidence of appellant's repeated removals of his wristband demonstrated not only that he was adept at removing the bands, but also that he was concerned about the information they carried (RB 86-87); and, (3) the wristband removal incidents also tended to corroborate the evidence of appellant's 2013 escape attempt (RB 87). Respondent's position is incorrect.

Again, to the extent that *any* degree of similarity is required to permit the authorization of other-acts evidence to prove knowledge or opportunity, the trial court abused its discretion in admitting evidence of appellant's removal of his wristbands. Those acts were wholly unlike the circumstances surrounding the murder of Tinajero. As appellant has pointed out, he did not remove his own wristband in carrying out the murder of Tinajero. (AOB 161-162.) Moreover, although he did remove Tinajero's wristband (14 RT 2403, 2450-2451), it is unlikely he did so out of concern about the information it contained; jail personnel surely could have identified him quickly and easily.

In addition, for the reasons appellant discussed in the preceding section, evidence regarding his removal of his wristband lacked probative value. That is, because the removal incidents occurred *after* the murder of

Tinajero, they could not have provided the "knowledge of jail procedures and rules as well as methods to overcome them" relevant to establish that he committed that murder. (See *People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-243.)

For similar reasons, even if respondent is correct that the People's "knowledge" theory can more accurately be described as "opportunity" (RB 79 and fn. 59), evidence concerning appellant's removal of his wristband was not probative to show the opportunity to murder Tinajero. Contrary to respondent's position (RB 86), the October 13, 2004, incident had no probative value insofar as appellant was found among court-bound inmates. That is, respondent's suggestion that appellant might have been hoping to blend in with the court-bound inmates (RB 86) is undermined by testimony that: an inmate who had tried to escape ordinarily would be placed on "E status;" the module deputy might check an inmate leaving for court line against his list; the deputy would call an inmate's name, and, if given the correct information, would hand out a pass. (17 RT 3028-3029.) Given these security measures, it is unlikely appellant would have tried to escape the module by simply trying to leave without a wristband.

Even assuming appellant was trying to leave the module via the court line, his knowledge as to how he could do so would have had to be gained from his activities prior to, not after, the murder. In addition, on the day of the murder, appellant left the module by using a fellow inmate's court pass (17 RT 3044-3045), not by removing his wristband. Finally, although respondent observes that appellant examined Tinajero's cellmates' wristbands (RB 86-87), the fact he did so had nothing to do with his knowledge or opportunity to move around the jail.

In short, the wristband incidents had no probative value with respect

to the murder of Tinajero. Evidence that appellant had removed his wristband on occasions subsequent to the murder did not support an inference that he therefore knew how to get from his own module to a locked cell in a separate "keep-away" module, much less that he had the "means and likely prospect" (*Hockey v. Medkehar*, *supra*, 30 F.Supp.2d at p. 1223) of doing so.

Thus, evidence relating to appellant's removal of his wristband was irrelevant to prove any fact other than appellant's criminal disposition. (See Evid. Code, § 1101, subds. (a), (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.) For this reason, even assuming the evidence of appellant's removal of his wristband was theoretically relevant to corroborate the evidence of appellant's 2013 escape attempt (RB 87), it was not admissible on that ground. (See *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 835 [prior act evidence "is not admissible solely to corroborate or bolster a witness's credibility. [Citations.]"].)

4. The Trial Court Abused Its Discretion in Admitting Evidence That Appellant Escaped From A Locked Shower Stall

In his opening brief, appellant argued that the trial court abused its discretion in admitting evidence regarding appellant's July 30, 2005, escape from a locked shower because it bore no similarity to the circumstances surrounding the murder of Tinajero. (AOB 163-164.)

Respondent contends that the incident was probative of appellant's knowledge and ability to escape from secure areas and avoid immediate detection. (RB 88-89.) Respondent concedes that the circumstances were different from those surrounding his escape from his own floor and module, and later from Tinajero's, on the date of the murder. Nevertheless, respondent claims, any differences between the incidents related to the

weight and probative value of the evidence and did not require its exclusion. (RB 88.) Respondent's position is incorrect.

Again, to the extent that *any* degree of similarity is required to permit the authorization of other-acts evidence to prove knowledge or opportunity, the trial court abused its discretion in admitting evidence of appellant's escape from the shower, an incident which respondent itself acknowledges involves circumstances different from those surrounding the murder. As appellant has noted (AOB 163), he escaped from the shower by simply lathering himself up and squeezing through a portal in the shower door (15 RT 2671-2676; 16 RT 2805-2809); and, he did not leave the module but simply returned to his cell (15 RT 2668-2670).

In addition, for the reasons appellant discussed in the preceding section, evidence regarding appellant's escape from the shower lacked probative value to show knowledge. That is, because it occurred *after* the murder of Tinajero, it could not have provided the relevant knowledge. (See *People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-243.)

For similar reasons, even if respondent is correct that the People's "knowledge" theory can more accurately be described as "opportunity" (RB 79 and fn. 59), evidence concerning appellant's escape from the shower was not probative to show his opportunity to murder Tinajero. Respondent asserts that the incident was probative of "appellant's exceptional knowledge and ability to escape from secure areas and avoid immediate detection" (RB 88), yet fails to explain how it was probative on that point.

Respondent also speculates in a footnote that appellant may have escaped from the shower because he was concerned that his cell was being searched again. (RB 88, fn. 63.) Yet the prosecution's own evidence established that when deputies saw appellant running from the shower, they

immediately responded to and searched his cell, finding no contraband. (15 RT 2668-2671.) Even assuming respondent's speculation is correct, the fact remains that escaping from a shower is a far cry from escaping from one's module, entering a locked cell in a keep-away module on another floor, and returning to one's own module.

Under these circumstances, evidence that appellant had escaped from the shower did not support an inference that he therefore knew how to get from his own module to a locked cell in a separate "keep-away" module, much less that he had the "means and likely prospect" (*Hockey v. Medkehar*, *supra*, 30 F.Supp.2d at p. 1223) of doing so.

Thus, evidence relating to appellant's escape from the shower was irrelevant to prove any fact other than his criminal disposition. (See Evid. Code, § 1101, subds. (a), (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.)

5. The Trial Court Abused Its Discretion in Admitting Appellant's Letters and Telephone Calls to Irma Limas[22]

In his opening brief, appellant argued that the trial court abused its discretion in admitting evidence regarding appellant's letters and telephone calls to Irma Limas. (AOB 165-166.) Appellant has adequately raised that issue in his opening brief but here addresses respondent's contention that he has forfeited his challenge. (RB 90-91.)

Even if the prosecutor did not expressly seek to introduce evidence regarding appellant's communications with Limas pursuant to Evidence

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[22] In his opening brief, appellant mistakenly stated that, at some point, Limas gave appellant her name, "which was then Irma Gardea." (AOB 62.) In fact, "Gardea" was a false name. (14 RT 2469, 2474.)

Code section 1101, subdivision (b), that evidence did in fact constitute inadmissible other-acts evidence within the meaning of that section. (AOB 165-166.) That is, evidence relating to appellant's communications with Limas was irrelevant to prove any fact other than his criminal disposition. (See Evid. Code, § 1101, subds. (a), (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.)

Moreover, defense counsel made clear that he was objecting to the admission of other-acts evidence generally. (4 RT 738-739.) That is, when he specifically challenged some of the other-acts evidence he stated, "So this whole thing is really just an attempt to show that Mr. Pineda is a person of bad character" (4 RT 739). This statement was clearly intended to apply to all other-acts evidence, and therefore sufficed to preserve this issue for appeal.

In addition, this Court should review the claim even if it concludes that defense counsel's objections and motions to strike were insufficient. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 613-614 [this Court reviewed defendant's claim that trial court erred by denying his motion to strike an accomplice's testimony, even though trial court had initially denied motion to strike without prejudice and defendant failed to renew it]; *People v. Malone* (1988) 47 Cal.3d 1, 38 [although defendant failed to object or request an admonition, this Court assumed defendant did not waive asserted prosecutorial misconduct and reviewed merits of claim].)

Finally, appellant notes that this evidence constituted improper gang-related evidence and should have been excluded on that ground. (See Argument III, incorporated by reference as if fully set forth herein; see, e.g., AOB 187-188 [noting that gang evidence is character evidence, and that its admissibility is subject to the same restrictive rules that govern the

admission of character evidence generally].)

D. The Trial Court's Failure To Exclude the Other-Acts Evidence Pursuant to Evidence Code Section 352 Was An Abuse of Discretion

Under Evidence Code section 352, the trial court has a duty to examine whether the probative value of the evidence of the defendant's uncharged offenses is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) "[E]vidence should be excluded as unduly prejudicial when it is of such a nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose. [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

Thus, this Court has recognized that evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, citing *People v. Smallwood* (1986) 42 Cal.3d 415, 428,[23] and *People v. Thompson* (1988) 45 Cal.3d 86, 109.) The primary focus of this careful analysis, of course, is to ensure that the evidence is not offered to prove character or propensity and that its practical value outweighs the danger that the jury will nevertheless view it as evidence of criminal propensity.

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[23] *People v. Smallwood, supra*, 42 Cal.3d 415 has been overruled on another ground in *People v. Bean* (1988) 46 Cal.3d 919, 939, fn. 8.

With respect to each item of evidence admitted under Evidence Code section 1101, subdivision (b), respondent contends that its probative value was not substantially outweighed by the dangers of undue prejudice within the meaning of Evidence Code section 352. (RB 81-82, 85, 87-89, 92-93.) Examining the other-acts evidence in light of the factors set forth in *People v. Ewoldt*, *supra*, 7 Cal.4th at pages 404-405,[24] it is evident that respondent's position is incorrect.

First, as appellant has discussed in his opening brief (AOB 150-169) and in the preceding sections, the evidence had little if any probative value. Because the incidents – an escape attempt effected by relatively distinct means, and which did not involve entry into a separate module; possession of contraband (i.e., a shank, a syringe, a razor blade and an altered paperclip); his removal of his wristband on three occasions; his escape from a locked shower; and, evidence relating to his letters and telephone calls to Irma Limas – were so dissimilar to the circumstances surrounding the murder of Tinajero, the jury could not have properly understood them to be relevant to show knowledge, let alone opportunity.

Second, as to most of the incidents, the sources of the evidence were not entirely independent of the evidence of the charged offense. All but two (i.e., appellant's March 13, 2003, possession of a shank and December

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[24] Those factors are: (1) whether the evidence is material, i.e., the tendency of the evidence to demonstrate the issue for which it is being offered; (2) the extent to which the source of the evidence is independent of the evidence of the charged offense; (3) whether the defendant was punished for the uncharged misconduct; (4) whether the uncharged misconduct is more inflammatory than the charged offense; and (5) whether the uncharged misconduct is remote in time. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.)

19, 2003, escape attempt) of the incidents occurred after the murder of Tinajero. It is reasonable to infer that the prosecution witnesses to those incidents, all but one of whom were deputy sheriffs, were or at least may have been aware that appellant had been charged with the murder of another inmate. (See 15 RT 2594-2595 [Deputy James Milliner testified that, during October 13, 2004, wristband incident, he knew appellant and had no trouble difficulty recognizing him], 2655 [Deputy David Florence, who testified about appellant's possession of the paper clip and escape from locked shower, recalled that appellant was transferred to the 1750 module after the murder]; 16 RT 2787-2791 [Deputy Asael Saucedo knew who appellant was even before appellant was placed in the 1750 module, where the November 5, 2004, wristband and June 17, 2005, possession of altered paper clip occurred].) Thus, there existed the risk that the account of one or more witness's account may have been influenced by knowledge of Tinajero's murder. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

Third, the incidents did not result in criminal convictions; indeed, there was little evidence that appellant was disciplined for the infractions. (15 RT 2681 [possession of paper clip is treated as a disciplinary issue], 2808 [testimony that a discipline report would be written if an inmate does not return a razor].) As a result, there was a heightened risk that the jury might have been inclined to punish appellant for the uncharged offenses, regardless of whether it considered him guilty of the charged offenses, and increased the likelihood of "confusing the issues" (Evid. Code, § 352), because the jury had to determine whether the uncharged offenses had occurred. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

Fourth, this Court should reject respondent's repeated suggestions that the other-acts evidence was not inflammatory when compared to

gruesome details of the charged murders. (RB 81-82, 85, 87-89, 92-93.) This Court has long recognized that prior acts of violence and other crimes have an inherently inflammatory and prejudicial effect. (See, e.g., *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; *People v. Thompson*, *supra*, 27 Cal.3d at p. 314.) Although the potential for prejudice may be decreased where an uncharged crime is less inflammatory than the charge crime (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405), it is not eliminated. Even if, standing alone, the uncharged acts were less inflammatory than the charged crimes, their introduction into evidence was likely to cloud the jury's assessment of the evidence. That is, it was highly likely that the other-acts evidence would be regarded by the jury, consciously or otherwise, as evidence that appellant would escape in the future and/or that he had committed or would commit other offenses not before them, and that it would find him guilty on that basis. In addition, appellant submits that in capital cases uncharged acts are almost invariably less inflammatory than charged offenses; thus, this factor may render Evidence Code section 352 toothless, at least in capital cases.

