No. S119296

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS LEE BATTLE, Defendant and Appellant.	(San Bernardino County Superior Court No. FVI012605)

APPELLANT'S REPLY BRIEF

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

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant Thomas Lee Battle ("Battle") replies to contentions made by respondent ("the State") that necessitate an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in his opening brief. In particular, Battle does not present a reply on Argument VI, his challenges to the California death penalty statute, and Argument VII, his claim of cumulative prejudice resulting from errors at the penalty phase. The failure to address any particular argument, sub-argument or assertion made by the State, or to reiterate any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Battle (see *People v.*

Hill (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties are fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1] All statutory references are to the Penal Code unless stated otherwise.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING NO PRIMA FACIE CASE OF RACIAL DISCRIMINATION WHERE THE PROSECUTOR PEREMPTORILY STRUCK AFRICAN-AMERICAN PROSPECTIVE JUROR J.B. AND SIX OF THE SEVEN AFRICAN-AMERICANS CALLED TO THE JURY BOX WERE EXCUSED

A. The Trial Court Applied The Wrong Standard

In his opening brief, Battle explains that the trial court applied the wrong legal standard in deciding his motion under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). The trial court erroneously required a showing of "systematic exclusion" and evidence conclusively demonstrating racial motivation, instead of a mere inference of discrimination, at the prima facie stage. (AOB 63-68.) The State acknowledges that the trial court "invoked the term 'systematic exclusion,'" but contends it "did not articulate the standard it applied." (RB 14.) The State's argument is contradicted by the record. The trial court explicitly stated that to move "forward" beyond stage one, it would "ha[ve] to make a finding that there has been a systematic exclusion of a protective [sic] class." (5 RT 1128.) In case any ambiguity remained, the trial court immediately thereafter indicated that the "issue" it was deciding was "whether or not there's a systematic exclusion." (*Ibid.*) These statements were not idle references to an inapplicable legal term, but clear articulations of the legal issue the court believed it was required to address. The trial court plainly applied an incorrect legal standard. (*People v. Montiel* (1993) 5 Cal.4th 877, 907-908 [trial court's statement that it was "required to determine" whether there existed "systematic exclusion"

showed that it applied improper standard].)[2]

B. Remand Is The Appropriate Remedy

Battle sets forth why, under the facts of this case, this Court's customary remedy of reviewing the prima facie case de novo is insufficient to cure the trial court's explicit application of an incorrect legal standard. (AOB 68-79.) The State answers in a footnote. (RB 14, fn. 8; cf. *People v. Lucatero* (2008) 166 Cal.App.4th 1110, 1115, fn.1 [warning that "[a] footnote is not a proper place to raise an argument on appeal"].) The State contends that the basis for Battle's request for remand is a "general disagreement with this Court's practice" and is supported by "no compelling reason." (RB 14, fn.8.) To the contrary, Battle explains that his request for remand does *not* violate this Court's general practice, which is sufficient in the vast majority of *Batson/Wheeler* stage-one cases, where de novo analysis of undisputed statistical and demographic facts on a cold appellate record is appropriate and practical in the face of presumed trial court error. (AOB 74-76 & fns. 21, 22.)

In civil cases, it is commonplace to remand for redetermination of an issue reserved to the trial court when an appellate court finds the trial court applied the wrong standard or ignored evidence that it should have considered. (AOB 71; see also *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 802 [collecting cases]; *In re Charlisse C.* (2008) 45 Cal.4th 145, 167 [collecting cases].) Remand is all the more appropriate here in

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[2] In any event, the State does not dispute that even setting aside the trial court's explicit application of the wrong legal standard, de novo review is required because the trial court presumably applied the incorrect legal standard later repudiated in *Johnson v. California* (2005) 545 U.S. 162. (See AOB 51.)

light of the fact that the trial court itself found this to be a "close" case. (5 RT 1130; *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23 [remanding where "the District Court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the court found this to be a 'close case'"].)

Remand for a *Batson* stage-one determination is a practice employed in both federal and state courts, including the United States Supreme Court. (AOB 72.) Battle asks no more than application of existing precedent to his case to cure the manifest defects in the trial court's determination. Contrary to the State's cursory claim (RB 14, fn. 8), stare decisis is not implicated.

C. The State's Claim That This Court Should Disregard Record Evidence Not Explicitly Argued By Trial Counsel Is Contrary To This Court's Precedent And Is Contradicted By The State's Own Arguments

This Court has long held that the reviewing Court "considers the entire record of voir dire" to determine whether a prima facie case is established under *Batson* and *Wheeler*. (*People v. Panah* (2005) 35 Cal.4th 395, 439.) The State challenges this view. It asserts that Battle presents "various new arguments and additional facts on appeal" (RB 22) and argues that no facts in the record or argument to be drawn from them should be considered by a reviewing court unless they were presented to the trial court at the hearing (RB 23). This very argument was considered and rejected over 20 years ago in *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard*).

In *Howard,* this Court confronted a particularly bare-bones prima showing by defense counsel. Defense counsel relied solely on the fact that the prosecutor had challenged the only two black prospective jurors and "did not make any effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the

prosecutor's voir dire, or the prospective jurors' answers to questions." (*Howard, supra*, 1 Cal.4th at p. 1155.) The Court explained that, although the defense's presentation was "clearly inadequate, we have not limited our review in such cases solely to counsel's presentation at the time of the motion. This is because other circumstances might support the finding of a prima facie case even though a defendant's showing has been no more detailed than in the case before us." (*Ibid.*) Further, the Court underscored that a trial court cannot "blind itself to everything except defense counsel's presentation." (*Ibid.*; see also *People v. Neuman* (2009) 176 Cal.App.4th 571, 582 [attempt to "freeze[] the record at the time of the motion" and "ignore[] everything that happened thereafter. . . flies in the face of the rule that we examine the entire record."]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 410 ["Despite defendant's failure to carry his burden under *Wheeler* to establish a prima facie case of purposeful discrimination, we must review the record to determine if there was any basis for his claim"].)

The rule articulated in *Howard* is particularly important for stage-one cases decided before the high court, in *Johnson v. California, supra*, 545 U.S. 162, overruled this Court's unduly stringent prima facie test. After all, the remedy for a trial court's use of an erroneous legal standard to judge a *Batson* claim is diligent, de novo review by the appellate court. If a trial court is not permitted to "blind itself" to factors unaddressed by trial counsel (*Howard, supra*, 1 Cal.4th at p. 1155), an appellate court attempting to cure legal error through de novo review cannot blind itself to evidence supporting an inference of discrimination simply because it was not highlighted at trial. This is particularly true where the trial court explicitly applied a legally incorrect standard to deny the defendant's claim.

The State contradicts its own proposed rule: it argues *against* a prima facie case by citing many facts not presented to the trial court at the time of the hearing. For instance, the State cites the seating of an African-American alternate juror. (RB 18-19 & fn.10.) Not only had this not occurred at the time of the motion, it did not occur until *after* the jury itself had been selected. The State's argument therefore contradicts cases upon which the State relies. (RB 18, citing *People v. Blacksher* (2011) 52 Cal.4th 769, 802 [no prima facie case where ultimate jury included African-Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 906 [same].) The State's rule would require reviewing courts to ignore evidence routinely considered in *Batson/Wheeler* cases, e.g. the ultimate composition of the jury, acceptance of minority jurors by the prosecution, or comparative juror analysis, when this evidence was not presented (or even was impossible to present) to the trial court at the time of the ruling. Such a limitation is inconsistent with established law and should not be adopted by this Court.

D. Battle Established An Inference Of Racial Discrimination By The Prosecutor In His Peremptory Challenge Of J.B.

In his opening brief, Battle points to five factors supporting an inference of discrimination in the prosecutor's peremptory strike of Prospective Juror J.B.:

> (1) that the defendant and the stricken juror(s) were members of the same, identified minority group (African-American), and were similar only as to group membership, but were otherwise heterogeneous, while the victims and the majority of the remaining jurors were members of a different group (Caucasian); (2) that the prosecutor struck most of the members of the identified group and used a disproportionate number of his peremptory challenges against the identified group as well as against another minority group (Hispanics); (3) that the prosecutor engaged in disparate voir dire of the stricken juror at issue; (4) that the prosecutor appeared eager to

> allow one African-American prospective juror (J.K.) to be excused for hardship; and (5) that the prosecutor sought to stipulate to the excusal for cause of at least 50 percent (four of the eight) of the African-American jurors in the jury panel based on their questionnaires, despite the fact that these questionnaires did not necessarily support disqualification.

(AOB 80.) The State mistakenly attempts to minimize or simply ignore these factors.

1. The Demographic Composition of the Jury Supports an Inference of Discrimination, and Neither the Prosecutor's Delay in Striking African-American Jurors nor His Ultimate Acceptance of an African-American Alternate Undermines This Inference

The State cannot and does not challenge the fact that Battle, a black man, was tried and sentenced by an all-white jury for the murder of a white couple. The State concedes that in "some cases," the fact that an all-white jury sat in judgment of a black defendant "contributes" to an inference of discrimination. (RB 23; cf. AOB 81-82 [collecting cases holding that all-white or nearly all-white jury weighs strongly and even conclusively in support of an inference of discrimination]; see also *People v. Fuller* (1982) 136 Cal.App.3d 403, 419 [prima facie case established where three black jurors stricken and resultant jury was all-white].) However, the State claims that because defense counsel himself struck the final African-American juror (E.F.), Battle's reference to the indisputable racial composition of the jury is "misleading." (RB 24.) That defense counsel struck an African-American juror demonstrates only that defense counsel was not basing his decisions on racial stereotypes. It says nothing about the prosecutor or the evidence supporting an inference of discrimination. (*People v. Snow* (1987) 44 Cal.3d 216, 225 [the propriety of the prosecutor's peremptory challenges

must be determined without regard to the defendant's own challenges].)

Citing *People v. Blacksher*, *supra*, 52 Cal.4th 769 and *People v. Clark*, *supra*, 52 Cal.4th 856, the State asserts that two timing factors – that the prosecutor did not strike Prospective Jurors S.W. or J.B. "right away" and had not yet stricken Prospective Juror E.F. by the time defense counsel struck him – dispel any inference of discrimination. (RB 18.) The point in *Blacksher* was that the prosecutor had *accepted* six African-American jurors, who served on the jury, despite challenging two others. (*People v. Blacksher*, *supra*, 52 Cal.4th 769 at p. 802.) The jury that convicted and sentenced Battle to death had no African-Americans. In *People v. Clark* (2011) 52 Cal.4th 856, the Court also relied on the fact that an African-American served on the jury, in addition to the prosecutor's delay in striking African-American jurors, (*id.* at p. 906), so it too is distinguishable.[3]

To the extent that waiting to excuse African-American jurors has any relevance, it is minimal. A prosecutor's decision to delay immediately striking all African-American jurors does not affirmatively establish that the peremptory challenges were race-blind because it is equally consistent with a strategy to avoid detection of race-conscious strikes. (See *People v. Motton* (1985) 39 Cal.3d 596, 607 [even where prosecutor repeatedly accepts panel including black jurors and later strikes them, reviewing court must consider possibility that prosecutor's temporary acceptance was merely a ploy to hide his racially-discriminatory motive].)

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[3] For the reasons stated by Justice Kennard in her dissenting opinion, Battle disagrees with the conclusion in *People v. Clark* (2011) 52 Cal.4th 856 that the statistical showing in that case did not rise to the level of a prima facie case. (*Id.* at pp. 1009-1013.)