Contrary to respondent's suggestion (RB 94), the trial court's admonitions[25] and jury instructions would not have properly guided the

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[25] The trial court admonished the jury that, "let me indicate that with this witness and with other witnesses talking about things that occur in the jail, they're offered only to show the defendant's knowledge of the operations of the jails and the limitations placed on inmates, not to show that he's a person of bad character." (15 RT 2640.) After the prosecutor noted that the admonition applied to the testimony of witnesses Aaron Dominguez and James Milliner, and defense counsel added that it would apply to the testimony of "subsequent officers" as well (15 RT 2640), the court reiterated, "It's all limited to showing Mr. Pineda's knowledge of the operation of the jail and the limitations placed on inmates" (15 RT 2641).

(continued...)

jury's consideration of the other-acts evidence. In his opening brief, appellant pointed out that CALJIC No. 2.50 told the jury that it could consider other acts evidence to determine if it tended to show knowledge of jail procedures and rules as well as methods to overcome them, but did not explain *how* the jury was to determine whether the evidence did in fact show such knowledge. (AOB 173, citing 5 CT 1263.) According to respondent, the more relevant consideration, for purposes of harmless error analysis, is that the instructions were amply clear about how the jury *should not* use that evidence, i.e., to prove that appellant is "a person of bad character or that he has a disposition to commit crimes." (RB 94.) Respondent further relies on the presumption that jurors follow the court's instructions and admonitions. (*Ibid.*)

However, because the trial court admitted so much evidence of appellant's uncharged misconduct and bad character, it was highly unlikely that the jury would be able to follow the limiting instructions that were given. The high court has recognized how difficult – sometimes impossible – it is for jurors to follow a limiting instruction. "The government should not have the windfall of having the jury be influenced by evidence against the defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." (*Jackson v. Denno* (1964) 378 U.S. 368, 388, fn. 15.) At least one justice called "naive" the "assumption that prejudicial effects can be overcome by instructions to the jury, [which] all

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[25](...continued)
Later, the trial court stated, "Obviously we're going through a number of incidents that don't relate specifically to the homicides charged in counts 1 and count 2. This goes to the knowledge of Mr. Pineda of the jail rules and any incidents involving the ability to circumvent those rules." (16 RT 2795.)

practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453, conc. opn. of Jackson, J., citations omitted.)

This Court long ago acknowledged that a limiting instruction with respect to a uncharged crime calls for "discrimination so subtle [as to be] a feat beyond the compass of ordinary minds." (*People v. Antick* (1975) 15 Cal.3d 79, 98, superceded on other grounds by constitutional amendment.) This Court has recognized that the risk the jury will misuse evidence that reveals a defendant's other crimes may be so great that no limiting instruction can sufficiently protect against it and the evidence must be excluded. (See *People v. Coleman* (1985) 38 Cal.3d 69, 85-86, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13, and *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32 [although limiting instruction was given, trial court abused 352 discretion by admitting letters written by murder victim revealing prior violence by appellant].) One appellate court bluntly criticized the "sophistry and lack of realism" in thinking that a limiting instruction "can have any realistic effect . . ." on the jury's use of other crimes evidence, noting that "jurors are mere mortals. . . . We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence and not applying it in an improper manner." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.) More recently, another appellate court described the problem in vivid terms: "A limiting instruction warning jurors they should not think about the elephant in the room is not the same thing as having no elephant in the room." (*People v. Fritz* (2007) 153 Cal.App.4th 949, 962.)

Thus, one of the factors which the court must weigh in applying Evidence Code section 352 is "whether the circumstances of the statement

are such that the jury will be unable to follow the limiting instruction." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 392.) "If the court concludes that the jury will be unable to use the evidence solely within its limitations, the court should exercise its discretion and exclude the evidence." (*Ibid.*) As this Court once said regarding statements by a murder victim revealing prior uncharged misconduct by the defendant,

> In a not very subtle way it told the jury what kind of man it was that was before them on trial. It will not do to say, as does the attorney general, that the jury was told that these declarations were not to be considered for their truthfulness but merely as verbal acts casting light upon [the victim's] state of mind. It is difficult to believe that even the trained mind of a psychoanalyst could thus departmentalize itself sufficiently to obey the mandate of the limiting instruction. Certainly a lay mind could not do so.

(*People v. Hamilton* (1961) 55 Cal.2d 881, 898, overruled on other grounds in *People v. Wilson* (1969) 1 Cal.3d 431, 440.) Although in other respects the *Hamilton* opinion has been abrogated, the concerns articulated in this passage are still valid and appropriate considerations in assessing the admissibility of evidence that the defendant committed or threatened other criminal conduct. (*People v. Ortiz*, *supra*, 38 Cal.App.4th at p. 392.) Even with the limiting instructions, it is likely that the jury improperly considered that bad character evidence as an indication that appellant was "a dangerous person more likely than others to have committed the present offense." (See *People v. Thompson*, *supra*, 45 Cal.3d at p. 109.)

Under these circumstances, the trial court's failure to exclude the other-acts evidence under Evidence Code section 352 was an abuse of discretion.

E. The Erroneous Admission of the Evidence Was Highly Prejudicial and Deprived Appellant of His Fourteenth Amendment Rights to Due Process and a Fair Trial, and His Eighth Amendment Right to a Reliable Determination of Penalty

Respondent contends that any error did not deprive appellant of his federal constitutional rights and was harmless. In particular, respondent asserts that: (1) the jury was repeatedly admonished regarding the limited purpose for which evidence of appellant's uncharged misconduct was offered; (2) the prosecutor did not highlight the other-acts evidence in her guilt phase arguments to the jury; (3) the other-acts evidence was not particularly inflammatory, especially in comparison to the facts of the two murders; and, (4) evidence of appellant's guilt of both murders was compelling. (RB 93-99.) Respondent's position is incorrect.

By admitting an array of other-acts evidence with little if any probative value, the trial court injected the risk underlying the historical prohibition against propensity evidence (see Section B, *ante*): that appellant was convicted for who he is, not because the jury found him guilty beyond a reasonable doubt of the charged offenses. Similarly, the jurors may have refused altogether to consider the defense theories that (1) appellant did not intentionally run over Juan Armenta and was guilty only of involuntary manslaughter (21 RT 3495-3528), and (2) that Tinajero was murdered by his cellmates, not by appellant. (21 RT 3530-3553.)

Thus, for the reasons stated in the opening brief (AOB 169-176) and in the argument above, the trial court's error in admitting the other-acts evidence not only violated California's evidentiary law, it also violated appellant's federal due process right to a fundamentally fair trial (*Pulley v. Harris* (1984) 465 U.S. 37; *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1384-

1386) and a fair and impartial jury (*Turner v. State of Louisiana* (1965) 379 U.S. 466, 471-472), and the trial court's error in admitting the evidence over appellant's objections had the legal consequence of violating his right to due process (*People v. Partida* (2005) 37 Cal.4th 428, 433-439). The evidence also violated his right to a fair and impartial jury and a reliable penalty verdict. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

Because this error is of federal constitutional dimension, it is subject to the *Chapman* standard of review. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1385 [erroneous admission of bad character evidence amounts to federal constitutional error].) This requires the state to prove, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In other words, the state must prove there is no "reasonable possibility" that this error "might have contributed to [appellant's] conviction." (*Ibid.*) The prosecution cannot meet this burden in this instance.

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III

THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING EVIDENCE OF APPELLANT'S GANG MEMBERSHIP

In his opening brief, appellant argued that the trial court erred in admitting evidence of appellant's gang membership, as well as expert testimony regarding gang culture and activity in the Los Angeles County Jail, requiring reversal of the entire judgment. (AOB 177-201.) Because appellant has adequately raised the merits of his claim, he does not address respondent's contention that his challenges to the admission of gang-related evidence lack merit, and that, even if any error occurred, it was harmless. (RB 99-130.) Instead, appellant here addresses respondent's contention that he has forfeited his claims of error because he failed to object at trial. (RB 101-105, 123, fn. 72, 125-128.)

A. Contrary to Respondent's Position, Appellant's Arguments Are Cognizable On Appeal

1. Appellant Has Not Forfeited His Objection to Gang References In His Statements and Letters to Irma Limas

According to respondent, appellant cannot complain on appeal about the references to his gang membership in Irma Lima's testimony or in the letters he wrote to her because he neither objected to, nor moved to preclude, that evidence in the trial court. (RB 101-105.) Respondent's position is incorrect.

Respondent disputes appellant's claim that, during a pre-trial conference about drafting the juror questionnaire, he objected to the admission of gang-related evidence. (RB 102; see also AOB 177-178.) Instead, respondent suggests, defense counsel merely indicated his tactical preference not to ask the prospective jurors about their attitudes towards

gang evidence. (RB 102.) However, a fair reading of the record shows that appellant objected not only to any references to gangs in the jury questionnaire, but also to the admission of gang-related evidence.

In particular, defense counsel stated

> Your Honor, I would strongly disagree with the People with respect to this being a gang case. . . . And I don't believe any references to gangs should be made.
>
> *Gangs is very prejudicial, and the identification I believe by the witness, the operative witness is established by her familiarity with the person that was speaking to her, and gangs doesn't – gangs is only prejudicial.*

(3 RT 488, italics added.) Defense counsel then agreed that he believed it was unnecessary to "prescreen" jurors regarding adverse contacts with gang members, but added that he believed the prosecution should make an offer of proof "as to why Wilmas and Chingon is important . . . or relevant to this case in terms of identification."[26] (3 RT 489.) After the prosecutor made an offer of proof as to why that testimony was relevant to the issue of identity (3 RT 489-490), defense counsel reiterated his request that references to appellant's gang affiliation be omitted from the questionnaire. (3 RT 490.) However, he also commented that "before the People call the witness, perhaps we can have [an Evidence Code section] 402 hearing . . . with respect to that issue." (3 RT 490.)

Defense counsel's comments demonstrated not only his concern that references to gangs would bias prospective jurors, but his position that

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[26] According to both Limas and the prosecution's gang expert, East Side Wilmas is a street gang. (14 RT 2480-2481; 18 RT 3141.) Limas also testified that "Chingon" means "[t]ough guy, bad ass" (14 RT 2469), a definition consistent with those provided by the gang expert and appellant himself (18 RT 3174; 19 RT 3292).

gang-related evidence was irrelevant, that is, had no tendency in reason to establish identity, and prejudicial. It is true, as respondent points out, that defense counsel commented that he would oppose the People's Evidence Code section 1101, subdivision (b), motion, and that "we can argue that at a later time." (RB 103-104, fn. 70, citing 3 RT 486.) However, contrary to respondent's suggestion (RB 104, fn. 70), defense counsel's comment does not indicate his understanding that the sole issue under discussion was the juror questionnaire. The prosecutor's motion, as she described it, related to specific other-acts evidence, not gang evidence. (3 RT 485-486 [specifically referring to appellant's escape attempt and "wristband switching"].) Thus, it is reasonable to infer that defense counsel meant only that he would address the admissibility of *other-acts evidence* at a later date.

Although respondent correctly points out that defense counsel did not follow up his request for an Evidence Code section 402 hearing with respect to Limas's testimony (RB 104), most of her testimony did not explicitly touch on appellant's gang affiliation.[27] (See 14 RT 2464-2488.) At any rate, defense counsel reasonably may have concluded that he could effectively challenge the admission of her gang-related testimony in precisely the manner he did, by objecting when the prosecutor sought to elicit it. Indeed, defense counsel objected to both of the questions asked by the prosecutor to elicit gang-related testimony from Limas. Specifically, after the prosecutor read a portion of one of the letters – to wit, "From the

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[27] Even if defense counsel did not follow up with his request for a 402 hearing with respect to Limas's testimony, the fact that he did request such a hearing with respect to the testimony of the prosecution's gang expert, Javier Clift, amply demonstrates his intention to challenge the admission of evidence relating to appellant's gang affiliation. (17 RT 2974, 3071-3087; 18 RT 3089-3107.)

big bad ass ES Wilmas" (14 RT 2480; People's Exhibit 96D) – defense counsel objected that the letter "[spoke] for itself" (14 RT 2480).[28] Later, when the prosecutor asked Limas to explain who the East Side Wilmas were, defense counsel objected on foundational grounds. (14 RT 2481.)