Here, as in *People v. Motton, supra*, 39 Cal.3d 596, the prosecutor did not merely delay striking E.F., but twice accepted a panel that included him. (6 RT 1199, 1204.) Although "not a conclusive factor, 'the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor'" to consider in analyzing a *Batson/Wheeler* objection [citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 926.) Given the "practical realities of jury selection," however, this Court has held that accepting a panel that includes an African-American does not dispel an inference of discrimination where a "highly undesirable juror" remains in the panel. (*People v. Motton*, *supra*, at p. 608; see *People v. Reynoso*, *supra*, at p. 942, fn. 6 (dis. opn. of Moreno, J.) [reliance on prosecutor's acceptance of jurors can be "misleading" without analyzing context]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1320 (conc. and dis. opn. of Kennard, J.) [proper analysis of prosecutor's acceptance of jurors from protected group must assess "tactical realities of jury selection"].)

Immediately before the prosecutor first accepted a panel including E.F., the defense had lodged an unsuccessful cause challenge to Juror R.C., based on what defense counsel termed the juror's "very frightening" religious views and his statements both in his questionnaire and during voir dire suggesting that he would automatically impose death if the defendant were found guilty. (6 RT 1198.) It was only at this point that the prosecutor chose – for the first time – to accept the panel. (6 RT 1199.) Unsurprisingly, the defense immediately struck R.C. (6 RT 1199.) In other words, the prosecutor was virtually assured that the defense would not accept the panel, and thus the prosecutor was under no threat of seating E.F. by accepting the panel at that time.

Remaining on the panel at the time of the prosecutor's second acceptance of E.F. (and also present during the first acceptance) was R.H., another "highly undesirable" juror for the defense. (*People v. Motton, supra*, 39 Cal.3d at p. 608.) R.H. was a former member of the "San Bernardino Sheriff's Rangers," a group that rode with, and provided political and financial backing for, the San Bernardino County Sheriff. (6 RT 1112.) R.H.'s questionnaire stated, "I favor the death penalty." (13 CT 3582.) The San Bernardino Sheriff was responsible for interrogating Battle, and the defense challenged the interrogation tactics, including the failure to record portions of the interrogation. (12 RT 3150, 3192, 3220.) In addition, the admissions and confessions the sheriff deputies elicited from Battle were the centerpiece of the prosecution's case. Therefore, defense counsel was highly unlikely to accept a panel including a juror who both favored the death penalty and had with ties to the San Bernardino Sheriff's Department. Again unsurprisingly, defense counsel immediately struck R.H. after the prosecutor temporarily accepted the panel. (6 RT 1204.) R.H. was replaced by G.L., a psychology student working in social services who "would favor life in prison" (6 RT 1205-1206), and whom the prosecutor immediately excused (6 RT 1208).[4]

In these circumstances, because the defense was extremely unlikely to accept the panel as constituted at the time of the prosecutor's first or

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[4] Also present on the panel at the time of the prosecutor's second acceptance was juror Billie A. (21 CT 5919-5939 [questionnaire]), a different juror than B.A. (17 CT 4855-4876 [questionnaire]). Billie A., whose son was in law enforcement (21 CT 5928), not only answered that he favored the death penalty (21 CT 5934), but volunteered during voir dire that he had recently voted for it (6 RT 1200). Defense counsel excused him after he excused R.H. (6 RT 1214.)

second acceptance, there is "no way to determine whether the prosecutor would have challenged [E.F.] had the defense not done so first." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 933 (dis. opn. of Kennard, J.); see *People v. Motton, supra*, 39 Cal.3d at p. 608 [prima facie case found where defense later struck one of the black jurors temporarily accepted by the prosecution].) In fact, the prosecutor earlier had *repeated* opportunities to seat E.F. when the defense passed, but instead chose to continue with further peremptory challenges. (6 RT 1145-1146, 1162.)

Equally importantly, the prosecutor's treatment of E.F. at the time he temporarily accepted the panel is of limited relevance because the court had already warned him that it was a "close" case. (5 RT 1130.) Not only was the prosecutor warned, but E.F. was the *sole remaining minority juror in the box* every time the prosecutor exercised a peremptory challenge after the denial of the *Batson/Wheeler* motion.[5] The optics of the prosecutor striking E.F., the last nonwhite juror in the box, would not have been good. Given that the trial court had found no inference of discrimination, striking E.F. might even have threatened the conviction on appeal. (See *Johnson v. California*, *supra*, 545 U.S. at p. 164 [striking three of three black jurors established prima facie case].) Therefore, little can be ascertained from the prosecutor's temporary acceptance of E.F. Certainly, it does not dispel the other significant evidence supporting an inference of discrimination.

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[5] Juror S.H., who wrote "white" under his race and ethnic origin (15 RT 4352), had a Hispanic surname. However, he was immediately stricken by the defense upon entering the panel (6 RT 1167), and thus the prosecutor never had the opportunity to strike while S.H. was in the box.

2. The Pattern of Strikes Provides a Strong Inference that the Prosecutor Preferred White Jurors

There is no denying the fact that, due to the small number of African-American prospective jurors subject to challenge in this case, there is significant element of uncertainty in relying solely on a statistical analysis of the proportion of African-Americans stricken. (See AOB 86.) However, the pattern of strikes was not limited to African-Americans. The State ignores Battle's holistic explanation of how the jury came to be an all-white one: the prosecutor targeted not only a disproportionate number of African-American jurors, but also Hispanic jurors. (See *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 921 ["Striking members of more than one protected group is also relevant and may indicate a discriminatory intent"].)

When the motion was considered, almost 50 percent of the prosecutor's strikes (5 of 11) were against Hispanic or African-American jurors. (See AOB 89-91.)[6] When J.B. was stricken, the numbers were even

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[6] Battle focuses on the time the motion was considered and the time of J.B. was excused for two reasons. First, these respective time frames are when the challenged strike occurred and the trial court made its ruling. Second, statistics based on the jurors who followed are not particularly useful because all jurors called after the *Batson/Wheeler* motion self-identified as white. (See 6 RT 1167 and *ante* fn. 5 [S.H. identified himself as white].) And, as noted above, E.F., the only other nonwhite juror, was stricken by the defense, a fact that provides little insight into the prosecutor's intent.

The prosecutor's first 11 strikes were against white juror D.S. (5 RT 986), Hispanic juror M.T. (5 RT 1003), Hispanic juror D.P. (5 RT 1020), Hispanic juror E.M. (5 RT 1026), African-American juror S.W. (5 RT 1032), white juror T.M. (5 RT 1043), white juror V.E. (5 RT 1050), white juror G.J. (5 RT 1091), African-American juror J.B. (5 RT 1099), white

(continued...)

higher – at 55 percent (5 of 9). Yet, during the first nine prosecutorial peremptories, Hispanic and African-American jurors comprised – on average – only 23 percent of the jurors in the box. (5 RT 893-1099.) "'Happenstance is unlikely to produce this disparity.'" (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241, quoting *Miller -El v. Cockrell* (2003) 537 U.S. 322, 342.)

In fact, the odds that the prosecutor would randomly strike 5 African-American or Hispanic jurors in his first nine challenges are exceedingly low – approximately 3 in a 100. The Seventh Circuit engaged in a similar probability estimation in *Hooper v. Ryan* (7th Cir. 2013) 729 F.3d 782:

> We asked at oral argument whether anyone in either the state or federal litigation had performed a statistical analysis to determine whether, if 11 peremptory challenges had been exercised without regard to race, all five eligible black members of a 63-person venire would have been excused. No one hired a statistician to do the analysis. Our back-of-the-envelope calculation suggests that the probability is vanishingly small.

(*Id.* at p. 786.) Indeed, to the extent this Court accepts the State's invitation to focus on whether or not the prosecutor acted "right away" on a discriminatory impulse (RB 18), the odds that the prosecutor would randomly use 4 of his first 5 strikes on non-white jurors are less than 2 in 100.[7] In short, the State's claim that Battle presents a "weak" statistical

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[6](...continued)
juror D.B. (5 RT 1107), and white juror L.R. (5 RT 1115.)

[7] The prosecutor's first five strikes were against white juror D.S. (5 RT 986), Hispanic juror M.T. (5 RT 1003), Hispanic juror D.P. (5 RT 1020), Hispanic juror E.M. (5 RT 1026), African-American juror S.W. (5 (continued...)

case (RB 18) is simply incorrect. The pattern of the prosecution's strikes strongly suggests that the prosecutor preferred white jurors and was disproportionately targeting Hispanic and African-American jurors. This supports an inference of discrimination in the peremptory challenge of J.B.

Rather than counter the disparate pattern of strikes against minority prospective jurors, the State first points to the fact that the prosecutor accepted an African-American alternate. (RB 18-19 & fn. 10.) As Battle notes in his opening brief, the parties' strategies for selecting alternate jurors are so markedly different from their strategies for selecting the actual jury that this Court does not even consider these jurors to be "similarly situated" for purposes of comparative analysis. (AOB 83, fn. 25; *People v. Lewis* (2006) 39 Cal.4th 970, 1018, fn. 13.) The reason for this conclusion is that fewer peremptory challenges are allotted for alternate juror selection and, even if alternates are ultimately seated, there is only a small chance that any one alternate will be selected. (*Ibid.*) As a result, a party might "decide[] not to challenge a prospective alternate juror even if counsel would have challenged a person with similar views who was being considered for service on the originally constituted jury." (*Ibid.*)

The State's contrary argument – that the likelihood an alternate would be seated on the jury was "very high" and thus the prosecutor's decision not to strike the sole African-American alternate is "significant" (RB 18-19, fn. 10) – ignores the point made in *Lewis*.[8] Despite a long trial

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[7](...continued)
RT 1032).

[8] The States incorrectly calculates the number of alternates ultimately seated. There were not one, but two alternates who were seated (continued...)

resulting in two jurors being excused, the one African-American alternate in this case was never seated. Surely, even a prosecutor who let group bias infect jury selection and struck African-American jurors would not be ignorant of the low likelihood that the sole African-American alternate would actually serve on the jury and therefore might forego striking the juror. (See *People v. Lewis*, *supra*, 39 Cal.4th at p. 1018, fn. 13.)

In addition, the trial court had "in effect warned" (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078) the prosecutor that it might soon find a prima facie case by saying it was already a "close" case. (5 RT 1130; see also *People v. Trevino* (1985) 39 Cal.3d 667, 688 [discounting seating of Hispanic alternate where "prosecution left a solitary Spanish surnamed juror on the panel as an alternate, but only after the defense advised the court that it intended to make the *Wheeler* motion"], disapproved on other grounds by *People v. Johnson* (1989) 47 Cal.3d 1194, 1216-1221.) Like the prosecutor's temporary acceptance of juror E.F., the prosecutor might well have decided that striking the sole African-American alternate would raise the trial court's suspicions and cause it to require explanations for all the challenged jurors. Thus, it is of minimal relevance that the prosecutor chose not to strike the lone African-American alternate.

The State also attempts to undercut the statistical pattern by pointing out that S.W., one of the African-Americans peremptorily challenged, was

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[8](...continued)
during the penalty trial. (13 RT 3378 [replacement of original seated Juror No. 11 with Alternate No. 3]; 14 RT 3579-3581 [replacement of Alternate No. 3 with Alternate No. 2.)

subject to a prior cause challenge. (RB at 19-20, & fn. 11.)[9] As this Court has noted, circumstances may "appear[] in the record [that] dispel any inference of discriminatory motive." (*People v. Clark*, *supra*, 52 Cal.4th at p. 906.) Nevertheless, affirmatively dispelling an otherwise fair inference of discrimination "requires more than a determination that the record could have supported race-neutral reasons for the prosecutor's use of his peremptory challenges." (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110.) This principle is particularly important under de novo review at stage one, where the trial court's observations of voir dire are not entitled to deference. Thus, where, as here, there are two reasonable interpretations of the record – one which is consistent with a discriminatory motive – the record does little to dispel an inference of discrimination.