Respondent notes that defense counsel did not object on due process, relevance or Evidence Code section 352 grounds (RB 101), but this Court has made clear that the purpose of requiring an objection is to alert the trial court to the issues before it and enable it to make an informed ruling. (*People v. Partida* (2005) 27 Cal.4th 428, 435.) Here, the trial court had already been made aware that the defense took the position that gang evidence is prejudicial. (See 3 RT 488-489.)

Moreover, in both instances, any further objections likely would have been futile. First, the prosecutor had already quoted from the letter, to wit, "From the big bad ass ES Wilmas." Therefore, the jury heard the gang reference even before defense counsel could object. (14 RT 2480.) Second, Limas interjected that East Side Wilmas is a gang before the trial could rule on defense counsel's foundational objection. (14 RT 2481.) Because further objections could not "unring the bells" (see *People v. Hill* (1998) 17 Cal.4th 800, 845 [quoting the axiom, "It has been truly said: 'You can't unring a bell'"]), this Court should excuse appellant's failure to object on due process, relevance or Evidence Code section 352 grounds (*id.* at p. 820 [a defendant will be excused from the necessity of either a timely objection and/or request for admonition if either would be futile]).

Finally, this Court should review the claim even if it concludes that

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[28] People's Exhibit 96D had been marked for identification but not yet received into evidence at that point. (14 RT 2479; 18 RT 3184.)

defense counsel's objections and motions to strike were insufficient. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 613-614 [this Court reviewed defendant's claim that trial court erred by denying his motion to strike an accomplice's testimony, even though trial court had initially denied motion to strike without prejudice and defendant failed to renew it]; *People v. Malone* (1988) 47 Cal.3d 1, 38 [although defendant failed to object or request an admonition, this Court assumed defendant did not waive asserted prosecutorial misconduct and reviewed merits of claim].)

Respondent further contends that, even assuming appellant's arguments were preserved for appeal, the references to Chingon of the East Side Wilmas gang in his own statements and letters to Limas were relevant to his identity and therefore admissible. (RB 105-107.) Appellant has adequately argued in his opening brief that the trial court prejudicially erred in admitting this evidence (AOB 177-179, 190-201), but here addresses respondent's mistaken contention that the evidence was necessary for the prosecution to establish his identity as the person who made those statements (RB 105-107.)

First, the prosecutor could have elicited testimony from Limas relevant to identity without including prejudicial references to gangs. Respondent acknowledges that telephone records from Tinajero's cell showed that two collect calls were made from that cell to Limas's office telephone number in the late afternoon on the date of the murder. (RB 106, citing 14 RT 2467-2468; 15 RT 2631-2632; 16 RT 2885-2886, 2892.)[29] Second, Limas testified that: she received telephone calls from someone

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[29] Most of the pages cited by respondent relate to phone calls made from appellant's cell, not Tinajero's cell. (14 RT 2467-2468; 15 RT 2631-2632; 16 RT 2885-2886, 2892; see also Peo. Exhs. 85 & 89.)

who identified himself as "Santi" (14 RT 2465-2466); Santi indicated that he grew up in "Wilmas, the San Pedro area" (14 RT 2468); Santi told her that he was in custody regarding "a 187" and that "I believe they ran over somebody or something like that" (14 RT 2471); and, Santi asked her to find someone named Raul, who was testifying against him (14 RT 2470-2471, 2485). Third, the return addresses and/or signature in several of the letters received by Limas contained identifying information connected to appellant. (9 RT 1528; 14 RT 2477, 2479-2480, 2482-2483; Peo. Exh. 96A [return address contained appellant's surname and booking number]; Peo. Exh. 96D [return address contained appellant's surname and booking number, and enclosed letter was signed, "Santiago Pineda Hernandez Chingon"]; Peo. Exh. 97A [return address reads in part, "Santi"]; Peo. Exh. 97B [return address contained appellant's surname and booking number].) Fourth, at a minimum, any prejudicial references to gangs in appellant's letters could have been redacted before they were admitted into evidence.

2. Appellant Has Not Forfeited His Objection to Evidence Regarding Hispanic Gangs and His Gang Affiliation

In his opening brief, appellant argued that evidence regarding Hispanic gangs and his gang affiliation was irrelevant and inadmissible for any legitimate purpose. (AOB 179-184, 190-196.) Respondent contends that the trial court did not abuse its discretion in permitting the prosecution to present expert testimony explaining the implausibility of the defense theory that Tinajero's cellmates murdered him on orders from the Surenos for being a "snitch." (RB 107-120.) Appellant has already sufficiently demonstrated the merits of his claim in his opening brief, but here addresses respondent's contention that he has forfeited the claim. (See RB 108-109, fn. 71, and 123, fn. 72.)

Respondent contends that the defense, not the prosecution, first injected the issue of the Surenos gang, affiliated street gangs, and their role in jailhouse culture. (RB 107.) Specifically, respondent notes that, in his opening statement to the jury, defense counsel raised the theory that Tinajero's cellmates were the actual killers. (RB 107-108, citing 9 RT 1509-1510.) However, as appellant set forth in the preceding section, the prosecution had already made clear during pretrial proceedings that it intended to introduce evidence of his gang involvement and he had objected to the admission of such evidence. (4 RT 487-489.)

Respondent observes that defense counsel: did not object to any of the direct or redirect examination testimony by Anthony Sloan, Matthew Good or Gregory Palacol (three of Tinajero's cellmates) relating to the theory that Tinajero's cellmates killed him in connection with a gang hit (RT 108-109, fn. 71, citing 13 RT 2231-2232, 2307-2309; 14 RT 2506; AOB 193); explored their connections to the Southsiders gang and the notion that "hit" orders typically issued from the gang unit, where they had previously served as trusties (RB 108-113, citing 13 RT 2203-2207, 2222-2223, 2232-2233, 2318-2320, 2327-2329, 2331; 14 RT 2453-2454, 2495-2496, 2507-2509); injected the issue of the Surenos gang into the testimony regarding appellant's 2003 escape attempt and introduced gang-related terminology during his cross-examination and recross examination of Luis Montalban (RB 113-114, 123, citing 15 RT 2700, 2706, 2708); and, did not object during Deputy Josue Torres' testimony regarding operations in the jail among the inmates (RB 115, citing 17 RT 3043-3044, 3051).

Similarly, respondent points out that defense counsel objected only on foundational grounds to Deputy Dan DeVille's testimony regarding (1) appellant's possession of transcripts of Tinajero's testimony and an arrest

report regarding the death of Juan Armenta; and, (2) his experience in the jail's gang unit and his knowledge of jail culture. (RB 114, citing 16 RT 2759-2762.) Moreover, respondent points out that, during his cross-examination of Deputy DeVille, defense counsel inquired into whether "hits" were normally carried out through the gang module and whether a "green light" could be carried out by any gang member. (RB 114-115, citing 16 RT 2763-2764, 2766-2768, 2770-2772.)

However, notwithstanding appellant's pretrial objection to gang-related evidence, it is significant that none of testimony listed above explicitly related to *appellant's* gang affiliation. Indeed, most of this testimony did not relate to appellant at all, but instead related to jailhouse gang culture generally.[30] Therefore, even assuming appellant forfeited his objection to evidence regarding jailhouse gang culture, he did not forfeit his objection to evidence relating to his own gang affiliation.[31] Indeed, as respondent acknowledges (RB 115), defense counsel requested a "402 hearing" (Evid. Code, § 402) before the prosecutor's gang expert, Detective Clift, testified regarding gang activity and the "gang relationship between [appellant] and Mr. Tinajero." (17 RT 2974.)

Respondent also acknowledges that defense counsel objected on relevance grounds in response to an offer of proof made by the prosecutor

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[30] In any event, to the extent the evidence related to jailhouse gang culture generally rather than appellant's gang affiliation, it was consistent with the defense theory that Tinajero was murdered by his cellmates, not by appellant. (21 RT 3530-3553.)

[31] Indeed, defense counsel reasonably may have concluded that testimony relating to jailhouse gang culture would support the defense theory so long as it did not also include evidence of appellant's gang affiliation.

regarding Detective Clift's testimony. (RB 123, fn. 72.) Specifically, defense counsel objected that

> it seems to be the same old issue revisited again, trying to do indirectly what she cannot do directly.[32] [¶] I believe the People have tried to create an issue of gangs where it does not exist. There is no – we have not introduced any testimony at this point to show that this is a gang hit. The People have invented this issue, and now they're trying to go further and call an expert to say it was not a gang killing, and I would submit it.

(18 RT 3133-3134.)

Only after the trial court overruled that objection did the prosecution elicit testimony specifically relating to appellant's gang affiliation. (19 RT 3134, 3140-3143.) Appellant subsequently moved for a mistrial based upon the prosecution's direct examination of the gang expert, again arguing that the prosecution "did indirectly what the court had prohibited them from doing directly, and I think the – the relevancy of this testimony is very remote and it should be stricken under [Evidence Code] 352 at least."[33] (19 RT 3159-3160.) The trial court denied appellant's motion, finding that the prosecution had

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[32] Defense counsel earlier had moved for a mistrial on the ground that, by testifying that he did not believe Tinajero's white cellmates were involved in the murder, Detective Clift was testifying as an expert that appellant was guilty. The trial court denied the motion but granted a motion to strike Detective Clift's testimony on that point. (18 RT 3114-3117; see also 18 RT 3121-3123 [defense counsel renewed objection during 402 hearing].)

[33] Tellingly, respondent fails to mention this motion for mistrial in arguing that appellant has forfeited his argument.

> stayed within the limits of the parameters I set.[34] The issue of gang activity is peripherally involved in the case, unfortunately, but it also is consistent with earlier information we had that [appellant] had received permission from or approval from, I was going to say shot callers, but other individuals in the – that had some control over the jail to carry out the hit, so that has to be explained as well.

(18 RT 3160.)

This Court has explained that "[t]he purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial." (*People v. Brown* (2003) 31 Cal.4th 518, 553; see also *People v. Partida, supra*, 27 Cal.4th at p. 435.) Here, as appellant

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[34] The trial court was not entirely clear as to what "parameters" it was referring to. Before Detective Clift testified in front of the jury, the trial court acknowledged that "[t]his isn't a case involving gang activity specifically," but concluded

> the relevance of gangs is present to the extent that as we've heard some of the testimony, [appellant] received items . . . apparently through the use of threats of gang retaliation or group retaliation if an individual didn't give it up, so it is relevant. [¶] But I want to be cautious about the use of gang testimony because the California Supreme Court said it's highly prejudicial.

(18 RT 3105.) Later, in ruling on appellant's first motion for a mistrial regarding Detective Clift's testimony, the trial court barred the prosecution from eliciting testimony that, based upon their individual criminal histories, Tinajero's white cellmates would not have committed the crime; on the other hand, the court permitted the prosecution to elicit generalized testimony that ordinary jail gang associations were such that white inmates would not carry out a hit on behalf of Hispanic gangs. (18 RT 3115-3117, 3123.)

demonstrated above, he interposed challenges to the admission of gang-related evidence sufficient to permit the court to take corrective measures, such as admonishing the jury and/or striking the challenged evidence.

In addition, as noted above, this Court should review the claim even if it concludes that defense counsel's objections and motions to strike were insufficient. (See, e.g., *People v. Gurule*, *supra*, 28 Cal.4th at pp. 613-614; *People v. Malone*, *supra*, 47 Cal.3d at p. 38.)

Under these circumstances, appellant's challenge to the admission of gang-related evidence – or, at a minimum, evidence relating to his own gang affiliation – is cognizable on appeal.

3. Appellant Has Not Forfeited His Objection to Evidence Ostensibly Admitted to Impeach His Denial That He Was a Sureno Member

In his opening brief, appellant noted that the gang-related evidence in this case included a letter he wrote to his friend Della Rose Santos, as well as testimony regarding that letter, ostensibly introduced to impeach his denial that he was a Sureno member. Appellant has adequately demonstrated that this evidence was irrelevant and inadmissible for any purpose, and that admission of this evidence constituted prejudicial error. (AOB 184-201.)