Although the fact that the prosecutor made an unsuccessful cause challenge does provide a theoretically race-neutral explanation for the strike of S.W., an unsuccessful cause challenge is not talismanic. To the contrary, an unsuccessful cause challenge can be evidence of discrimination, if it is legally unsupported. (*Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 957 [legally dubious cause challenge "add[s] to the evidence from which an inference of improper discrimination could be drawn"].) It is questionable whether juror S.W.'s stated concerns that she "didn't know" whether she could "do death," that it might be "too difficult" and or that she did not want "to have any part of it" (RB 20) would provide a legal basis for a

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[9] The State appears to claim that Battle independently challenges the strike of S.W. (RB at 12, 19, fn. 11.) However, no *Batson/Wheeler* objection was lodged with respect to S.W., and Battle's claim is directed at the exclusion of juror J.B. (AOB 50, 56 [Battle's *Batson/Wheeler* claim made with respect to juror J.B.].)

cause excusal, particularly in light of her repeated affirmations (both in voir dire and in her questionnaire) that she could consider either death or life without possibility of parole. (5 RT 977-978; 19 CT 5346-5347 [S.W. "favored" death penalty, had no religious or moral objections, was willing to consider aggravating and mitigating factors].) In fact, as the State itself observes, the prosecutor did not even press for a final ruling on this challenge (RB 21), suggesting that the prosecutor himself did not believe the challenge was substantiated in light of S.W.'s voir dire.

The prosecutor's unsupported challenge of S.W. is consistent with a racially conscious attempt to purge the jury of African-Americans. This weakly supported and tepidly advocated cause challenge does not preclude Battle from relying on the strike of S.W. as part of an overall pattern of disparate strikes against minority jurors.

3. The Court Should Consider the Evidence of Disparate Questioning

In his opening brief, Battle points to two ways in which the prosecutor's questioning of African-American prospective jurors differed from his questioning of white jurors. First, the questioning of African-American J.B. (as well as African-Americans A.H. and J.K.) was significantly longer than that of any of the seated white jurors or of other non-black stricken jurors. (AOB 92-94.) Second, the form of the death qualification questions posed by the prosecutor was frequently more intense for African-American jurors than for most other non-African-American jurors. (AOB 95-97.)

With respect to the length of questioning, the State focuses solely on the questioning of J.B., and ignores Battle's citation to lengthier questioning of other African-American prospective jurors. (See AOB 95.) The State

asserts that the length of J.B.'s voir dire is attributable to J.B.'s questionnaire response that the death penalty might be "'cruel'" and "'inhumane.'" (RB 21.) But analysis of the questioning does not bear out this position. J.B. provided a relatively brief – and completely reasonable – statement that she had written the words "inhumane" and "cruel" not out of opposition to the death penalty, but in reference to innocent people in Texas who had been sent to death row. (5 RT 1040.) Even when the prosecutor pressed further, this exchange only accounted for a single page of J.B.'s voir dire. Excising this portion of her voir dire would still leave the questioning of J.B. longer than that of virtually all other jurors.

With respect to the intensity of the questioning, the State first argues that there is "no way to determine disproportionality" in the prosecutor's questioning without comparing it "against Battle's questioning of non-Black jurors." (RB 24.) That the prosecutor frequently used differently styled questions when speaking to African-American jurors has nothing to do with how defense counsel questioned jurors of any race.[10] The reality is that six of the seven African-American jurors the prosecutor questioned were examined with greater scrutiny. (AOB 97-98.) This fact alone is suspicious. (See *Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, 1006 [affirming grant of habeas relief on *Batson* claim where district court relied on "a provocative question regarding the death penalty" asked to the lone African-American juror challenged].) Nor does the State explain why

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[10] If the State intended to assert that it is not possible to assess whether the form of questioning was disproportionate unless the prosecutor's questions to black jurors were matched "against the [*prosecutor's*] questioning of non-black jurors," Battle provided a list of phrases the prosecutor used with such jurors. (AOB 95-96.)

African-American jurors were disproportionately subject to repeated formulations of the same death qualification questions in the face of initial affirmations that they could impose death. (See AOB 98.)

Instead, the State provides an incomplete characterization of an exchange in which J.B. used the word "unfortunate" when discussing the requirement that she base her decision on the law, not personal feelings. (See RB 19.) The full context was as follows:

> [Prosecutor] Q. Right. No. And I think everybody would agree with you [that it is cruel and inhumane to put innocent people on death row].
>
> Is that something that's going to be on your mind, what happened in Texas, that's going to cause you or give you some concern if you reach the penalty phase in this case where you say, Well, I know about perhaps there have been some innocent people that have been put on death row. I don't want to make that mistake; I'm not going to vote for death. It's just easier. I will give him life without parole?
>
> [J.B.] A. No. Because I have to live with myself, and I go with my first feeling and I go with basically facts. And if -- it's unfortunate that if it's proven that he's guilty I have to go along with the law. There's -- I can't go by, This is what [J.B.] feels. I have to go by, This is the law, this is what he did, this is what was proven. And without a reasonable doubt I have to. I have to vote on it.
>
> [Prosecutor] Q. No problem being somebody in the back, being part of the group that decides, Hey, death is the appropriate sentence and coming back out here looking at the defendant and telling him so?

[J.B.] A. No. I don't have a problem with that. I'm my own person. I don't let anyone sway me right or left. I have to go by what I feel.

(5 RT 1040-1041.)

Although J.B. did use the word "unfortunate" when affirming that jurors must follow the law, this appears to be in reference to the prosecutor's suggestion that some jurors might find it "easier" to simply vote for life. (5 RT 1040.) There is nothing in the substance of J.B.'s response that suggests she thought delivering a death sentence was "unfortunate" for anyone other than the defendant. Indeed, immediately after this statement, J.B. stated unequivocally, "No. I don't have a problem with that" when asked if she had any qualms about "looking at the defendant and telling him" that death was the appropriate sentence. (5 RT 1041.) In sum, J.B.'s answers do not support the State's contention that she was "uncomfortable with the death penalty." (RB 21.)

4. The Prosecutor's Advocacy on Behalf of the Hardship Excusal of J.K. Further Evidences Racial Bias

In his opening brief, Battle explains that the prosecutor expressed an immediate willingness to stipulate to juror J.K.'s excusal, even prior to any verification that jury service would, in fact, pose a hardship for her due to a scheduling conflict with a work project related to her masters degree program. (AOB 99-101.) The State counters that J.K.'s hardship was "unequivocal from the beginning." (RB 24.) This claim is contradicted by J.K.'s own statements and the conduct of the trial court. When first questioned in detail, J.K. stated that she needed to attend certain workplace meetings for her schoolwork, but she did not yet appear to know when the meetings would be held. (See 4 RT 846-847.) As noted in the opening

brief, the trial court's questioning confirmed defense counsel's belief that the juror had not yet attempted to work out the alleged scheduling problem with her supervisor, and the court requested that she attempt to do so. (AOB 100; 5 RT 1060 [court inquiry "have you made any attempts to talk to your work such that you could do what you need to do for your class with them? Have you done that yet?" J.K. "*No, I haven't*," italics added].) J.K.'s subsequent effort to discern whether a actual conflict existed did not decisively resolve the problem (5 RT 1073-1076), and a hardship was ultimately found (5 RT 1076-1077). Nonetheless, the prosecutor's willingness to stipulate *prior* to resolving that a scheduling conflict actually existed raises doubt about his motive.

But even were the State's assertion – that the hardship was unequivocal from the beginning – correct, the prosecutor had no need to advocate one way or the other. In fact, if the hardship was indeed clear from the beginning, the outcome would have been inevitable, and there would have been no need for the prosecutor to speak for J.K. in the first place. Instead, he acted as an advocate for her excusal. While the record also suggests that defense counsel conversely advocated for keeping J.K. in the venire, there was no obvious reason for the prosecutor to fight defense counsel on this point, particularly since J.K. repeatedly indicated she could vote for death. (See 5 RT 1056-1058.) This fact supports the prima facie case.

5. This Court Should Not Ignore the Prosecutor's Numerous Offers to Stipulate to Excusing African-American Jurors

In his opening brief, Battle explains that the prosecutor offered to stipulate to excuse for cause an astounding percentage (61 percent) of

African-American jurors. (AOB 102-103 & fns. 39-40.)[11] This figure itself is difficult to interpret in isolation because it could have race-neutral explanations. However, during the *Batson/Wheeler* hearing, defense counsel pointed to evidence that the prosecutor's offers to stipulate to excusing African-American jurors were suspicious, noting that many of them were unsubstantiated. (5 RT 1126-1127.) The State first argues that this Court should ignore this evidence because defense counsel stated – only with respect to the offer to stipulate to excuse J.B. – that "he [could not] say . . . for sure" that the prosecutor had offered to stipulate to her excusal. (RB 22.) The State's recitation of the record is materially incomplete. Defense counsel stated:

> I can't say for sure because I don't have the document in front of me -- *Mr. Mazurek would be able to confirm this* – - and I cannot say this for sure, but I am relatively certain that in Mr. Mazurek's list of proposed stipulations which he presented to me, I believe that [J.B.] was listed -- was on that list. And there's absolutely no reason -- and if she isn't, I apologize, and *I would ask to be corrected by [Mr. Mazurek] on that.* But I believe that he requested me to stipulate to [J.B.]. And from her questionnaire, there's absolutely no reason to do that other than racial bias.
>
> This happened on other jurors in Mr. Mazurek's list of proposed stipulations. And I would suggest as an example 173, [A.H.], who's still in the panel. And *he asked to stipulate* to that juror, and there was absolutely no reason. Her questionnaire was completely unbiased. She said she could be completely fair, she neither favored nor opposed the death penalty, and yet he put that on his list of stipulations. And there are other examples too that *I would ask to -- to have a chance maybe to present to the Court from that*

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[11] In contrast, only 33 percent of white jurors were subject to stipulated cause excusals. (AOB 103 & fn. 40.)

particular list. But that --

> The fact that Mr. Mazurek was seeking to exclude jurors prior to us even beginning voir dire based on race and the fact that he excluded a very fair juror, [J.B.], in a case where Mr. Battle is African-American where there's very few African-Americans available to him to serve on the jury is a violation of his Fourteenth Amendment rights.

(5 RT 1126-1127, italics added.)

In short, defense counsel not only stated (1) that he was "relatively certain" about the fact that the prosecutor tendered a cause stipulation to J.B. and stated in no uncertain terms that the prosecutor offered to stipulate to A.H., but also (2) asked to be corrected by the prosecutor if he was wrong and (3) requested from the court an opportunity to present evidence from the original list if his proffer was deemed insufficient. The prosecutor offered no correction. Instead of granting an opportunity to present further evidence on the issue, the trial court explained that absent definitive proof of "racial[] motivat[ion]" such as stipulating *only* to minorities, it would accept the proposed stipulations at face value and not consider their relevance. (5 RT 1129-1130; cf. *People v. Motton, supra*, 39 Cal.3d at p. 604 ["deficiencies in the record in this case can be attributed in part to the obstructions imposed by the trial judge" who "refused to invoke the aid of the prosecutor in reconstructing the record"].)