Respondent incorrectly claims that appellant has forfeited this argument by not objecting on that ground at trial. (RB 125-128.) Appellant submits that it would have been futile to object to admission of his letter to Santos because the trial court had already decided to admit evidence of his gang affiliation, as discussed in the preceding sections. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 820 [appellate issue not waived for failure to object if objection would be futile].) In addition, as noted above, this Court should review the claim even if it concludes that defense counsel's objections and

motions to strike were insufficient. (See, e.g., *People v. Gurule*, *supra*, 28 Cal.4th at pp. 613-614; *People v. Malone*, *supra*, 47 Cal.3d at p. 38.) Consequently, this Court should reach the merits of appellant's claim.

B. Conclusion

For the reasons set forth in the opening brief and in the preceding section, reversal is required because the People cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) At a minimum, reversal is required because it is reasonably probable that the outcome would have been more favorable if the gang evidence had not been presented to the jury. (*People v. Partida*, *supra*, 37 Cal.4th at p. 439, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498.)

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IV

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ELICIT IRRELEVANT, PREJUDICIAL HEARSAY EVIDENCE REGARDING APPELLANT'S POSSESSION OF "SHANKS"

Prosecution witness Gregory Palacol testified that a couple of hours after the murder of Raul Tinajero, he was interviewed in the day room and a deputy showed him a photograph of appellant (14 RT 2417, 2421-2422, 2424, 2454; Peo. Exh. No. 95); the deputy said "he was having trouble with this person[,] finding shanks and stuff on him, and he just showed it to me and asked me if that was the guy that was . . . in my cell that [committed the murder]" (14 RT 2424); and, during a second interview, Palacol was shown a photographic lineup and identified appellant as the person who murdered Tinajero (14 RT 2418-2421, 2454; Peo. Exh. No. 95). In his opening brief, appellant argued that the trial court erred in permitting Palacol to testify about the deputy's hearsay statement regarding appellant's possession of "shanks and stuff," and that the error violated state law as well as the state and federal Constitutions.[35] (AOB 202-210.)

Respondent contends that the deputy's statement was admissible for a non-hearsay purpose, i.e., to explain the circumstances regarding Palacol's photographic identification of appellant. Respondent further contends that the evidence was harmless. (RB 130-136.) Respondent's contentions are

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[35] Specifically, appellant argues that the error violated, in addition to California's evidentiary rules, the Sixth, Eighth and Fourteenth Amendments to the federal Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 209; cf. RB 130 [respondent asserts that appellant has argued that the trial court's error violated, in addition to California evidentiary rules, the Fifth, Sixth and Fourteenth Amendments].)

incorrect.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is generally inadmissible except where permitted by an exception to the "hearsay rule." (Evid. Code, § 1200, subd. (b).) Out-of-court statements not offered for the truth, but for some other purpose, are not hearsay, but they are only admissible if "the nonhearsay purpose is relevant to an issue in dispute." (*People v. Davis* (2005) 36 Cal.4th 510, 535-536.) As this Court has explained, "'[a] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.' [Citation.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 814, abrogated on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . ." (Evid. Code, § 352.)

Even if, as respondent suggests (RB 133), the trial court implicitly found that the deputy's statement to Palacol was relevant for the non-hearsay purpose urged by the prosecutor – that is, to explain the circumstances regarding the deputy's inquiry and Palacol's identification of the photograph – that finding was erroneous. Neither the prosecutor nor respondent has explained how the deputy's statement – and the reference to "shanks and stuff" in particular – explained the circumstances surrounding Palacol's identification of the photograph. Indeed, the jury would have gotten a clearer picture of those circumstances had the prosecutor limited

his inquiry so as to avoid eliciting testimony concerning the deputy's hearsay statement; for instance, the prosecutor simply could have elicited Palacol's testimony as to whether the deputy asked him if he recognized the person depicted in the photograph.[36]

According to respondent, had the prosecutor not asked Palacol about the circumstances surrounding the deputy's inquiry, the jury would have been left to wonder why the deputy showed Palacol only that one photograph, rather than presenting him with a photographic lineup as the deputies later did. Respondent further contends that this would have fueled a defense argument that the single photograph show-up was a suggestive identification that tainted Palacol's subsequent six-photograph identification, and that the sheriff's department had prejudged the matter and was deliberately targeting appellant to take the blame for the murder. (RB 133.)

However, the prosecution presented other evidence from which the

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[36] Respondent claims that presenting evidence of the earlier identification and the deputy's statement served the interest of candor and fairness because an argument could be made that Palacol's one-photograph identification of appellant, accompanied by the deputy's statement, may have influenced his later identification of appellant from the photographic lineup. (RB 133, fn. 75.) However, the interest of candor would have been served just as well, and the interest of justice even better, had the trial court simply admonished the prosecutor to (1) instruct Palacol to omit the deputy's reference to shanks, and (2) structure her direct examination to avoid that testimony from inadvertently being introduced. (See, e.g., *People v. Hinton* (2006) 37 Cal.4th 839, 892 [trial court performed its statutory balancing functions under Evidence Code section 352 where, among other things, it ensured that the testimony was tailored so as to avoid any prejudicial references to defendant's involvement in an unrelated murder, and personally instructed the witness not to make any mention of that murder].)

jury could infer why, at that point in time, jail personnel were investigating appellant's possible role in the murder, evidence which did not also contain the irrelevant, prejudicial reference to his possession of "shanks and stuff." (See, e.g., 12 RT 2033-2036, 2044 [testimony of Deputy Sheriff Cheryl Comstock]; 13 RT 2349-2357, 2362-2365 [testimony of Deputy Sheriff Otoniel Avila].) Had the prosecution so limited its presentation, the jury nevertheless would have had enough evidence from which to draw an inference as to why the deputies showed appellant's photograph to Palacol.

Respondent also suggests that because the trial court overruled appellant's objection, the jury was able to hear testimony suggesting that the purpose of the deputy's inquiry was not to investigate the murder, but rather to follow up on a "far less serious rule violation" by appellant. Therefore, according to respondent, the testimony was relevant for a non-hearsay purpose. (RB 133-134.) Notwithstanding respondent's failure to identify the supposed non-hearsay purpose, Palacol's testimony – as the excerpt quoted by respondent itself demonstrates (RB 131)[37] – made clear that the deputy showed him the photograph specifically to investigate the murder.[38]

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[37] Specifically, respondent observed that "Palacol then testified that when the deputy showed him Exhibit 95, 'He said he was having trouble with this person finding shanks and stuff on him, and he just showed it to me and asked me if that was the guy that was in his cell that did that – in my cell that did that [*i.e., the murderer*].'" (RB 131, italics added.)

[38] The pertinent exchange took place as follows:

> [Prosecutor]: Okay. Mr. Palacol, when the deputy was showing you this photograph, what were the circumstances for why he was showing it to you? What did he say?
>
> [Palacol]: He said he was having trouble with this person finding shanks and stuff on him, and *he just showed it*

(continued...)

(14 RT 2424.) Moreover, Palacol and his cellmates were placed in the day room and interviewed after reporting that there was a "man down in [cell] 13." (12 RT 2178-2179; 13 RT 2296, 2300, 2345-2347, 2366-2367; 14 RT 2417.) Finally, as noted above, jail personnel had already begun investigating appellant's possible involvement in the incident. (12 RT 2033-2036, 2044 [testimony of Deputy Sheriff Cheryl Comstock]; 13 RT 2349-2357, 2362-2365 [testimony of Deputy Sheriff Otoniel Avila]).

Even assuming the jurors somehow concluded the deputy was investigating some "far less serious rule violation" (RB 133-134) rather than the murder, the deputy's hearsay statement had no probative value. As appellant has noted, there was no evidence that appellant used a shank to commit the homicide. (See Argument II, incorporated by reference as if fully set forth herein.)

For the reasons set forth in Argument II, respondent is also mistaken in claiming that the trial court did not abuse its discretion by overruling appellant's objection under Evidence Code section 352. (RB 134; see also 14 RT 2422 [appellant's Evidence Code section 352 objection].)

Finally, respondent is incorrect in asserting that the testimony was harmless. (RB 134-135.) Appellant has demonstrated already that the trial

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[38](...continued)
to me and asked me if that was the guy that was in his cell that did that – in my cell that did that.

[Prosecutor]: *That did the murder*?

[Palacol]: Yes.

[Prosecutor]: And what did you tell him?

[Palacol]: Yes.

(14 RT 2424, italics added.)

court's error was prejudicial. (AOB 204-209.) However, he further notes that it cannot be assumed the jury believed that Palacol's vague phrase "shanks and stuff" referred only to the incidents introduced pursuant to section 1101, subdivision (b). Instead, the jury likely speculated that appellant had committed prior offenses beyond, and perhaps even more serious than, those incidents.

Moreover, contrary to respondent's position (RB 135, citing 5 CT 1260-1261, 1263; CALJIC Nos. 2.09, 2.50, 2.50.1, 2.50.2), it is unlikely that the limiting instructions, including CALJIC No. 2.50,[39] cured the error. (See AOB 208.) For instance, the jury likely assumed that, because Palacol's testimony related to the circumstances surrounding Tinajero's murder and the subsequent investigation, the limiting instructions did not apply to his testimony regarding the deputy's reference to shanks. As such, the jurors may have believed themselves to be authorized to consider it as evidence of bad character in violation of Evidence Code section 1101,

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[39] CALJIC No. 2.50, as provided to the jury in this case, reads as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.

(5 CT 1263.)

subdivision (a). (See Argument II.)

Respondent is similarly incorrect in asserting that the trial court's error implicated state law only. (RB 134.) As appellant has pointed out (AOB 209), state law errors that render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment to the federal Constitution. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Estelle v. McGuire* (1991) 502 U.S. 62, 67-68; *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737.) Moreover, the error undermined the reliability of the guilt phase verdict as a proper basis for the imposition of the death penalty, in violation of the Eighth and Fourteenth Amendments to the federal Constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Accordingly, for the reasons set forth above and in appellant's opening brief, the entire judgment must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if this Court views the error as one of state law only, the judgment must be reversed because it is reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.)

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V

THE COURT ERRED IN ADMITTING, AS FACTOR (B) EVIDENCE, THE HIGHLY INCRIMINATING HEARSAY TESTIMONY OF DEPUTY THOMAS MOREAN REGARDING AN INCIDENT INVOLVING MUTUAL COMBAT, THEREBY VIOLATING APPELLANT'S RIGHT TO CONFRONTATION AND PREVENTING HIM FROM RECEIVING A FAIR TRIAL AND DUE PROCESS OF LAW IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, appellant argued that the trial court erred in admitting the testimony of Deputy Thomas Morean regarding an incident in which appellant engaged in "mutual combat" – namely, a fight in a day room at the Los Angeles County Jail. Specifically, appellant argued that Deputy Morean's testimony regarding the fight constituted inadmissible hearsay[40] and violated his right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution and the analogous provision of the state Constitution (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15). (AOB 211-228.)

Respondent contends that appellant is entitled to no relief on this claim, as Deputy Morean testified about his own observations of appellant's reddened knuckles and scratched back after the incident. Respondent further contends that, assuming any portion of Deputy Morean's testimony was inadmissible hearsay admitted for the truth of the matter asserted, appellant forfeited any objection thereto. Finally, respondent asserts, any error was harmless. (RB 136-148.) Respondent's contentions are incorrect.

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[40] "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).)

B. Deputy Morean's Testimony Was Based Largely On Inadmissible Hearsay; Appellant's Argument Is Cognizable on Appeal

The Sixth and Fourteenth Amendments to the federal Constitution guarantee an accused the right to be confronted with the witnesses against him. (U.S. Const., 6th and 14th Amends.; *Michigan v. Bryant* (2011) 562 U.S. 344, 352; *Pointer v. Texas* (1965) 380 U.S. 400, 401.) As appellant discusses below, the United States Supreme Court has further explained that the Sixth Amendment Confrontation Clause applies only to hearsay that is "testimonial." (*Crawford v. Washington* (2004) 541 U.S. 36, 68.) Recently, this Court made clear that

> [i]n light of our hearsay rules and *Crawford*, a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term.

(*People v. Sanchez* (2016) 63 Cal.4th 665, 680, italics in original.)

Respondent contends that Deputy Morean's testimony that he was "alerted" that "[a] fight had occurred inside of the day room" – which, again, it mistakenly argues was the only out-of-court statement actually aired by the prosecution (see Section B, *ante*) – did not violate the Confrontation Clause. (RB 142-144.) Specifically, respondent claims that nothing in the record establishes that the statement was made with any "degree of formality or solemnity" (see *People v. Lopez* (2012) 55 Cal.4th

569, 581) or that its primary purpose pertained to a criminal prosecution. (RB 144.) Respondent's contentions are incorrect.