Batson hearings are often fast-paced and based on oral proffers by the parties. Rarely do they involve the submission of exhibits or the taking of testimony. This is particularly true of stage-one proceedings, where, due to the procedural posture, the record is least developed. For instance, the most commonly cited factor – the race of the jurors stricken – often is not proved with reference to exhibits or questionnaires, but simply alleged by

the movant and observed by the parties. (See *People v. Motton, supra*, 39 Cal.3d at p. 604 [defense counsel need not establish race by question and answer].) Trial courts therefore rely on the parties to dispute these allegations, if dispute is to be had. (Cf. *People v. Bonilla* (2007) 41 Cal.4th 313, 344 [no inference of discrimination arose where prosecutor claimed he did not realize that juror was Hispanic].) Similarly, this Court has relied on the parties' failure to dispute assertions made during *Batson* hearings. (*People v. Elliott* (2012) 53 Cal.4th 535, 560 [noting that "[d]efense counsel did not dispute the prosecutor's statements" that juror was "weak on death"]; see *People v. Chism* (2014) 58 Cal.4th 1266, 1344 (conc. and dis. opn. of Liu J.) [relying on the defense counsel's "uncontested observation" that in first penalty trial, the two holdouts were black women].) A contrary rule would require the objecting party to turn every *Batson* motion into a full-blown evidentiary hearing at stage one.

The State's attempts to minimize the relevance of the proffered stipulations fare no better than its request that this Court ignore them. Although the prosecutor at trial gave no explanation for why he attempted to disqualify J.B., the State on appeal manufactures one: that J.B.'s questionnaire response calling the death penalty "'cruel'" and "'inhumane'" could "could have led the prosecutor to reasonably believe that she was unwilling to impose the death penalty." (RB 22.) Although worthy of follow up in voir dire, J.B.'s single, ambiguous questionnaire response was not so obviously disqualifying as to warrant a stipulation. Indeed, it would have been error had the court relied on this answer alone to disqualify her. (*People v. Leon* (2015) 61 Cal.4th 569, 590 [juror's questionnaire response that "I do not believe the death penalty is a humain [sic] punishment" – even when accompanied by statement that he would automatically impose

life – insufficient to disqualify juror who indicated he could set aside feelings].)

But most importantly, no reasonable party would read the questionnaire response in isolation. J.B. stated that she (1) neither favored nor opposed the death penalty and would seriously consider both possible penalties, (2) did not have any moral, philosophical or religious objections to the death penalty, (3) would not automatically vote either for life or death if the Battle was convicted of special circumstances murder, (4) would be able to weigh and consider all mitigating and aggravating facts in the case, and (5) thought the death penalty was used "about right" in California. (14 CT 4086-4088.) In short, it is simply impossible to read the entirety of J.B.'s questionnaire as demonstrating, as the State argues, that she was so unwilling to impose the death penalty that she was worthy of a stipulated disqualification. (RB 22.) As noted previously (*ante* at p. 17), an unjustified challenge for cause supports an inference of discrimination. (*Crittenden v. Ayers*, *supra*, 624 F.3d at p. 957.) So too should the prosecutor's unjustified attempt to remove by stipulation a qualified juror who later was the subject of the disputed peremptory challenge.

The State similarly tries to justify the proposed stipulation to A.H. based on an isolated questionnaire response: that A.H. would always vote not guilty to avoid a penalty hearing. (RB 22.) But crucially, the State fails to address Battle's point that the *prosecutor himself* later suggested that this might have been an inadvertent mistake in checking a box, an error apparently committed by several jurors. (6 RT 1241-1242; AOB 111-112.) It is not surprising that the prosecutor considered this possibility, since the response clearly conflicted with A.H.'s other measured and unobjectionable

questionnaire responses. (See 13 CT 3638-3640.)[12]

Although the State underscores that A.H. was later dismissed by stipulation (RB 22), her excusal was based on voir dire responses, and notably *not* because she would automatically vote not guilty to avoid a penalty trial – the questionnaire response the State claims was the basis for the original proffered stipulation. In sum, A.H. was a good candidate for the prosecutor to voir dire, not one whose disqualification was so manifest from her questionnaire as to warrant a stipulated disqualification. (See *People v. Turner* (1986) 42 Cal.3d 711, 727 [giving weight to fact that the prosecutor immediately removed the last black prospective juror, rather than asked the follow-up questions about juror's ambiguous remark].)

The State takes the same tack with M.N. (RB 25.) It notes her reference to a religious objection to the death penalty and ignores all other conflicting questionnaire responses. (See 26 CT 5654 [she neither favored nor opposed the death penalty and would consider both possible penalties and would not automatically vote for or against death].) Indeed, in light of her "conflicting" and "neutral" answers, the State concedes the prosecutor could have harbored no more than a "suspicion" that she would be unable to serve. (RB 25.) But this is *precisely* the point. Although the prosecutor may have suspected that after being pressed in voir dire M.N. might be disqualified, it is the fact that he hoped to target her beforehand – based on suspicions alone – that is highly questionable.

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[12] These answers show that, like J.B., A.H. neither favored nor opposed the death penalty, would not automatically vote for either death or a life sentence, had no moral or religious objection to the death penalty, was willing to weigh and consider all the aggravating and mitigating factors in deciding the penalty and thought that the death penalty was used about the right amount. (13 CT 3638-3640.)

As for B.A., the State first tries to reinvent the record, claiming that the prosecutor – who stated he was "willing to stipulate" to excuse B.A. – in fact "preferred" to have B.A. remain in the venire. (RB 25.) The record could not be clearer: the prosecutor stated, "*I offered* to stipulate to an African/American [B.A.]," but defense counsel "wouldn't let *me*." (6 RT 1246-1247, italics added.) Although, according to the prosecutor, defense counsel initially agreed to join the stipulation, to which the prosecution was a "willing" party (6 RT 1246), the defense "withdrew" its offer (6 RT 1247). The record simply does not support the State's position that the prosecutor did not offer to stipulate to excuse B.A. or that it preferred to keep B.A. in the venire.

The State next claims that the prosecutor's offer to stipulate to excuse B.A. was unremarkable "because he knew that the defense presumptively would not want a peace officer on the jury." (RB 26.) But the central point is that B.A.'s *federal* peace officer status did *not* disqualify him from service. (6 RT 1246 [B.A. is "a federal peace officer; he's not an 832 police officer. He used to be, but he's not anymore."].) In an adversarial system, it is highly unusual for a prosecutor to agree to an *unjustified* stipulated excusal simply because the defense "would not want a [former] peace officer on the jury." (RB 26.) Moreover, B.A. was a peace officer who came from a family of peace officers and gave strongly pro-prosecution responses in his questionnaire. (AOB 112, fn. 49.) Although it is perhaps possible that the prosecutor was willing to sacrifice strategic advantage in jury selection in this capital case, such a conclusion is belied by this record. (See 5 RT 1060 [prosecutor declined court's suggestion that he could resolve dispute over J.K.'s hardship by using one of his peremptory challenges to excuse her].)

In isolation, perhaps any one of these unsubstantiated offers to stipulate could be overlooked. But considered collectively, a clear pattern emerges. The prosecutor was willing to stipulate to excuse African-American jurors where their questionnaire responses did not justify disqualification. This supports an inference of discrimination in his use of peremptory challenge against J.B.

In the same vein, perhaps looked at individually, no single factor cited in support of a prima facie case may raise an inference of discrimination. However, reviewed de novo in their totality, these factors – the unstated racial undercurrents in the case, the statistical disparity in using peremptory challenges against non-white jurors, the disparate questioning of African-American jurors, the unjustified offers to stipulate to excuse African-American jurors for cause or hardship – are sufficient to meet the "quite low" threshold for making a prima facie case. (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1145.) The case should be remanded for further proceedings on Battle's *Batson/Wheeler* claim or, more appropriately given the long passage of time, reversed. (AOB 117.)

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II.

BATTLE'S INVOLUNTARY STATEMENTS TO SPECIAL INVESTIGATOR HEARD AND SUBSEQUENTLY TO OTHER LAW ENFORCEMENT PERSONNEL WERE ADMITTED AT TRIAL IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

The trial court erred in permitting the prosecutor to introduce into evidence Battle's tape-recorded statement to Sheriff's Investigator Robert Heard, and his subsequent statements to detectives Michael Gilliam and Derek Pacifico. Battle's pivotal admission – that he knew the perpetrators' plan was to kill Andrew and Shirley Demko – was elicited by Heard's coercive interrogation tactics, and the involuntariness of this admission taints the admissions Battle made later the same day.

In light of the prosecutor's reliance on Battle's statements, the jury's lengthy deliberations and inquiries, and the weakness of the case apart from Battle's admissions, the erroneous admission of the statements at the guilt phase cannot be said to be harmless beyond a reasonable doubt. At a minimum, because Battle's statements portrayed him as the actual killer or as an aider and abetter acting with an intent to kill, the statements' erroneous admission mandates reversal of the special circumstance findings and the death sentence.

A. Battle's Admission That He Knew Of the Plan to Kill and His Subsequent Admissions Were the Product of Heard's Coercive Interrogation Tactics

During the November 26 interrogation by detectives Pacifico and Gilliam, Battle admitted participating in burglary and robbery at the Demkos' residence and acknowledged the Demkos had been kidnapped, but he maintained he got out of the car while the Demkos were still alive and denied knowing the plan was to kill them. (3 CT 832-850.) As explained

in Battle's opening brief (AOB 125-151), when Heard interrogated Battle the next day, he implicitly promised he could help if Battle told him the truth, materially misrepresented the law of homicide, and played on Battle's expressed fear for his and his three-year-old godson Marquis's safety. These coercive tactics rendered involuntary Battle's admission that he knew of the plan to kill, and tainted the statements Battle made to law enforcement later the same day, including his ultimate confession to choking and stabbing Andrew Demko and stabbing Shirley Demko.

1. The State's Arguments on Non-Dispositive Points Do Not Answer Battle's Claim

The State makes a number of arguments that do not respond to or defeat Battle's claim. To be sure, the voluntariness of an interrogation statement is judged by examining the totality of the circumstances surrounding the admission or confession. (See AOB 124, citing *Colorado v. Connelly* (1986) 479 U.S. 157, 176 and *People v. McWhorter* (2009) 47 Cal.4th 318, 347.) The State, however, disputes points that are not at issue.

First, the State argues, based on a discussion of such factors such as the interrogating officers' attire, the participants' tones of voice, the offers of food and drink, the overall length of the interrogations and number of breaks taken (RB 32-34), that there was nothing coercive about "the nature of the interviews" (RB 34). Battle has not argued there was. Rather, it is what Heard *said* to Battle to induce him to make the admissions he made that renders Battle's statements involuntary.

Second, the State points out that Battle signed a consent form, agreeing that he was taking the polygraph examination voluntarily, "without duress, coercion, promise of reward or immunity," and that he knew he could stop the examination at any time. (RB 33, citing 4 CT 1165B, and 4

CT 967-970.) Battle has not argued his consent to take the polygraph examination was coerced or involuntary. Rather, the issue is whether, during the interrogation Heard conducted before administering the polygraph examination, he improperly elicited Battle's admission to knowing of the plan to kill the Demkos.