According to respondent, the only arguable hearsay testimony by Deputy Morean was the following: (1) he testified that he had been "alerted to" information about an incident in the day room (23 RT 2379); and, (2) after the prosecutor asked what that information was, Deputy Morean responded that "[a] fight had occurred inside of the day room" (23 RT 3979). (RB 140.) According to respondent, appellant made no objection to that colloquy on hearsay or any other grounds, and has therefore forfeited his claim that "this statement" was inadmissible hearsay and that it violated his Sixth Amendment confrontation rights. (RB 140-142.) Respondent's position is incorrect.

Contrary to respondent's position, testimony that a fight had occurred in the day room was not the only hearsay testimony from Deputy Morean. (RB 140-141 and fn. 78.) As Deputy Morean acknowledged, the information contained in his disciplinary report, except for his observations of redness on appellant's knuckles and scratches on his back, came from other individuals. (23 RT 3981-3983, 3992-3993.) Most important, the prosecutor elicited Deputy Morean's testimony that he would not have written a disciplinary report against appellant if he had had information that appellant was the victim in the incident. (23 RT 3991.)

That evidence obviously was introduced to prove the truth of the matters asserted. (See Evid. Code, § 1200, subd. (a).) Specifically, it was introduced to support the prosecution's position that the incident involved mutual combat, and had no relevance otherwise. Thus, *all* of Deputy Morean's testimony not based on his own observations was based on hearsay. (23 RT 3991.)

Respondent is also incorrect in asserting that appellant failed to object to the colloquy noted above. Even if appellant did not object *immediately* after the prosecutor elicited the testimony described above, he did object shortly thereafter to "any hearsay."[41] (23 RT 3980.) On its face, defense counsel's objection related to any – which is to say, *all* – hearsay

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[41] Directly after Deputy Morean testified that he had been alerted to the fact that a fight had occurred in the day room, the prosecutor elicited his testimony that he saw one of the individuals involved in the fight, namely, appellant. (23 RT 3979-3980.) The following exchange then took place:

> [Prosecutor]: And what was the defendant's involvement in the fight?
>
> [Deputy Morean]: When I came to the incident, there was other deputies that had already been interviewing and separating all of the inmates that were involved. One of the deputies that was doing the interviewing said –"
>
> [Defense counsel]: *Objection to any hearsay*, Your Honor.
>
> [The court]: Sustained as to what was said.
>
> [Prosecutor]: Did you obtain any information as to who started the fight?
>
> [Deputy Morean]: Yeah, I was told that –
>
> [Defense counsel]: *Objection to what he was told by someone else, Your Honor.*
>
> [Prosecutor]: State of mind.
>
> [Defense counsel]: *Hearsay.*
>
> [The court]: State of mind of whom?
>
> [Prosecutor]: Of this officer.
>
> [Defense counsel]: *Irrelevant.*

(23 RT 3980, italics added.) The trial court sustained the objection. (23 RT 3980.)

testimony by Deputy Morean, and therefore operated to challenge the admission of his testimony that a fight had occurred in the day room. Moreover, the objection was posed soon enough that the trial court could have excluded any improper testimony by Deputy Morean and prevented further prejudice to appellant. Under these circumstances, appellant's objection served the purposes of a timely objection with respect to all hearsay testimony by Deputy Morean. (See *People v. Partida* (2005) 37 Cal.4th 428, 434 ["'The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal.' [Citation.]"].) Finally, this exchange belies respondent's claim that appellant did not challenge the admission of Deputy Morean's testimony that a fight had occurred in the day room until his subsequent motion to strike Deputy Morean's testimony in its entirety (23 RT 3989-3990). (RB 141, citing *People v. Perry* (1972) 7 Cal.3d 756, 780, overruled on other grounds by *People v. Green* (1980) 27 Cal.3d 1, 28-34; *People v. Demetrulias* (2006) 39 Cal.4th 1, 21; *People v. Abbott* (1956) 47 Cal.2d 362, 372.)

As noted above, respondent is also incorrect in asserting that Deputy Morean's testimony that a fight had occurred in the day room was the only hearsay to be admitted into evidence. Deputy Morean acknowledged that he did not witness the incident and that the information contained in his disciplinary report, other than his observations of redness on appellant's knuckles and scratches on his back, came from other individuals. (23 RT

3992.) In particular, the prosecutor elicited Deputy Morean's testimony that he would not have written the disciplinary report if he had information that appellant was the victim in the incident (23 RT 3991), evidence to which appellant also objected, as a fair reading of the record reveals. (23 RT 3989-3990, 3993.)

Specifically, after the prosecutor asked Deputy Morean on redirect examination whether he had information that appellant was not the victim in the incident, defense counsel objected on hearsay grounds. (23 RT 3988-3989.) At the bench, defense counsel stated

> Your, Honor on the firsthand I was planning to ask the court to strike the entirety of this officer's testimony because it appears from the direct examination and cross-examination he had no firsthand knowledge of the incident nor does he have a present memory of that particular incident; and, two, certainly what the People are trying to do now is trying to bootleg hearsay information in to evidence through this officer, who for this officer to now arrive at a conclusion that he was – that the defendant was not a victim.
>
> A victim having a certain connotation in mind to most common people that certainly they want that inference drawn, and I would again renew[[42]] my motion to strike for lack of firsthand knowledge.

(23 RT 3989-3990.) The trial court denied defense counsel's motion with respect to Deputy Morean's personal observations, but sustained the objection with respect to information that appellant was not the victim. (23

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[42] Citing 23 RT 3990, respondent asserts that "[d]efense counsel then 'renew[ed] his motion to strike for lack of firsthand knowledge' (a motion he had never previously made)." (RB 139.) However, it is clear defense counsel was following up on his earlier statement that "I was planning to ask the court to strike the entirety of this officer's testimony . . . ." (23 RT 2389.)

RT 3990.)

Despite the trial court's ruling, the prosecutor elicited that information indirectly, asking Deputy Morean whether he would have written a disciplinary report if he had had information that appellant was the victim. After Deputy Morean testified that he would not have done so, defense counsel objected, then decided to "let the answer stay." (23 RT 3991.) However, after Deputy Morean subsequently acknowledged that the information contained in his disciplinary report, other than his observations of redness on appellant's knuckles and scratches on his back, came from other individuals, appellant renewed his motion to strike, which the trial court denied. (23 RT 3992.)

Here, too, appellant's motions to strike (notwithstanding defense counsel's withdrawal of his objection) served the requirements and purposes of a timely objection as explained in *Partida*. (*People v. Partida*, *supra*, 37 Cal.4th at p. 434.) The challenges were specific both with respect to the evidence challenged and the reasons for the challenge, and they came quickly enough that the trial judge to rule on the admissibility of the evidence to avoid possible prejudice. (*Ibid.*) This was not a case where appellant failed to object altogether until unfavorable evidence was admitted (see *People v. Perry*, *supra*, 7 Cal.3d at p. 781 [question asked by the prosecutor was such that the answer from defendant would necessarily contain inadmissible evidence, but defense counsel did not object until defendant gave an unfavorable response]), nor did he wait until his motion to strike to state the basis of his challenge (see *People v. Demtrulias*, *supra*, 39 Cal.4th at pp. 21-22 [party cannot make a "placeholder" objection stating general or incorrect grounds, only to revise the objection later in a motion to strike stating specific or different grounds]).

Moreover, contrary to respondent's position (RB 143-144 and fn. 79), appellant made a timely objection on Confrontation Clause grounds. As noted in the preceding section, defense counsel objected on hearsay grounds after the prosecutor asked Deputy Morean whether he had had information that appellant was not the victim in the incident. (23 RT 3988-3989.) Then, during a sidebar conference, defense counsel followed up that objection by moving to strike Deputy Morean's testimony in its entirety on the grounds that (1) he had no firsthand knowledge of the incident or present memory of the incident, and (2) the prosecution was "trying to bootleg hearsay information in to evidence through this officer." (23 RT 3989.) Even if defense counsel did not expressly refer to the Confrontation Clause, his objection clearly implicated the denial of an opportunity to cross-examine the witnesses against appellant and therefore sufficed to preserve his claim for appeal. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 809 ["Where 'it appears that (1) the appellate claim is the kind that required no trial court action to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution[,] . . . defendant's new constitutional arguments are not forfeited on appeal. [Citations.]"]; *People v. Holmes* (2012) 212 Cal.App.4th 431, 436 [where the context makes clear that the court and opposing counsel were aware that the confrontation clause was the basis of the hearsay objection, the constitutional objection is preserved]; cf. *People v. Alvarez* (1996) 14 Cal.4th 155, 186-187 [confrontation clause issue waived where (1) there was neither a "specific" nor "timely" objection predicated on the Sixth Amendment's confrontation

clause,[43] and (2) the challenged evidence fell squarely into the spontaneous declarations exception to the hearsay rule].) In objecting that Deputy Morean's testimony was not based on firsthand information (23 RT 3989), he was necessarily pointing out that Deputy Morean was relaying the statements of anonymous declarants who were not subject to cross-examination. (Cf. *California v. Green* (1970) 399 U.S. 149, 153-168.)

Even assuming, arguendo, that defense counsel failed to make a timely objection to any of the evidence, the instant argument is cognizable on appeal because, in ruling on appellant's motion, the trial court passed on the admissibility of Deputy Morean's testimony in its entirety, not just those portions to which appellant posed objections (23 RT 3989-3990, 3992). (See *People v. Abbott*, *supra*, 47 Cal.2d at p. 372 [where the trial court chose to pass upon the admissibility of all of the evidence, whether objected to or not, this Court treated the question of whether there was error in admitting the evidence as properly before it].)

Finally, this Court should review the claim even if it concludes that defense counsel's objections and motions to strike were insufficient. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 613-614 [this Court reviewed defendant's claim that trial court erred by denying his motion to strike an accomplice's testimony, even though trial court had initially denied motion

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[43] Prior to trial, defendant moved the superior court, in limine, to preclude the People from introducing the challenged evidence on the ground that it was inadmissible hearsay, and included a "bare reference to the 'confrontation rule.'" This Court concluded that that was insufficient to preserve the confrontation evidence. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 186.)

to strike without prejudice and defendant failed to renew it]; *People v. Malone* (1988) 47 Cal.3d 1, 38 [although defendant failed to object or request an admonition, this Court assumed defendant did not waive asserted prosecutorial misconduct and reviewed merits of claim].)

For the reasons set forth in appellant's opening brief and in the instant section, most of Deputy Morean's testimony constituted inadmissible hearsay. In addition, contrary to respondent's contention, appellant's argument is cognizable on appeal.

C. Contrary to Respondent's Position, The Hearsay Information Elicited From Deputy Morean Was Testimonial

In his opening brief, appellant argued that Deputy Morean's hearsay testimony was testimonial in nature, and that its admission violated his right to confrontation under the Sixth and Fourteenth Amendments.[44] (AOB 220-225.)

Respondent incorrectly asserts that the hearsay elicited from Deputy Morean was not "testimonial" for Confrontation Clause purposes. (RB 143.) The United States Supreme Court has explained that

> under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." [*Michigan v. Bryant*, *supra*, 562 U.S. at p.] 359, 131 S.Ct. 1143. But that does not mean that the Confrontation Clause bars every

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[44] By conveying what he had been told by others at the scene, Deputy Morean's testimony implicated the Confrontation Clause. (See *United States v. Brooks* (9th Cir. 2014) 772 F.3d 1161, 1167 ["out-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause"].)

> statement that satisfies the "primary purpose" test. We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles v. California*, 554 U.S. 353, 358–359, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008); *Crawford* [*v. Washington*, *supra*,] 541 U.S. [36,] 56, n. 6, 62, 124 S.Ct. 1354. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

(*Ohio v. Clark* (2015) 135 S.Ct. 2173, 2180-2181.)

According to respondent, "nothing in the record establishes that the unnamed declarant's statement to Deputy Morean that 'A fight had occurred inside of the day room,' was made with any 'degree or formality,' nor that its primary purpose pertained to a criminal prosecution." (RB 144.) Instead, respondent suggests, the apparent purpose of the statement was merely to prompt Deputy Morean to go to the day room to assist other deputies, and as such was analogous to a statement made "to enable police assistance to meet an ongoing emergency." (*Ibid.*, citing *Davis v. Washington* (2006) 547 U.S. 813, 822.)