Third, the State contends that Battle's statements were not "true confessions," but rather "incidental admissions" that he made while trying to exculpate himself and blame others. (RB 34.)[13] The distinction between confessions and admissions, however, is irrelevant. This Court has long held that the due process clause of the Fourteenth Amendment and the state Constitution preclude the admission of any involuntary statement, whether an admission or a confession, obtained from a criminal suspect through state compulsion. (*People v. Haydel* (1974) 12 Cal.3d 190, 197, citing *Ashcraft v. Tennessee* (1946) 327 U.S. 274, 278 and *People v. Atchley* (1959) 53 Cal.2d 160, 170.) During Heard's interrogation, Battle admitted he knew the plan was not merely to rob the Demkos, but to kill them. (4 CT 998.) He then made additional incriminating statements, culminating in his confession that he strangled and stabbed Andrew Demko and stabbed Shirley Demko, while Perry Washington held a gun to his head. (5 CT 1430-1432). His initial involuntary admission, not only his later confession, comes within the proscription against using of coerced confessions at trial. (*Ashcraft v. Tennessee*, *supra*, 327 U.S. at p. 278 [coerced admission of knowledge of murder and killer's identity after denying such knowledge requires reversal];

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[13] As the jury was instructed, a confession "acknowledges guilt of the crime or crimes for which the defendant is on trial," while an admission "tends to prove his guilt when considered with the rest of the evidence." (2 CT 511; CALJIC No. 2.70.)

People v. Holloway (2004) 33 Cal.4th 96 [court applies coerced-confession analysis to defendant's admission he was at victims' residence the morning they were killed, but concludes statements were not involuntary].)

Moreover, the State's suggestion that Battle made his admissions while trying to exculpate himself ignores that each account Battle gave was inculpatory. Battle said that: he went to the Demko residence and participated in burglary, robbery and kidnapping, knowing the perpetrators' plan was to kill the Demkos (4 CT 981-998); he was present in the desert when the Demkos were killed (4 CT 1139-1149); he stabbed Shirley Demko and choked and stabbed Andrew Demko, albeit when Neal threatened to harm his godson Marquis and with Steve holding a gun to his head (4 CT 1156-1159; 5 CT 1320-1389); he was not the actual killer, but merely went to the Demkos' residence to rob them, then tied them up, returned home and told Perry what he had done (implying Perry then killed the Demkos) (5 CT 1399-1408); and at Perry's insistence and for fear Perry would harm Marquis, he stabbed Shirley Demko and choked and stabbed Andrew Demko, while Perry trained a gun on him (5 CT 1424-1432). Thus, the State's reliance on cases in which the defendants continued to deny responsibility or acknowledged only a limited involvement in a calculated effort to exculpate themselves is misplaced. (RB 34-35, citing *People v. Williams* (2010) 49 Cal.4th 405, 444; *People v. Guerra* (2006) 37 Cal.4th 1067, 1096; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58 and *People v. Holloway*, *supra*, 33 Cal.4th at p. 116.)

On this point, the high court's decision in *Ashcraft v. Tennessee*, *supra*, 327 U.S. 274, where the defendant was charged with being an accessory before the fact in his wife's murder, is instructive. There, the state argued that the defendant's coerced admission – that he had knowledge

about his wife's murder, including the identity of the killer – was exculpatory. The Court rejected the claim outright: "To admit knowledge of the murder and of who committed it after these protestations [denials] by him would for most people be the equivalent of a confession of guilty participation in advance of the crime." (*Id.* at p. 278.) Similarly, Battle's admission that he knew there was a plan to kill the Demkos was incriminating, not exculpatory. As previously explained (AOB 138-140), this statement, by itself, exposed Battle to accomplice liability for deliberate and premeditated murder, could subject him to a burglary, robbery or multiple-murder special circumstance finding, and aggravated his culpability for purposes of penalty.

2. The State's Answer to Battle's Claim is Flawed And Incomplete

The State turns to what in fact is Battle's claim – that Battle's incriminating statements were coerced by Heard's implied promise of lenity, material misrepresentation of applicable criminal law, and exploitation of Battle's emotional attachment to Marquis. Its arguments that Heard's comments were not coercive (RB 35-39) and were not causally related to Battle's admissions (RB 39-42) are mistaken.

a. Heard's implied promise to help Battle if he made further admissions within a limited time

The State argues that Heard's statement to Battle – "once I write my report, I can't promise to do anything for you because if my boss found out that I promised you something that was untrue, I'd be in trouble" – did not amount to an improper promise of lenity. (RB 35.) The State adds that Heard's statement was "too brief and insubstantial to qualify as an inducement" and that this is not a case in which "a promise of leniency in

exchange for a confession permeated the entire interrogation." (RB 34-35, quoting *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1236-1237.) As Battle has argued (AOB 135-136), whether or not Heard specified a particular benefit, the message *Battle reasonably would have understood* was clear: although Heard could not do anything to help Battle "once [he] wrote [his] report," he *could* help Battle *before* then, if Battle told him what he wanted to hear. The State ignores that Heard's offer was for a limited time only, which added an element of urgency and pressure, and that Heard would not have asked Battle several times whether he could write something down if he had not made an implied promise of a benefit available to Battle "until I write my report." (See, e.g., 4 CT 996; AOB 136-138.)

None of the cases the State cites regarding what Heard himself referred to as a possible "promise" to do something for Battle (4 CT 991) is on point. In *People v. Holloway*, *supra*, 33 Cal.4th 96, discussed further in Section 2.b. below, the issue was whether the interrogating officer's statement that the crime could subject the defendant to the death penalty, or his suggestion that it could made a difference if the killings were "accidental or resulted from an uncontrollable fit of rage during a drunken blackout," amounted to a promise of leniency. (*Id.* at p. 116.) This Court concluded the officer "did no more than tell defendant the benefit that might 'flow[ ] naturally from a truthful and honest course of conduct' . . ., for such circumstances can reduce the degree of a homicide or, at the least, serve as arguments for mitigation in the penalty decision." (*Ibid.*, citation omitted.) Heard's statement that he could not promise anything *once he had written his report* – implicitly conveying that before then he *could* promise to help – is not comparable. It did not simply note circumstances that might reduce criminal liability or mitigate punishment, but implicitly offered a quid pro

quo for Battle's saying what Heard wanted to hear.

People v. Carrington (2009) 47 Cal.4th 145 is equally inapposite, and the State's discussion of the case is incomplete. (See RB 35). In *Carrington*, the officer told the defendant that he would "try to explain this whole thing" to law enforcement personnel from Los Altos who were investigating a different crime, but then qualified his offer by saying, "*I have no control over that.* I'm in Redwood city here. . . ." (47 Cal.4th at p. 169, italics added.) This Court held the officer's statement did not constitute a promise of leniency when considered in the context both the defendant's prior questions as to why she was arrested and the officer's subsequent disclaimer of any control over or information about the Los Altos crime investigation. The State omits any reference to the officer's follow-up statement disavowing his ability to promise lenity. (RB 35.) In this case, Heard's promise was neither in response to a direct question from Battle nor accompanied by a qualification or disavowal.

People v. Musselwhite, *supra*, 17 Cal.4th 1216 is even further from the mark. There, the defendant claimed his *Miranda* waiver was improperly induced by promises of lenity. At the outset of the interview, the detective simply said he "want[ed] to show [the defendant's] degree of cooperation" by acknowledging he had come to the police station voluntarily to help with the investigation. (*Id.* at p. 1236; see RB 35.) Unlike Heard's comments in this case, nothing the officer in *Musselwhite* said could reasonably have been understood as an implicit promise of a benefit if the defendant made admissions about the crime the officer was investigating.

b. Heard's false assurance that Battle's knowledge of a plan to kill the Demkos was "not important"

The State disputes that Heard misleadingly and falsely conveyed to Battle that admitting he knew of the plan to kill the Demkos was not important. (RB 39; see AOB 138-140.) The State maintains that Heard's statement – as long as Battle was "not involved in that" (i.e. did not participate in killing anyone), that was all that was "important" (4 CT 995) – referred to the upcoming polygraph examination. In the State's view, "Heard was simply informing Battle that if he knew about the killings, but denied it on the polygraph test, he would fail that question." (RB 36, citing 4 CT 995-996.) Yet, the fact that Heard moved from assuring Battle that all that mattered was that Battle not have been "involved," to the subject of the polygraph test, did not negate the message. Although the relevant excerpt, like most of the transcription of the police interviews, is virtually devoid of punctuation, Heard's use of the word "but" clearly signaled a transition from the assurance to the polygraph:

> HEARD: I don't care if they said something and you thought oh my God is that what they're going to do because as long as you're not involved in that, that's all that's important *but the problem is* that if I was to ask you on the polygraph exam see we're going to run with November thirteenth but the polygraph question is before you arrived at that house the day that this thing went down okay?
>
> BATTLE: Uh huh.

(4 CT 995, italics added.) The statement reasonably could be understood as asserting the false assurance Battle posits. Similarly misleading assurances by police interrogators have been found to be coercive. (See *United States v.*

Preston (9th Cir. 2014) 751 F.3d 1008, 1026-1027 (en banc) [falsely suggesting that intellectually disabled suspect would not be punished if he admitted to being a one-time child rapist, rather than a predator who abuses children repeatedly, contributed to involuntary confession].)

Alternatively, the State suggests that Heard's assurance conveyed a "corollary warning" that if Battle *were* involved in the murders he would be in more trouble – i.e. his comments "would have also prevented him from admitting further involvement." (RB 36-37.) The point, however, is that Heard's misleading assurance was among the coercive tactics that *did* prompt Battle to admit he knew the plan was to kill Andrew and Shirley Demko. The coercive effect of that false assurance is not undercut by the fact that Heard contrasted simply knowing of the plan with being involved in implementing the plan. As explained previously, Heard was an experienced investigator who pushed Battle step-by-step into increasingly serious admissions and repeatedly used the misleading assurance that a highly incriminating fact was not important. (AOB 139-140.)

The State urges that Heard's assurance is analogous to the detective's statement in *People v. Holloway* that if the defendant had killed accidentally or during a drunken blackout, "that could make[ ] a lot of difference"– a statement this Court found unobjectionable. (RB 37, quoting *People v. Holloway*, *supra*, 33 Cal.4th at p. 116.) However, as the State acknowledges and as noted above, in *Holloway* this Court observed that the officer's admonition simply and accurately informed the defendant of the benefit that might "'flow[ ] naturally'" from telling the truth – i.e. it was *true* that the defendant's culpability likely would be reduced or mitigated if the crime were accidental or the result of a drunken blackout. (*Id.* at p. 116, citation omitted.) In contrast, Heard did *not* correctly inform Battle of the

significance of admitting a fact. On the contrary, as previously discussed (AOB 138-140), Heard materially misrepresented the legal consequences of knowing the plan was to kill Andrew and Shirley Demko, rather than merely to burglarize and rob them. Put differently, knowledge of the perpetrators' intent to kill *was* important: aiding and abetting deliberate and premeditated double murder is far more aggravated than accomplice liability for felony murder, as Heard would have known.

Similarly, the State's attempt to distinguish *People v. Cahill* (1994) 22 Cal.App.4th 296 (*Cahill II*) on this issue misses the point. As the State notes (RB 38), in *Holloway*, this Court explained that in *Cahill II* the detective gave the defendant a "materially deceptive" account of the law of homicide by "[leading] the defendant to believe he could avoid a first degree murder charge, in a burglary-murder case, by admitting to an unpremeditated role in the killing." (*People v. Holloway*, *supra*, 33 Cal.4th at p. 117.) Here, Heard led Battle to believe that knowing the plan was not merely to burglarize and rob the Demkos but to kill them was not important, so long as he had not participated in killing them. Because, as discussed above, Battle's participation in the robbery, burglary and kidnapping of the Demkos knowing the plan was to kill them could establish the predicate for accomplice liability for deliberate and premeditated murder, or the requisite mental state for the felony-murder or multiple-murder special circumstances if the jury found Battle was not the actual killer, this was a "materially deceptive" account of the law of homicide. *Cahill II* squarely supports Battle's position.

Further, the State does not respond to Battle's challenge to the trial court's reliance on state law about police deception during the interrogation, which is inconsistent with federal constitutional law. (See AOB 141-147.)

Battle reads the State's silence on this question as a tacit concession that his argument is correct. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [the State's decision not to respond to appellant's argument in its principal brief constitutes a concession]; *People v. Johnson* (1980) 26 Cal.3d 557, 574 [on appeal defendant's failure to address prejudice component of speedy-trial claim concedes the issue].) In the alternative, the State should be deemed to have forfeited or waived its opportunity to address this aspect of Battle's claim. (See *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 [claim that defendant omitted from his opening brief is deemed waived].)

c. Heard's exploitation of Battle's fear for his godson's and his own safety

The State offers several arguments on the issue of Heard's exploitation of Battle's fear for the safety of his godson Marquis and himself: (1) that all Heard did was "articulate what Battle was implying," in that Battle himself had alluded to his concern; (2) that Heard would have been justified in raising the issue regardless; (3) that Heard never promised any benefit based on Battle's disclosure of his concern; and (4) that Battle later acknowledged that Neal, who ostensibly had insinuated that Battle's godson might be in danger, was not involved in the murders. (RB 38-39.) The State misapprehends Battle's claim. As previously explained (AOB 147-150), the point is simply that Heard played on Battle's expressed concern for his own and his godson's safety, intimating that Battle's actions might be explained or his culpability mitigated if he said this was a factor, and intimating that if he continued to implicate others, his fears might be realized. Heard's ploy is another in the totality of coercive interrogation tactics, along with the implied promise of leniency and misrepresentation of the law of homicide, that combined to elicit and confirm Battle's involuntary

admission.

d. The causal connection between Heard's tactics and Battle's admissions

The State argues that even if any of Heard's comments were coercive, they were not causally related to Battle's admissions. (RB 39-40.) The State focuses on Battle's so-called "key admissions" – those that came later in the day – but ignores that Battle's threshold admission – he knew the perpetrators intended to kill the Demkos – came just *moments* after Heard implicitly promised he could help Battle (before he wrote his report), misled Battle about the importance of his knowledge of the perpetrators' intent to kill, and focused on Battle's fear for his and Marquis's safety. (5 CT 991 [promise], 995 ["that's all that's important"], 996 [godson], 997 [admission]; cf. *People v. Williams*, *supra*, 49 Cal.4th at p. 444 [defendant "continued to deny responsibility," during the first and second of four interviews, in the face of interrogators' references to the death penalty and deceptive remarks].) Temporal proximity is a factor demonstrating causation here. (*People v. Cahill*, *supra*, 22 Cal.App.4th at pp. 315-316 [causation found where defendant repeatedly resisted implicating himself in homicide until told that by doing so he might avoid first degree murder charge].)

Moreover, in the course of distinguishing Battle's so-called "key" admissions from his initial admission that he knew of the plan to kill, the State implicitly concedes causation as to that admission. Thus, the State asserts that Heard made his "comments . . . *while encouraging Battle to admit*" he knew of the plan to kill, and that the first of Battle's "key" admissions came over two hours after Heard *"urged Battle to admit* simply knowing about the plan to kill the Demkos." (RB 40, italics added.) That is precisely Battle's point – Heard coerced Battle's initial admission that he

knew the perpetrators planned to kill the Demkos.

Contrary to the State's view, the issue is not whether Heard's coercive tactics proximately caused Battle's "key admission" that he personally stabbed Shirley and Andrew Demko while Perry held a gun to his head. As previously discussed (AOB 150-151), as a matter of law, the coercive tactics yielding Battle's initial admission tainted all his subsequent statements that day because they were made during a continuous interrogation process. The State does not squarely address the issue of taint, much less identify a break in the continuity of the interrogation process of November 27. Plainly put, the State fails to carry its burden to show an "'intervening independent act by the defendant or a third party' to break the causal chain" in such a way that the later admissions and confession are not in fact obtained by exploiting the initial coerced statement. (Compare *People v. McWhorter*, *supra*, 47 Cal.4th at p. 360 [defendant's second statement was sufficiently attenuated from first involuntary statement where, inter alia, second interview was a week after first interview, preceded by a new *Miranda* waiver, and conducted by a different detective who did not exploit information obtained from first statement].)

B. The State Cannot Meet Its Burden To Show the Admission Of Battle's Involuntary Statements Was Harmless Beyond a Reasonable Doubt

The prejudicial impact of the erroneous admission of Battle's statements is fully set out in the opening brief. (AOB 151-168.) The State fails to address several parts of Battle's argument: (1) that the length of the jury's deliberations and the questions the jury addressed to the court show the closeness of the case (AOB 153-156); (2) that there was ample reason to question the veracity of prosecution witnesses Matthew Hunter, William Kryger and Jenica McCune, particular when their testimony

is considered along with Battle's inadmissible statements (AOB 159-161); and (3) that the record discloses inconsistencies between Battle's statements and the physical evidence, an inadequate crime scene investigation and the absence of physical evidence placing Battle inside the Demko residence or in the desert where their bodies were found (AOB 161-165).

Instead, the State first argues that the admission of Battle's statements was harmless because Battle never gave an "outright confession" or "an honest version of events wherein he was wholly culpable." (RB 42.) As discussed in Section A.1. (*ante* at pp. 31-34), whether Battle's statements are deemed an "admission" or a "confession" is irrelevant. Whether Battle admitted being solely responsible or acting in concert with others, his statement he personally stabbed both victims and stabbed and choked one was highly incriminating, even if he said he did so with Perry holding a gun to his head.

Second, the State notes that "[w]hat was useful" to the prosecution about Battle's statements was "the level of detail in which he was describing the victims' home, the manner of the killings, and the location where the victims' bodies were found." Precisely. This is one reason the admission of Battle's statements was prejudicial. So too is the fact that, as the State also notes, the prosecutor used Battle's statements "to show that, although [his] stories of what happened varied dramatically, the basic facts he revealed along the way match too perfectly with the other evidence for him not to have been involved." (RB 42, citing 12 RT 3099-3229.) The extent to which Battle's accounts "matched" other evidence and could be used to show him to have been "involved" in the murders argues *in favor* of a finding that the unconstitutional admission of the involuntary statements is not harmless beyond a reasonable doubt.

Third, the State asserts that "the entire defense rested on the exculpatory statements Battle made during those very same interviews" (RB 42) and that Battle's defense would have been weaker without his exculpatory statements. (RB 42-43.)[14] This argument turns the prejudice question on its head. Without Battle's involuntary statements, the *prosecution*, which had the burden of proof, would have had a substantially weaker case. The jury would have heard Battle admit only that he participated in the burglary, robbery and kidnapping, but deny that he was present when Andrew and Shirley Demko were killed. And the jury would not have heard that Battle knew of the plan to kill the Demkos. Undoubtedly, the defense would have responded differently to the prosecution's drastically-changed case. Without the involuntary statements, there would have been no reason to present the defense that was used at trial, and thus the fact that defense would have been weaker is irrelevant.

In any event, the other evidence the State cites, even in combination with Battle's voluntary admission, does not demonstrate beyond a reasonable doubt that, without Battle's involuntary statements, the guilt-phase verdicts would have been the same. That Battle said he expected to be getting a car from people who would be found dead in the desert proves only that he had heard about a possible murder, not that he participated in it. Similarly, that Battle may have been seen wearing black clothing and carrying duct tape and zip ties, or have had been in possession of stolen property, falls short of proving he committed or participated in the murders. Moreover, the State

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[14] As previously set forth (AOB 30-35), the defense theory was that Perry was the actual killer and that Battle made up the various accounts he gave the police, including the inculpatory statements, in order to shield Perry, whom he feared. (See 12 RT 3185-3186, 3210-3212.)

ignores the evidence that undermines the credibility of the witnesses who gave this testimony. (See AOB 159-161.) It also overlooks the fact that the harmless error analysis under federal constitutional law looks not to the sufficiency of the properly admitted evidence independent of the inadmissible evidence, but to whether there is "a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; accord, *Chapman v. California* (1967) 386 U.S. 18, p. 23.)

Finally, in asserting that any error was harmless with regard to both the guilt and penalty phases (RB 43), the State glosses over the distinction between the guilt phase and the penalty phase, and ignores the special circumstance allegations altogether. As previously explained (AOB 139-140, 165-168), the erroneous admission of Battle's statements had serious implications for both the special circumstance and penalty determinations. Without Battle's involuntary statements, there was room for doubt whether Battle was the actual killer or an accomplice. Indeed, Battle's admission that he knew there was a plan to kill the Demkos was crucial because it provided the basis for finding he harbored the intent to kill necessary to return true findings on the felony-murder, multiple-murder and kidnapping special circumstances. (AOB 165-166.) The subsequent involuntary statements strengthened that evidence. The State has not proved beyond a reasonable doubt that without the involuntary statements, no juror would have rejected the special circumstance allegations.

In addition, the involuntary statements were relevant at the penalty phase as an aggravating circumstance under section 190.3, factor (a). The introduction of Battle's additional, more incriminating statements increased the likelihood not only that the special circumstances would be found true,

but that the jury would vote to sentence Battle to death. Failing to address these issues, the State has not met it burden to prove the admission of Battle's involuntary statements was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO REDACT STATEMENTS BATTLE MADE DURING CUSTODIAL INTERROGATIONS ABOUT PAWNING HIS SWORDS AND PREVIOUSLY COMMITTING BURGLARY

As explained in the opening brief, the trial court denied defense counsel's request to exclude statements Battle made during custodial interrogations about pawning his swords and committing prior burglaries. (AOB 169-171.) Because any probative value those statements may have had was substantially outweighed by their prejudicial impact, the court abused its discretion under Evidence Code section 352 by declining to order their redaction, and thereby violated state law and deprived Battle of right under the Fourteenth Amendment to due process and a fair trial. (AOB 171-192.)

A. The Error In Admitting Battle's References To His Sword Collection

As noted previously (AOB 173-174), at trial the court and the prosecutor implicitly acknowledged that the fact Battle had pawned the two swords he owned was not relevant. (8 RT 1791-1792, 9 RT 2100.) On this basis alone the evidence should have been excluded. (Evid. Code, § 350.) The State now insists the evidence was relevant "in the context of the story [Battle] was telling about how he ended up with [the] Demkos' television and VCR" – i.e., Battle's statement that he was already planning to pawn some of his own possessions and so agreed to pawn items taken from the Demko residence. (RB 45.) There is no question the evidence about Battle owning swords was part of his explanation. But that fact – the State's "context" argument – does make the sword evidence *legally* relevant,

because it had no "tendency to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Whether Battle owned or pawned two swords was not probative of any disputed fact, such as whether Battle took the television and VCR from the Demko residence, or whether he went with others to the Demko residence knowing the plan was to kill them, much less whether he choked and stabbed Andrew Demko and stabbed Shirley Demko, with a knife (not a sword).