On the contrary, the primary purpose of the hearsay statements was testimonial. (See *People v. Sanchez*, *supra*, 63 Cal.4th at p. 689 ["[t]estimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony"].) First, although it is unclear whether jail personnel ever considered pursuing criminal prosecution of appellant in connection with the incident, there is no question that assault, in and of itself, is an offense that *could* lead to criminal prosecution.[45] Thus, a statement regarding such

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[45] Deputy Morean testified that he did not know whether appellant (continued...)

an assault is made "'under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial.' [Citation.]" (*United States v. Mills* (C.D. Cal. 2006) 446 F.Supp.2d 1115, 1137.)

Second, based on the content and context of the interviews conducted by the deputies following the incident, a reasonable person would have understood the primary purpose to be investigative. (See *United States v. Brooks*, *supra*, 772 F.3d at pp. 1167-1169 [postal inspector's testimony about non-testifying postal employee's statements violated Confrontation Clause, in part because employee would have known that primary purpose of the conversation was to establish or prove facts potentially relevant to a later criminal prosecution]; cf. *Davis v. Washington*, *supra*, 547 U.S. at p. 822 [statements taken by police officers in the course of an interrogation are "nontestimonial," and not subject to the Confrontation Clause, when they are made under circumstances objectively indicating that primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency].) As Deputy Morean's own testimony established, the inmates involved in the incident were separated and interviewed. (23 RT 3980.) Therefore, the jail deputies were conducting interviews to determine what happened, not to resolve an emergency still in progress. (See *Davis v. Washington*, *supra*, 547 U.S. at p. 827.)

Third, jail deputies are law enforcement officers. (See *Starr v. Baca* (9th Cir. 2011) 652 F.3d 1202, 1218.) Thus, the interviews on which

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[45](...continued)
was subjected to disciplinary or criminal proceedings following the incident. (23 RT 3986-3987.)

Deputy Morean's information was based (other than his own observations) were "somewhat formal" in that they were conducted by "bona fide law enforcement officer[s]." (*United States v. Brooks*, *supra*, 772 F.3d at p. 1169; see also *Davis v. Washington*, *supra*, 547 U.S. at p. 826 [contested statements were made to a 911 operator, whereas, in consolidated *Hammon* case, statements were made to a law enforcement officer].)

Finally, the record undercuts respondent's suggestion that the apparent purpose of the statement that "[a] fight had occurred inside of the day room" was merely to prompt Deputy Morean to go to the day room to assist other deputies, and that it was therefore analogous to a statement made to enable police assistance to meet an ongoing emergency. (RB 144.) Deputy Morean explained that "[w]hen I came to the incident, there was [*sic*] other deputies that had already been interviewing and separating all of the inmates that were involved." (23 RT 3980.) Thus, it is clear from Deputy Morean's testimony that the fight was over and that there was no ongoing emergency. (Cf. *Davis v. Washington*, *supra*, 547 U.S. at p. 822.) As such, even assuming the purpose of the hearsay statements was to prompt Deputy Morean to go to the day room to assist other deputies (RB 144), their "primary purpose pertain[ed] in some fashion to a criminal prosecution" (*People v. Lopez*, *supra*, 55 Cal.4th at p. 582),[46] rendering

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[46] Appellant submits that the evidence was also testimonial under the alternate test adopted by Justice Thomas, who has "described the degree of formality required as questioning resulting from a 'formalized dialogue' or the taking of statements 'sufficiently formal to resemble the Marian examinations' [citation] but not 'a mere conversation between a witness or suspect and a police officer' [citation]. [Citations.]" (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 689-690.)

them "testimonial" for purposes of the Confrontation Clause.[47]

Thus, for the reasons stated above and in appellant's opening brief (AOB 200-225), Deputy Morean's hearsay testimony was testimonial in nature, and its admission violated appellant's right to confrontation under the Sixth and Fourteenth Amendments.

D. The Admission of Morean's Testimony Was Unduly Prejudicial

In his opening brief, appellant argued that the trial court's admission of Deputy Morean's testimony was unduly prejudicial. But for the information gathered from unnamed declarants, Deputy's Morean's testimony that he observed redness on the left and right knuckles of appellant's hands and scratches on his back (23 RT 3981, 3983) lacked evidentiary value. Morever, this hearsay evidence unfairly strengthened the prosecutor's argument that appellant would continue to be a danger in prison, undermining his case in mitigation. (AOB 225-228.)

Respondent contends that any error was harmless. (RB 144-148.) According to respondent, the record does not establish that the purported hearsay statement was "testimonial" for Confrontation Clause purposes, and therefore the purported error implicates only state law. (RB 144.) Respondent further contends that appellant cannot meet the standard applicable to state law error, i.e., that appellant must show a "reasonable

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[47] The high court has explained that the Confrontation Clause "does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding." (*Ohio v. Clark*, *supra*, 135 S.Ct. at p. 2180, citing *Giles v. California* (2008) 554 U.S. 353, 358-359 and *Crawford v. Washington*, *supra*, 541 U.S. at p. 56, fn. 6, 62.) There is nothing in the record suggesting that any such exception to the Sixth Amendment's confrontation requirement was present in this case.

(i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (RB 145, citing *People v. Brown* (1988) 46 Cal.3d 432, 448.) Respondent's position is incorrect.

As appellant has demonstrated (AOB 220-225 and Section C, *ante*), Deputy Morean's hearsay testimony (which, again, was not limited to the one statement identified by respondent) was in fact "testimonial." Therefore, contrary to respondent's claim, the trial court's error violated the federal Constitution, not just state law.

Evidence admitted in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment requires reversal unless the prosecution can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[48] (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even assuming the error must be reviewed under the "reasonable possibility" test applicable to state-law error at the penalty phase (see *People v. Brown*, *supra*, 46 Cal.4th at p. 448 [state law test for error at the penalty phase is whether there is a "reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred"]), the penalty judgment must be reversed.

First, the prosecution cannot meet the *Chapman* test because it cannot show that the error in admitting, through the testimony of Deputy Morean, the prejudicial statements of the unnamed deputies and inmates, none of whom were shown to be unavailable, was harmless and did not

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[48] This Court has assumed without deciding that the Sixth Amendment right to confrontation applies to evidence introduced at the penalty phase. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1232; *People v. Fuiava* (2012) 53 Cal.4th 622, 720.)

contribute to the verdict because appellant was denied the opportunity to meaningfully cross-examine those anonymous declarants and potentially elicit evidence that appellant acted in self-defense. (See *People v. Lucky* (1988) 45 Cal.3d 259, 291 ["'where the prosecution's evidence shows a jailhouse scuffle, the scene as witnessed does not suggest defendant may have been acting in self-defense, and defendant presents no evidence in mitigation, a finding of criminal assault is justified'"].)

Second, absent the hearsay testimony, the jury could infer that appellant had engaged in an act involving force or violence within the meaning of Penal Code section 190.3, factor (b), only by indulging in speculation. Deputy's Morean's testimony that he observed redness on the left and right knuckles of appellant's hands and scratches on his back (23 RT 3981, 3983), without more, was insufficient to establish that appellant had committed an assault (cf. *People v. Jackson* (2014) 58 Cal.4th 724, 736, 760-761 [correctional officer who testified about incident in which defendant engaged in mutual combat had personally witnessed the incident; another correctional officer, from whose testimony the jury reasonably could infer that the defendant participated in mutual combat on a separate occasion, had witnessed the melee]; *People v. Moore* (2011) 51 Cal.4th 1104, 1117, 1136 [three correctional officers from San Quentin State Prison testified that they each observed an incident in which defendant fought with another inmate; in two of the instances, the officers believed that defendant was the aggressor]; *People v. Lucky, supra*, 45 Cal.3d at pp. 290-291 [prison guard who testified about incident involving mutual combat had personally witnessed the incident and testified to facts suggesting that the defendant was the aggressor]). Indeed, had the trial court correctly analyzed his testimony it is unlikely the prosecutor would have called him

to testify at all.

Third, in contending that any error was harmless, respondent minimizes the significance of the evidence (RB 145-146), ignoring the fact that the prosecutor obviously considered it impactful enough to introduce it into evidence and refer to the incident in her argument to the jury.[49] Although Deputy Morean admitted that he never saw appellant swing at or strike anyone else (23 RT 3983-3985), he also testified that he would not have written a disciplinary report if he had had information that appellant was the victim in the incident (23 RT 3991). Accordingly, the jury necessarily inferred that appellant was the aggressor.

In addition, even if fights were common in the Men's Central Jail (RB 145, citing 23 RT 3986), Deputy Morean's testimony was vague as to the severity of the incident and the number of inmates involved (see 23 RT 3980 ["When I came to the incident there was other deputies that had already been interviewing and separating *all of the inmates that were involved*"], 3985 ["I can't tell you if other inmates were written [up] or they weren't"], italics added). Thus, the jurors were likely to speculate that the incident involved a melee or riot, a scenario they likely would find far more frightening than an ordinary fight. However, even assuming the jury concluded that the fight was a typical one, they would have been biased by the hearsay testimony that appellant was not a victim. Indeed, as appellant has observed (AOB 226), the evidence unfairly strengthened the prosecutor's argument that appellant would continue to be a danger in

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[49] Specifically, the prosecutor argued that "[w]e know [appellant was involved in the fight] because he had the redness of his knuckles, and you don't get redness on your knuckles unless you're hitting somebody else." (31 RT 5073; see also 23 RT 3981, 3983.)

prison, undermining appellant's case in mitigation (31 RT 5072-5073).

Finally, contrary to respondent's position (RB 145-148), it cannot be assumed that the error was harmless in light of the circumstances of the two murders and aggravating evidence. Appellant has already demonstrated that the trial court erred in admitting irrelevant, inflammatory "other acts" evidence, gang evidence, and hearsay evidence that appellant had possessed "shanks" in the jail, which, among other things, undermined the reliability of the guilt verdicts. (See Arguments II-IV, incorporated by reference as if fully set forth herein.) Similarly, appellant has demonstrated that the trial court erred in admitting some of the aggravating evidence pursuant to Penal Code section 190.3, factor (b), and in improperly instructing the jury with respect to "factor (b)" evidence, which, among other things, undermined the reliability of the penalty verdicts. (See Arguments VI and VII, incorporated by reference as if fully set forth herein.)

But for the trial court's erroneous admission of Deputy Morean's testimony, at least one of appellant's jurors may have concluded that the aggravating evidence did not substantially outweigh the mitigating evidence. The defense's case in mitigation included lay and expert witness testimony regarding appellant's impoverished and dysfunctional upbringing; the severe abuse inflicted on appellant by his father, Santiago Pineda Diaz (known as "Chago"); Chago's unrelenting efforts to raise appellant to be tough, such as pitting him against other boys in fistfights; Chago's chronic alcoholism, which contributed to the family's precarious financial situation and which required that, from a very young age, appellant shoulder much of the responsibility for his family; and, appellant's early exposure to drugs and alcohol. (AOB 82-104.)

Therefore, it is reasonably possible that, the erroneous admission of

Deputy Morean's testimony led at least one juror to impose the death penalty. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 137, disapproved of on another ground in *People v. Daniels* (1991) 52 Cal.3d 815, 866 [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial].) As this Court explained in first adopting the "reasonable possibility" test:

> If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming, as here, or that the crime involved was, as here, particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial.

(*People v. Hamilton*, *supra*, 60 Cal.2d at pp. 136-137.)

The error in this case cannot reasonably be determined to be harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Had the jury not heard this inadmissible evidence, there is a reasonable possibility that at least one juror would have decided that death was not the appropriate penalty. (*People v. Hamilton*, *supra*, 60 Cal.2d at pp. 136-137.) Since the death verdict was not surely unattributable to the erroneous admission of this evidence (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279), the error violated appellant's Sixth Amendment right to confront the witnesses against him (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68) and Eighth Amendment right to a reliable penalty verdict (see, e.g., *Sochor v. Florida* (1992) 504 U.S. 527, 539-540; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585; *Zant v. Stephens* (1983) 462 U.S.

862, 884-885). (U.S. Const., Amends. VI, VIII & XIV.)

Accordingly, for the reasons set forth in appellant's opening brief and in the preceding argument, the penalty judgment must be reversed.