Morever, as Battle argues (AOB 175-176), even if the evidence regarding Battle's swords could be deemed legally relevant, the trial court abused its discretion in concluding, based on a cursory analysis, that such probative value outweighed its prejudicial effect. As defense counsel urged at trial, the evidence regarding Battle's owning and pawning what he referred to as his "blade collection" (3 CT 893-894) created an inference that he was "an experienced user of knives" and made it "it more likely that he might have committed the crime." (8 RT 1791.)

The State counters that Battle's argument that the evidence constituted prejudicial character and propensity evidence under Evidence Code section 1101 was not raised at trial and thus has been forfeited. (RB 44-45.) This is incorrect. Although defense counsel may not have explicitly cited section 1101, as noted above, he asserted the sword evidence was improper character and propensity evidence. (See AOB 173.)[15] In this way, Battle alerted the trial court and the prosecutor to all the

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[15] In urging redaction of references to the swords under section 352, defense counsel specifically stated that the evidence "creates an inference that Mr. Battle's an experienced user of knives" (i.e. character) and that "in (continued...)

legal bases for his objection. His objection, as required by Evidence Code section 353, subdivision (a) "was timely made and so stated as to make clear the specific ground of the objection or motion . . . . " As this Court has admonished, Evidence Code section 353's objection requirement "must be interpreted reasonably, not formalistically":

> Evidence Code section 353 does not exalt form over substance. [Citation.] The statute does not require any particular form of objection. Rather, "the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." [Citation.] What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.

(*People v. Partida* (2005) 37 Cal.4th 428, 434.) Defense counsel's objection met these requirements. (See *People v. Williams* (1988) 44 Cal.3d 883, 906-907 [where prosecution stated it would introduce uncharged-crimes evidence, defendant's relevance objection preserved claim under Evid. Code, § 1101, subd. (b)].) Thus, the Evidence Code section 1101 argument was preserved, not forfeited, and supports a finding that the trial court abused its discretion in failing to order the redaction of Battle's inflammatory but irrelevant statements about owning and pawning swords.

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[15](...continued)
the context of the case in which these people are allegedly killed with a knife," the sword evidence "makes it more likely that he might have committed the crime" (i.e. propensity). (8 RT 1791.)

B. The Error in Admitting Battle's Statements About Prior Burglaries

The prosecutor's theory at trial was that Battle broke into the Demko residence, kidnapped Andrew and Shirley Demko, killed them, and took a television set, VCR and other possessions from their house. The defense urged that Battle had lied about participating in the incident to shield Perry Washington, who had burglarized, kidnapped and killed the Demkos. Burglary was thus key either way. Defense counsel therefore sought to exclude the statements Battle had made during his November 26 and November 27 custodial interrogations suggesting he had committed other burglaries: that he had not "worked with a team" before, that he was "used to having gloves," that he had never "broken into a house with somebody that was there," and that he was "just used" to "old couples . . . usually leav[ing] the back door unlocked, if they have a fenced in area and have dogs . . . . " (5 CT 1326, 1337, 1339, 1401.) As previously explained (AOB 181-184), these statements, taken together, conveyed that Battle had burglarized older people, even if, as the State points out (RB 47), he never explicitly admitted having committed prior burglaries.[16]

The State argues on the one hand that even if Battle's statements give rise to an inference that he had committed other burglaries, "it would hardly be prejudicial given that the statements were made while Battle was

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[16] Apart from Battle's statement that Neal told him he "shouldn't sweat it" because he had "done it before" (4 CT 939), which was made during the November 26 interrogation by Detectives Gilliam and Pacifico, Battle's statements regarding his prior burglaries were made November 27, after Investigator Heard had elicited Battle's involuntary admission to knowing the plan was to kill the Demkos. As set forth in Argument II, *ante*, Heard's interrogation tactics rendered that admission involuntary and tainted all of Battle's subsequent statements.

actually *admitting* participating in the burglary in this case." (RB 47, italics in original.) On the other hand, the State urges that the statements were "brief" and "*exculpatory* in nature." (*Ibid.*, italics added.) The arguments are inconsistent, and neither one makes sense.

First, the defense theory at trial was that Battle did *not* commit burglary in this case, or murder, but rather had lied to shield Perry. (AOB 162-163; 6 RT 1339; 12 RT 3158.) Moreover, the fact that at one point Battle stated he did participate in the Demko burglary does not mean his admission to having committed *other* burglaries – of "old couples," while wearing gloves – was not prejudicial. In this regard, the State ignores Battle's argument that the court erred under *People v. Ewoldt* (1994) 7 Cal.4th 380, 404, in refusing to redact the evidence of Battle's uncharged prior crimes without carefully assessing whether its probative value *substantially* outweighed its prejudicial effect. (AOB 184-187.) The State's reliance on *People v. Sapp* (2003) 31 Cal.4th 240, 276 is misplaced. As the State acknowledges parenthetically (RB 47), in *Sapp* the record made clear that the defendant's references to how he killed people related to the multiple murder victims in the case at bar. Here there is no suggestion Battle's comments about how he had committed burglary "before" referred to the Demkos.

Second, the State's suggestion that Battle's admission to having committing prior burglaries was exculpatory defies logic. None of Battle's statements regarding his past practices, which apparently differed from the way the Demkos were burglarized, suggested he did not participate in burglarizing the Demkos. Notably, Battle's statement that he had never "worked with a team . . . *before*" can hardly be characterized as exculpatory regarding the Demko crime. (5 CT 1337.)

C. The Erroneous Admission Of The Sword And Prior-Burglary Evidence Resulted In A Miscarriage Of Justice Under State Law And Rendered The Trial Fundamentally Unfair In Violation Of The Due Process Clause Of The Fourteenth Amendment

Battle's argument that the erroneous admission of his references to his swords and prior burglaries resulted in a miscarriage of justice under state law and deprived him of his right to a fair trial under federal law is set out in full in his opening brief. (AOB 188-192.) The erroneous admission of this contested evidence was highly inflammatory and prejudicial.

The State responds that the evidence of Battle's guilt was overwhelming, that the "minor references" to Battle's swords and prior burglaries were "inconsequential" and that the risk of prejudice was "at most minimal" because Battle admitted he burglarized the Demko residence and stabbed them himself. (RB 47-48.) As explained previously (AOB 153-162, 189) and above (at pp. 42-46), the evidence of Battle's guilt was in fact far from overwhelming, given the weakness of the prosecution's case apart from Battle's involuntary statements (see Argument II, *ante*), the inadequacy of the investigation, the absence of evidence placing Battle at either crime scene, and the length of the jury's deliberations and the questions they raised. Battle's references to his swords, and more particularly his intimation that he had burglarized other older people in the past, were neither "minor" nor "inconsequential" in a case involving the stabbing death of a couple in their 70's who were also burglarized. The erroneous admission of the evidence of Battle's swords and prior burglaries rendered Battle's trial fundamentally unfair, violated his right to due process and cannot be said to have been harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

IV.

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY DENIED BATTLE'S REQUEST TO INFORM THE JURY THAT ANY LINGERING OR RESIDUAL DOUBT A JUROR HARBORED ABOUT HIS GUILT WAS A PERMISSIBLE MITIGATING FACTOR

In his opening brief, Battle challenges trial court's refusal to give his requested instruction defining lingering or residual doubt and informing the jury that lingering or residual doubt is a relevant mitigating factor the jury can consider in selecting the appropriate penalty. (AOB 193-211.) Battle forthrightly acknowledges this Court's decisions holding that such an instruction is not required. (AOB 199-200.) He explains why the Court's rationales for its rule – that the instructions on factors (a) and (k) adequately cover the concept of lingering doubt and there is no federal requirement for a lingering doubt instruction – should be reconsidered. (AOB 200-202.)

In its response, the State has chosen not to answer any of these arguments. Instead, the State relies on the very rule Battle has deconstructed (RB 48) and then argues that he has cited no persuasive reason to revisit this Court's existing law (RB 50). The State has not met Battle's claim that this Court should reconsider and discard its rule that a trial court is not required to instruct on lingering doubt at the defendant's request at the penalty phase of a capital trial.

With regard to the specific instruction requested in this case, the State fails to contest several of Battle's points, including that: (1) the trial court's reasons for rejecting Battle's requested lingering doubt instruction were mistaken (AOB 198); (2) the requested instruction was a clear, concise and correct statement of law that was relevant to the jury's penalty decision (AOB 197-198); and (3) if the failure to give the

instruction was error, it was not harmless under either the state or federal harmless error standard (AOB 205-211).

Rather, the State argues that the standard instruction, CALJIC No. 8.85, along with the attorneys' arguments, covered the concept of lingering doubt. (AOB 49.) Certainly, as Battle previously discussed, both defense counsel and the prosecutor addressed lingering doubt in their closing arguments. (See AOB 195-196, 208-209.) Those arguments, however, did not compensate for the omission of the requested instruction. As explained in Battle's opening brief, and not answered by the State, counsel's opposing views on lingering doubt gave the jury mixed messages about the law. (AOB 208-209.) In quoting the prosecutor's argument, the State elides the prosecutor's comments that equated Battle's lingering doubt argument with disrespecting the jury's conscientious work in reaching the guilt-phase verdict and erroneously suggested that lingering doubt was the same as reasonable doubt. (Compare RB 48 and 15 RT 4031-4032.)[17] The former

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[17] After acknowledging that factor (k) embraces lingering doubt (15 RT 4030), the prosecutor's argument on lingering doubt continued as follows:

> There's this concept that the defendant is going to talk to you – that the defense is going to talk to you, I believe, called lingering doubt. And lingering doubt basically says – the principal [sic] behind it is, if you really don't think he did it, give him a break and give him life without parole instead of death.
>
> Well, you know, the defense got up in opening and told you they – the defense had respect for your verdict. I submit to you that if the defense argues lingering doubt to you, he has merely given lip service by saying they have respect for your

(continued...)

argument cut against the principle that lingering doubt is a legitimate mitigating factor, while the latter was incorrect.

Moreover, it is the duty of the trial court, not the parties, to instruct the jury about the applicable law by defining its terms and stating what it requires or allows. (AOB 198-199; Pen. Code, §§ 1093, subd. (f), 1127; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) This Court should not assume that arguments of counsel are sufficient to present the jury with the applicable law especially where, as here, their partisan nature is readily apparent (14 RT 3585-3586, 4055, 4060-4064 [defense]; 15 RT 4030-4032

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[17](...continued)
verdict. Because what they're really asking you to do is to go back and find doubt in what you have already done.

You've already determined that the defendant is guilty of these crimes. The defense wants you to go back and take a second bite of the apple and try to find some doubt where it doesn't exist. You all worked very hard and very conscientiously for a long period of time in reaching your decisions in this case. This is not the time to go back and rehash all of those things. If there was doubt – if there was any reasonable doubt by any of you, you wouldn't have convicted the defendant in the first place.

Okay. There isn't any lingering doubt in this case. The defendant did this. He confessed to it. The only evidence points to him. There isn't any doubt in this case, so don't focus on what you've already decided. Focus on your task here today which is to determine the appropriate punishment.

(15 RT 4031-4032.)

[prosecution]) and the court instructs the jury to follow only the law as stated by the court (3 CT 642). (AOB 208-209.) When the trial court leaves the jurors to decide whether the defense attorney's interpretation of the law or the prosecutor's contrary view of the law is correct, the contest is not a fair one:

> Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige.