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VI

THE TRIAL COURT'S ADMISSION OF IMPROPER FACTOR (b) EVIDENCE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY, EQUAL PROTECTION, A RELIABLE PENALTY VERDICT, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS

In his opening brief, appellant argued that the trial court erred in admitting evidence relating to the following incidents, pursuant to Penal Code section 190.3, factor (b) (hereafter, "factor (b) evidence"): (1) appellant's December 7, 2004, confrontation with Deputy Argandona (23 RT 4003-4009, 4015-4017); (2) a letter appellant wrote on September 26, 2006, which contained a purported threat against another individual (23 RT 4075-4093); (3) a June 7, 2005, confrontation with and threats against a fellow inmate, Benjamin Gonzalez (23 RT 4022-4031); (4) his possession of an altered paper clip on June 17, 2005; and, (5) appellant's letter to one Ursula Gomez and his attempt to smuggle letters as legal mail (AOB 229-281). The improper admission of this evidence violated appellant's state and federal constitutional rights to due process, a fair trial by an impartial jury, equal protection, and a reliable capital penalty determination, as well as the prohibitions against cruel and unusual punishment, requiring that the death judgment be reversed. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art I, §§ 7, 15, 16 and 17.)

Respondent contends that appellant has forfeited his objections to most of the evidence listed above by failing to make a timely objection in the trial court. Respondent further contends that, in any event, the evidence was properly admitted, and if any error occurred, it was harmless. (RB 148-

182.) Respondent's contentions are incorrect.[50]

A. The Trial Court Erred in Admitting Evidence Regarding Appellant's Encounter With Deputy Argandona

1. Appellant's Claim is Cognizable On Appeal

As respondent notes (RB 149-150), during an October 30, 2006, hearing, the court and counsel discussed the prosecution's intention to introduce evidence regarding appellant's December 7, 2004, encounter with Deputy Jason Argandona.[51] (4 RT 761.) According to respondent, the defense never asked for a hearing regarding this incident, nor did it move to exclude evidence of the incident. (RB 150.) However, during that same proceeding defense counsel asserted that some of the incidents did not constitute crimes within the meaning of *People v. Phillips* (1985) 41 Cal.3d 29. (4 RT 695-696, 757-758.)

On January 2, 2007, shortly before the prosecutor's opening statement, defense counsel objected as follows:

> I would – make *People versus Phillips* objection to various acts of violence which is factor (b) type evidence as not constituting a crime, and I believe the court has made tentative rulings as to some of them and not as to others.[52]

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[50] Appellant has summarized the pertinent procedural background in his opening brief (AOB 231-234), but in addressing respondent's contentions relating to forfeiture he discusses omissions and mischaracterizations of fact contained in respondent's own summary of that procedural background.

[51] Appellant argued that the trial court erred in admitting this evidence at pages 235-239 of his opening brief.

[52] The trial court and prosecutor agreed that, during the proceedings of December 7, 2006, the court had tentatively ruled admissible evidence of (1) an incident in which appellant engaged in mutual combat and (2) an

(continued...)

> I feel that some of the matters that the People have listed as factor (b) evidence are not consistent with the People's – with the *Phillips* case in that I don't believe that they show a crime or an attempt to commit a crime, and before the matter goes to the jury I would like for the court to just ask the People what witnesses they plan to call and what will they – whether or not it constitute[s] a crime.

(23 RT 3947-3948.)

On January 9, 2007, during the defense's penalty phase case, defense counsel stated the following:

> At this time, I know it may be premature, I intend to wait until the defense rest[s] in the penalty phase, to ask the court to dismiss most of these allegations of crimes; however, in light of the court's overruling the objections, I believe the court has indicated that at the point we make more or less [a Penal Code section] 1118 motion, that the court would deny that, so out of an abundance of caution, perhaps I should make it now, because it doesn't appear – well, it does appear that the court is going to allow many incidences to come in at this point, so I would hope the court will take my argument against these matters coming in as a motion to strike or a motion to dismiss these particular charges and outline for the jury what particular crimes were attempted or actually committed. [¶] And I would submit it to the court.

(27 RT 4636.) The trial court did not rule on defense counsel's request at that time, but simply stated that it would instruct the jury with respect to the elements of the crimes introduced pursuant to factor (b). (27 RT 4636-4637.) Finally, shortly before the prosecutor's penalty argument, defense counsel renewed his request that all prior acts be stricken on the ground that

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[52](...continued)
incident in which appellant "was calling another inmate a rat." (23 RT 3949.) The court and prosecutor further agreed that the trial court had made non-tentative rulings as to other incidents, including a letter in which appellant purportedly had threatened another inmate. (23 RT 3949-3950.)

they did not constitute crimes under *Phillips*. (31 RT 5013.)

Under these circumstances, trial counsel sufficiently preserved this issue for review. (See *People v. Partida* (2005) 27 Cal.4th 428, 435 [the purpose of requiring an objection is to alert the trial court to the issues before it and enable it to make an informed ruling].) Defense counsel repeatedly voiced his concerns that the incidents the prosecution sought to introduce under factor (b), or at least most of them, did not constitute crimes or attempted crimes. Even if defense counsel did not specifically identify appellant's encounter with Argandona as one of those incidents, the trial court was aware or reasonably should have been aware that the admissibility of all *of* the factor (b) evidence was at issue.

Moreover, in both instances, any further objections likely would have been futile as the trial court had consistently found the factor (b) evidence to be admissible. (22 RT 3821-3822 [court admitted appellant's letter to Della Rose Santos], 3822-3909 [tentatively admitting evidence regarding Benjamin Gonzalez and mutual combat incidents]; 23 RT 3949-3950 [court confirms prior rulings].) Therefore, should this Court conclude that defense counsel's objections did not encompass evidence relating to the Argandona incident, it should nevertheless excuse appellant's failure to object. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [a defendant will be excused from the necessity of either a timely objection and/or request for admonition if either would be futile].)

Finally, this Court should review the claim even if it concludes that defense counsel's objections and motions to strike were insufficient. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 613-614 [this Court reviewed defendant's claim that trial court erred by denying his motion to strike an accomplice's testimony, even though trial court had initially denied motion

to strike without prejudice and defendant failed to renew it]; *People v. Malone* (1988) 47 Cal.3d 1, 38 [although defendant failed to object or request an admonition, this Court assumed defendant did not waive asserted prosecutorial misconduct and reviewed merits of claim].)

2. Contrary to Respondent's Position, the Trial Court Erred in Admitting Evidence Relating to the December 7, 2004, Incident

In his opening brief, appellant showed that the evidence relating to appellant's encounter with Deputy Argandona did not amount to the commission of a criminal act within the meaning of Penal Code section 190.3, factor (b). (AOB 235-239.) Respondent disagrees, citing *People v. Lightsey* (2012) 54 Cal.4th 668 and *People v. Quiroga* (1993) 16 Cal.App.4th 961. (RB 156-158.) Respondent's analysis of those two cases is flawed.

As appellant noted in his opening brief (AOB 236-237), Argandona testified that he was escorting appellant back to his cell from the court line when he noticed that appellant had something in his hands and that he attempted to hide the object in his waistband. Appellant's hands were in front of him, in handcuffs, and the handcuffs were cuffed to a chain around his waist. Argandona asked appellant to show him what he had in his hands, but appellant grasped the object, ducked down and turned away. Appellant assumed what Argandona considered to be a defensive, or possibly an offensive, stance. The object appellant was holding turned out to be a bag of chips. (23 RT 4003-4005, 4015-4016.)

Respondent contends that, in distinguishing *People v. Lightsey*, *supra*, 54 Cal.4th 668 from the instant case, appellant fails to consider "the known circumstances surrounding" the incident. (RB 157.) A plain reading of *Lightsey* suggests that a trial court may consider all of the

circumstances involved in a particular incident in determining whether it constituted a crime or attempted crime within the meaning of factor (b). (*People v. Lightsey*, *supra*, 54 Cal.4th at p. 728.) Contrary to respondent's position (RB 156-157), however, *Lightsey* does not justify the consideration of wholly unrelated incidents in resolving that question.

In any event, "the known circumstances" surrounding the December 7, 2004, incident, such as Deputy Argandona's awareness of other incidents involving purported misconduct by appellant,[53] may have explained his (mistaken) concern that appellant possibly was carrying a weapon (23 RT 4006), but they had no relevance to "establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime." (*People v. Moore* (2011) 51 Cal.4th 1104, 1135, citing *People v. Phillips*, *supra*, 41 Cal.3d at p. 72.) That is, the incident did not involve force, violence or a threat, either express or implicit, to use force or violence. (See *People v. Lowery* (2011) 52 Cal.4th 419, 422, quoting *Virginia v. Black* (2003) 538 U.S. 343, 359 [explaining that a "true threat" must manifest a "serious expression of an intent to commit an act of unlawful violence"].) The People should not be permitted to use those "known circumstances" to bridge the evidentiary gap.

Respondent's analysis of *People v. Quiroga*, *supra*, 16 Cal.App.4th 961 is similarly flawed. (RB 157-158.) Respondent asserts that "[u]nlike the defendant in *Quiroga*, appellant was not merely slow to respond to

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[53] As respondent notes, Deputy Argandona testified that he had witnessed appellant's threat to stab Deputy Saucedo and his altercation with Deputy Florence, and that he was aware of appellant's possession of weapons while in custody. (RB 156, citing 23 RT 4002-4005, 4010-4011, 4021, 4037-4038, 4049-4050, 4056-4057, 4059.)

orders, but actively resisted Deputy Argandona's command by further clenching and concealing the item he was hiding in his hands, crouching, and assuming 'a defense stance or possibly an offensive stance.'" (RB 158.) However, as respondent's own summary of the facts makes clear (RB 157), Quiroga was not only slow to comply with police officers' demands, he reached between the couch cushions and, according to one of the officers, "[h]e seemed to be trying to hide his movements from me" (*id.* at p. 964). The officer ordered Quiroga to put his hands on his lap, but Quiroga was again "very uncooperative" and "finally" obeyed the order. Officer Stefani still felt uncomfortable and ordered Quiroga to stand up. After refusing several times, Quiroga finally stood up as another officer "pulled on his arm," then went to a corner of the room where another officer could observe him. (*Ibid.*) Thus, the facts underlying *Quiroga* are closer to the facts in the instant case than respondent acknowledges.

Thus, for the reasons set forth in appellant's opening brief and in the instant section, the trial court prejudicially erred in admitting evidence relating to his December 7, 2004, encounter with Deputy Argandona.

B. The Trial Court Erroneously Admitted Evidence Regarding Appellant's June 7, 2005, Confrontation With a Fellow Inmate[54]

1. Appellant's Claim is Cognizable On Appeal

According to respondent, appellant has forfeited his claim that the trial court erroneously admitted evidence regarding his June 7, 2005, confrontation with inmate Benjamin Gonzalez by failing to timely object before the testimony was aired. (RB 162, 165-166.) However, defense

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[54] Appellant argued that the trial court erred in admitting this evidence at pages 252-260 of his opening brief.

counsel already had voiced his concerns that the incidents the prosecution sought to introduce under factor (b), or at least most of them, did not constitute crimes or attempted crimes.

Specifically, on October 30, 2006, the court observed that the prosecution intended to introduce, among other things, evidence regarding a jailhouse disturbance in which appellant purportedly "yell[ed] insults and profanity at another inmate, including calling him a rat."[55] (4 RT 690.) Even if defense counsel did not specifically object to that evidence during that proceeding, he did assert that some of the incidents did not constitute crimes within the meaning of *People v. Phillips*, *supra*, 41 Cal.3d 29. (4 RT 695-696, 757-758.) On January 2, 2007, shortly before the prosecutor's opening statement, defense counsel again objected "that some of the matters that the People have listed as factor (b) evidence are not consistent with the People's – with the *Phillips* case in that I don't believe that they show a crime or an attempt to commit a crime."[56] (23 RT 3948.)

Under these circumstances, trial counsel sufficiently preserved this issue for review. (See *People v. Partida*, *supra*, 27 Cal.4th at p. 435 [the

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[55] As noted in footnote 50, *ante*, the trial court and prosecutor agreed that, during the proceedings of December 7, 2006, the court had tentatively ruled admissible evidence of the incident in which appellant "was calling [Gonzalez] a rat." (23 RT 3949.)

[56] After Deputy Andrew Cruz testified about the incident and was excused, defense counsel requested that the court instruct the jury to ignore his testimony because the incident did not constitute a crime under *People v. Phillips*, *supra*, 41 Cal.3d 29. (23 RT 4032-4033.) As respondent points out (RB 166, fn. 87), defense counsel asked that the trial court "not strike this last witness' testimony, but tell the jury to ignore it . . . ." (23 RT 4032). However, defense counsel subsequently requested that the trial court strike the factor (b) evidence. (27 RT 4636; 31 RT 5013.)

purpose of requiring an objection is to alert the trial court to the issues before it and enable it to make an informed ruling].) Defense counsel repeatedly voiced his concerns that the incidents the prosecution sought to introduce under factor (b), or at least most of them, did not constitute crimes or attempted crimes. Even if defense counsel did not specifically identify appellant's confrontation with Gonzalez as one of those incidents, the trial court was aware or reasonably should have been aware that the admissibility of all *of* the factor (b) evidence was at issue.

Moreover, in both instances, any further objections likely would have been futile as the trial court had consistently found the factor (b) evidence to be admissible (22 RT 3821-3822 [court admitted appellant's letter to Sandra Gomez], 3822-3909 [tentatively admitting evidence regarding Gonzalez and mutual combat incidents]; 23 RT 3949-3950 [court confirms prior rulings]). Therefore, should this Court conclude that defense counsel's objections did not encompass evidence relating to the Gonzalez incident, it should nevertheless excuse appellant's failure to object. (*People v. Hill, supra*, 17 Cal.4th at p. 820.)

Finally, this Court should review the claim even if it concludes that defense counsel's objections and motions to strike were insufficient. (See, e.g., *People v. Gurule, supra,* 28 Cal.4th at pp. 613-614; *People v. Malone, supra*, 47 Cal.3d at p. 38.)

C. The Trial Court Erred in Admitting Evidence That Appellant Possessed An Altered Paper Clip

1. Appellant's Claim is Cognizable On Appeal

In his opening brief, appellant argued that the trial court erred in admitting evidence that he possessed a broken paper clip, an object the prosecution asserted could be used as a handcuff key. (AOB 260-264.)

According to respondent, appellant did not object to any of the testimony regarding the incident and therefore has forfeited his claim. (RB 170-171.) Respondent's position is incorrect.

Respondent suggests that the record does not clearly show that the prosecutor was actually seeking to use the incident as factor (b) evidence. (RB 171, fn. 88.) However, as respondent acknowledges (RB 171), during October 30, 2006, proceedings, defense counsel stated that some of the matters in appellant's disciplinary reports did not amount to crimes admissible under factor (b), specifically mentioning appellant's possession of the paper clip as an example (4 RT 758). The trial court replied that, under case law, the possession of a "jailhouse made handcuff key" is admissible because it constitutes a crime or threat of a crime. (4 RT 758-759.) The court's response makes clear that, like the defense, the court believed that the prosecution intended to introduce appellant's possession of the paper clip under factor (b). Significantly, the prosecutor said nothing to the contrary.

Moreover, any further objections likely would have been futile as the trial court had consistently found the factor (b) evidence to be admissible (22 RT 3821-3822 [court admitted appellant's letter to Sandra Gomez], 3822-3909 [tentatively admitting evidence regarding Benjamin Gonzalez and mutual combat incidents]; 23 RT 3949-3950 [court confirms prior rulings]). Therefore, this Court should nevertheless excuse appellant's failure to renew his objection when the prosecutor elicited penalty phase testimony regarding the use or possible use of paper clips as handcuff keys. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

Finally, this Court should review the claim even if it concludes that defense counsel's objections and motions to strike were insufficient. (See,

e.g., *People v. Gurule*, *supra*, 28 Cal.4th at pp. 613-614; *People v. Malone*, *supra*, 47 Cal.3d at p. 38.)

Under these circumstances, appellant's claim is cognizable on appeal.

2. The Trial Court Erroneously Admitted Evidence Relating to Appellant's Possession of the Paper Clip

Appellant has adequately demonstrated that the trial court erroneously admitted evidence relating to appellant's possession of the paper clip for lack of proof that it was a handcuff key or that it carried an implied threat of violence. (AOB 261-263.) However, appellant here briefly addresses respondent's mistaken contention that his claim fails on its merits because it is based on the "false premise" that this evidence was admitted as factor (b) evidence. (RB 172.)

True, the prosecution presented evidence specifically regarding appellant's possession of the paper clip during the guilt phase rather than the penalty phase. (15 RT 2654-2657; 16 RT 2790-2793.) However, both defense expert James Esten and Luis Puig, who was called by the prosecution to rebut aspects of Esten's testimony, testified that paper clips can be used to unlock handcuffs. (28 RT 4774-4775; 29 RT 4896-4899), testimony which the jurors likely connected to the guilt phase testimony and considered under factor (b). (AOB 261-263.) Indeed, during her opening argument to the jury, the prosecutor included appellant's possession of the paper clip in her summary of the factor (b) evidence. (31 RT 5076-5077.)

Respondent acknowledges that the prosecutor referred to appellant's possession of the paper clip in her summary of factor (b) evidence, but

claims that her argument did not actually apply a factor (b) analysis to that evidence. Instead, respondent claims, the prosecutor directly related appellant's possession of the paper clip to the expert testimony about the ease with which inmates could use such items as handcuff keys, and therefore her argument was proper rebuttal of the defense theory that appellant could be securely housed as a life prisoner. (RB 173.) Yet it cannot be assumed the jury understood that evidence to be anything other than what the prosecutor *explicitly said it was in her argument*: one of the items of factor (b) evidence.[57] (31 RT 5076-5077.)

Thus, for the reasons set forth in appellant's opening brief and in the instant section, the trial court prejudicially erred in admitting evidence relating to his possession of a broken paper clip under factor (b). (See *People v. Lancaster* (2007) 41 Cal.4th 50, 92-93 [defendant's possession of handcuff key in jail was not "criminal activity" that constituted admissible aggravating evidence for purposes of factor (b)].)

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[57] As appellant pointed out in his opening brief (AOB 263), the trial court instructed the jury pursuant to CALJIC No. 8.87, which explained how the jury was to consider factor (b) evidence (6 CT 1427). It is likely that the jurors assumed that evidence of appellant's possession of the paper clip fell within one or more of the categories set forth in that instruction, particularly "attempted escape by violence" or "refusing to comply with guard's orders were [sic] compliance would reduce danger to the guards." As such, CALJIC No. 1.02 (6 CT 1422), which instructs the jury in pertinent part that "[s]tatements made by the attorneys during the trial are not evidence," would not have helped to cure the error.

D. Conclusion

For the reasons set forth in appellant's opening brief and in the preceding sections, there is a reasonable possibility that consideration of the improper factor (b) evidence discussed above, alone and in combination, affected the penalty verdict (*People v. Brown* (1988) 46 Cal.3d 432, 447), and it cannot be considered harmless beyond a reasonable doubt in that it cannot be held that "it did not contribute to the [sentence] obtained." (*Sochor v. Florida* (1992) 504 U.S. 527, 540, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, the judgment of death must be set aside.

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VII

THE TRIAL COURT'S DETERMINATION OF THE ULTIMATE FACTUAL QUESTION WHETHER THE ACTS INTRODUCED PURSUANT TO PENAL CODE SECTION 190.3, FACTOR (b), INVOLVED FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT OF FORCE OR VIOLENCE IMPERMISSIBLY INVADED THE EXCLUSIVE FACTFINDING PROVINCE OF THE JURY AND REQUIRES REVERSAL UNDER BOTH THE FEDERAL CONSTITUTION AND STATE LAW

The trial court instructed the jury that each of the criminal acts that were alleged under Penal Code section 190.3, factor (b), "involved the express or implied use of force or violence or the threat of force or violence." (6 CT 1427; 31 RT 5157.) The trial court listed the following activity as the factor (b) evidence in this case: "physical assaults and threats against guards, possession of weapons, an attempted escape by violence, refusing to comply with guard's orders were [*sic*] compliance would reduce danger to the guards, a fight with another inmate, creating a disturbance which endangered another inmate, and sending threatening letters." (6 CT 1427.) The trial court's instructions removed key issues from the jury's consideration and escalated the weight of the evidence beyond the statutory definition. Accordingly, it violated appellant's Sixth Amendment right to a trial by jury on every issue material to the case; his state and federal rights to due process of law; and his right to a reliable penalty verdict. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

Respondent contends that this Court has rejected appellant's claims in previous decisions. (RB 129, citing *People v. Bryant* (2014) 60 Cal.4th 335, 451-452; *People v. Burney* (2009) 47 Cal.4th 203, 259; *People v. Thomas* (2012) 53 Cal.4th 771, 833-834; *People v. Loker* (2008) 44 Cal.4th

691, 745; *People v. Nakahara* (2003) 30 Cal.4th 705, 720.) Appellant acknowledges that this Court has rejected similar contentions, but submits that the issue should be reconsidered. In *People v. Nakahara*, *supra*, 30 Cal.4th at p. 720, this Court stated that, although the jury had to determine the truth of a factual allegation under factor (b), its characterization as a incident involving force or violence was a matter of law for the trial court to decide.[58] However, this Court has found that the issue of whether "a particular instance of criminal activity 'involved . . . the express or implied threat to use force or violence' (§ 190.3, factor (b)) can only be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955.) Thus, a defendant may raise a defense under factor (b) that criminal activity does not involve force or violence. Such a defense creates "an ordinary evidentiary conflict for the *trier of fact*." (*Id.* at p. 957, italics added.) Accordingly, the jury must determine both that a particular act occurred and that the act involved the requisite force or violence. (See *People v. Lucas* (1995) 12 Cal.4th 415, 466-467 [jury must determine the existence of preliminary facts]; *People v. Figueroa* (1986) 41 Cal.3d 714, 734 [factual determinations are for the jury to decide].) This Court should reconsider *Nakahara* and the opinions adopting its analysis to the extent that they imply otherwise.

The trial court took the issue out of the jury's hand by instructing

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[58] The other cases cited by respondent merely adopt, either directly or indirectly, the analysis set forth in *Nakahara*. (*People v. Bryant*, *supra*, 60 Cal.4th at pp. 451-452 [citing *Burney*]; *People v. Burney*, *supra*, 47 Cal.4th at p. 259 [citing *Loker* and *People v. Monterroso* (2004) 34 Cal.4th 743, 793]; *People v. Thomas*, *supra*, 53 Cal.4th at pp. 833-834 [citing *Nakahara*]; *People v. Loker*, *supra*, 44 Cal.4th at p. 745 [citing *Nakahara* and *Monterroso*].)

that each of the acts that were alleged against appellant under factor (b) involved force or violence. (6 CT 1427; 31 RT 5157-5159.) This Court should find that the instruction created a directed verdict or a mandatory presumption that violated appellant's constitutional Sixth Amendment right to have the jury decide every factual issue. (See *Cunningham v. California* (2007) 549 U.S. 270; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

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VIII

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

Appellant argued in his opening brief that many features of California's capital sentencing scheme violate the United States Constitution. (AOB 301-317.) Appellant recognizes that this Court has previously rejected these arguments, but urges the Court to reconsider them. Respondent relies on the Court's previous precedents without any substantive new arguments. (RB 182-193.) Accordingly, no reply is necessary to respondent's contentions.

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IX

THE CUMULATIVE EFFECT OF ALL THE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

Appellant has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. (AOB 318-321.) Respondent simply contends that there was no error in appellant's trial, and that any errors which may have occurred, whether viewed individually or cumulatively, were harmless. (RB 193.) The issue is therefore joined. Should this Court find errors which it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors. No further reply to respondent's contentions is necessary.

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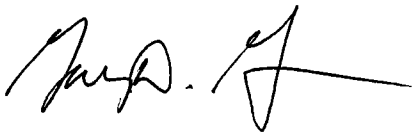
CONCLUSION

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

DATED: August 26, 2016

Respectfully submitted,

MARY K. McCOMB
State Public Defender



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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2)

I, Gary D. Garcia, am the Senior Deputy State Public Defender assigned to represent appellant Santiago Pineda in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 29,292 words in length.

DATED: August 26, 2016

GARY D. GARCIA

Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Santiago Pineda**
Case Number: **Supreme Court Crim. No. S150509**
Los Angeles County Superior Court No. NA051943-01 c/w NA061271-01

I, Neva Wandersee, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X / **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **August 26, 2016,** as follows:

Santiago Pineda CSP-SQ F-63366 San Quentin, CA 94974	Office of the Attorney General Scott A. Taryle Supervising Deputy Attorney General 300 South Spring St., Ste. 1702 Los Angeles, CA 90013
Honorable William R. Pounders Los Angeles Superior Court Capital Appeals Unit 210 West Temple Street., M-3 Los Angeles, CA 90012	California Appellate Project 101 Second Street., Suite 600 San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on August 26, 2014, at Oakland, California.

NEVA WANDERSEE