(*People v. Talle* (1952) 111 Cal.App.2d 650, 677, cited with approval in *People v. Thomas* (1992) 2 Cal.4th 489, 529; see *People v. Perez* (1962) 58 Cal.2d 229, 247 ["juries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence"], abrogated on another ground in *People v. Carrera* (1989) 49 Cal.3d 291, 321.)

The question posed here is significant. At the penalty phase, the jury is asked to decide between life and death for the defendant. Under California law, lingering doubt is, and for 50 years has been, a relevant mitigating factor that the jury may consider in making this decision. Lingering doubt is known to be a powerful mitigator. (AOB 208; *People v. Gay* (2008) 42 Cal.4th 1195, 1227 ["'residual doubt is perhaps the most effective strategy to employ at sentencing'"].) However, the concept of lingering doubt and its definition are not necessarily self-evident to those who sit on capital juries. A clear, straightforward instruction, like the one Battle requested, would provide this important information. Giving the instruction, when requested, is not burdensome or difficult for the trial

court. Some trial courts give the instruction; others, like the court in this case, do not. If capital penalty trials are to result in reliable verdicts about who should live and who should be executed, then the Court should ensure that all jurors understand the role of lingering doubt may have in their penalty deliberations. Battle urges this Court to revisit its prior decisions to the contrary and to hold that, upon request, a trial court must instruct on lingering or residual doubt.

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V.

THE *OCHOA* RESTRICTION ON EXECUTION IMPACT EVIDENCE GIVEN AS PART OF CALJIC NO. 8.85 PREVENTED THE JURY FROM GIVING MEANINGFUL EFFECT TO BATTLE'S MITIGATING EVIDENCE

At trial, seven of Battle's biological family members offered what is often called "execution impact" evidence, consisting of pleas that the jury not impose the death penalty, but spare Battle's life because they loved him and wanted to reestablish a relationship with him. They gave this testimony even though they had not been in contact with Battle since he was adopted out of the family at the age of four. (AOB 212-214.) Over Battle's objection, the trial court instructed the jury with the last two sentences of the factor (k) portion of CALJIC No. 8.85, which contain the instruction based on this Court's ruling in *People v. Ochoa* (1998) 19 Cal.4th 353, 456. The challenged instruction told the jury:

> Sympathy for the family of the defendant is not a matter that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character.

(15 RT 4101; 3 CT 663.) While recognizing that this Court has rejected other challenges to the *Ochoa* instruction (AOB 221-222), Battle argues that under the unusual circumstances of his case, involving a rupture of more than 20 years in his birth family's relationship with him, the instruction was ambiguous and unconstitutionally restricted Battle's jury from considering and giving effect to his particular penalty phase evidence, in violation of state law and the Eighth and Fourteenth Amendments of the federal Constitution (AOB 219-232).

A. Under The Unusual Circumstances of This Case, There Is A Reasonable Likelihood That The Jurors Interpreted The *Ochoa* Instruction In A Way That Precluded Them From Giving Meaningful Consideration To The Testimony Of Battle's Family Members, Which Was Relevant Evidence Under Section 190.3

The State does not contest that if the testimony of Battle's birth family was relevant as mitigation evidence, i.e., if "it illuminate[d] some positive quality of [his] background or character" (15 RT 4101; 3 CT 663), then the trial court's instruction was ambiguous and misleading, in violation of state law and the Eighth and Fourteenth Amendments. (See *People v. Mickey* (1991) 54 Cal.3d 612, 693 [federal constitutional error occurs when any barrier, including an instructional barrier, precludes any juror from considering relevant mitigating evidence].) Rather, the State asserts that the testimony of Battle's estranged biological family members "simply does not meet the criteria for proper mitigation evidence." (RB 50.) As the State argues:

> Indeed, while Battle's biological family members' natural love for Battle and their desire to resume a relationship with him after nearly a quarter century might have been facts worthy of sympathy, they did not reveal anything about Battle's character and were therefore irrelevant to mitigation.

(RB 54.) The State's argument proves Battle's point about the problem with giving the *Ochoa* instruction in his case. The State flatly asserts that the love Battle's relatives felt for him and their desire that he not be executed so they could resume their relationship with him said nothing about his character. That is the fallacy in the State's argument.

In fact, as previously explained (AOB 222-224), the love Battle's birth family expressed for him at trial and their feelings about a death

sentence *were* constitutionally relevant because they *did* speak to his character – that he was worthy of their love and a relationship with them despite his convictions for murder. *Ochoa* recognizes that such evidence is indicative of character and is relevant mitigation. However, unlike the typical case, where there has been a lifelong family relationship with the defendant, Battle's birth family's feelings about him did not obviously connect to "the positive qualities of the defendant's background or character" that the *Ochoa* instruction designates as the threshold for relevance. If, in the State's view, Battle's biological family's love for him and desire that he not be executed "did not reveal anything about Battle's character" (RB 54), then there is a reasonable likelihood the jurors would have understood the *Ochoa* instruction as directing them not to consider this evidence. And if the jurors applied the *Ochoa* instruction in this way, they would have refused to consider and give effect to constitutionally relevant mitigating evidence, in violation of section 190.3, factor (k) and the Eighth and Fourteenth Amendments. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 259, fn. 21 [instruction that hinders jury's ability to consider and give effect to mitigating evidence results in flawed sentencing process].)[18]

Elsewhere, the State selectively quotes from section 190.3, asserting that the jury must only be given the opportunity to consider "'any matter relevant to . . . mitigation . . . including, but not limited to, . . . the defendant's character, background, history, mental condition and physical

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[18] The State does not respond to Battle's discussion showing that counsel's arguments did not clarify the ambiguity in the *Ochoa* instruction as applied to the facts of this case. (See AOB 224-228.) The State thus implicitly concedes that if the *Ochoa* instruction is found to be ambiguous in this case, that defect was not counteracted by the closing arguments.

condition.'" (RB 55, quoting § 190.3.) What the State omits is telling. Section 190.3 does not limit a capital-sentencing jury to those defense-proffered considerations that fall within this Court's definition of "mitigation," i.e. "a defendant's character or record." (*Ochoa*, *supra*, 19 Cal.4th at p. 456; *People v. Easley* (1983) 34 Cal.3d 858, 879, fn. 10, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [under factor (k) the jury may consider as a mitigating factor any "'aspect of [the] defendant's character or record ... that the defendant proffers as a basis for a sentence less than death'"].) On its face, section 190.3 also encompasses "any" matter relevant to "sentence" and lists examples that are illustrative, but not exclusive.[19] In enacting section 190.3, the electorate must have intended this reference to "sentence" to mean something different than the references to "aggravation" and "mitigation." Otherwise, the word would be superfluous and would serve no purpose, in violation of this Court's rules of statutory construction. (*Tuolumne Jobs & Small Business Alliance v.*

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[19] Section 190.3 provides in pertinent part:

> In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant *as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to,* the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

(Italics added.)

Superior Court (2014) 59 Cal.4th 1029, 1038 ["courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage"]; accord, *Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory language a nullity is obviously to be avoided"].)[20]

Therefore, even apart from the ambiguity of the *Ochoa* instruction given the unique facts of this case (AOB 222-228), under the plain language of section 190.3, the effect of the defendant's execution on his family is relevant to the sentence, even if it is not considered relevant "mitigation" evidence. In short, contrary to the State's argument (RB 54-55), California law is broader than this Court's reading of the *Lockett* mandate. Thus, even if the State were correct that the testimony of Battle's biological relatives did not fit within the definition of relevant mitigation evidence, the testimony still would fall within the third explicitly designated category of evidence that the jury is to consider under California's capital-sentencing statute.

Neither of the two recent decisions rejecting execution impact claims, *People v. Cordova* (2015) 62 Cal.4th 104, 149 and *People v. Charles* (2015) 61 Cal.4th 308, 334-335, defeats Battle's claim. In *Cordova*, the Court rejected a request that the Court reconsider the *Ochoa*

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[20] This Court has acknowledged that section 190.3 does not limit the evidence that may be presented at the penalty phase to any matter relevant to "aggravation" or "mitigation," but also includes evidence relevant to "sentence." (See *People v. Bennett* (2009) 45 Cal.4th 577, 602; *Ochoa, supra*, 19 Cal.4th at p. 455.) The Court, however, has not explained the significance of this term or the difference between evidence relevant to "sentence" and evidence relevant to "aggravation" or "mitigation."

instruction, noting that the defendant "presents no good reason to do so." (*Id.* at p. 149.) In that case, defense counsel asked one relative why she did not believe the defendant should receive the death penalty, and she replied, "'Because he has a family who care about him and ... that would be devastating for the family.'" (*Ibid.*; see *id.* at p. 117.) The trial court told the jury, "'The impact on defendant's family of the penalty that's imposed is not relevant. You'll disregard that,'" and the jury later was given the *Ochoa* instruction. (*Id.* at p. 149.) In *Charles*, the trial court excluded testimony from the defendant's relatives that they did not want the death penalty imposed upon him. (*People v. Charles*, *supra*, at p. 334.) There is no indication the jury was given the *Ochoa* instruction.

Unlike this case, *Cordova* and *Charles* involved limited and straightforward questions of execution impact testimony. Neither case presented a claim at all analogous to that Battle asserts here – that under the unique facts of the case, involving a decades-long rupture in the birth family's relationship with Battle, the *Ochoa* instruction was ambiguous, and although the testimony of his relatives that they did not want a death sentence to be imposed *did* reflect a positive characteristic about Battle, i.e. his lifeworthiness, the *Ochoa* instruction likely precluded the jurors' consideration of this relevant evidence.

B. California's Restriction On Execution Impact Evidence Violates The Eighth And Fourteenth Amendments

As to Battle's general federal constitutional challenge to the *Ochoa* instruction (AOB 230-232), the State asserts that California complies with the Eighth Amendment mitigation mandate articulated in *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, and argues that "[b]ecause pure sympathy for the defendant's family is not independently relevant to lessen

the defendant's punishment, CALJIC No. 8.85 correctly instructs the jury not to consider it as evidence in mitigation." (RB 54-55.) The State, however, overlooks two points.

First, the threshold for relevant mitigating evidence is low. (AOB 230, citing *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) Indeed, "[v]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce . . . ." (*Payne v. Tennessee* (1991) 501 U.S. 808, 822.) It was precisely because of the broad latitude afforded capital defendants that the United States Supreme Court held that "evidence about . . . the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 826.) Second, the underlying premise of *Payne* is that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the prosecution. (*Payne v. Tennessee*, *supra*, at pp. 820-826.) Indeed, in his concurring opinion, Justice Scalia explicitly noted that "the Eighth Amendment permits parity between mitigating and aggravating factors." (*Id.* at p. 833.) Battle was denied this parity under the Eighth Amendment. The jurors were able to consider and give effect to the impact of Battle's crimes on Andrew and Shirley Demkos's family, but were not able to consider or give effect to the impact his execution would have on his family.[21]

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[21] Battle notes that the trials in *People v. Ochoa*, *supra*, 19 Cal.4th at p. 416 and *People v. Bemore* (2000) 22 Cal.4th 809, 855-856 [holding there was no Eighth Amendment violation in instructing jury that sympathy for the defendant's family was not to be considered] occurred before *Payne* was decided. Therefore, no victim impact evidence was introduced, and the (continued...)

Battle also claims that California's rule that a jury may not consider the impact of the defendant's execution on his family except as it reflects on "a positive characteristic" of the defendant violates the Eighth and Fourteenth Amendments. (AOB 228-230.) The State offers no response to this argument. Again, the State's silence reasonably can be read as conceding this point. (*People v. Bouzas*, *supra*, 53 Cal.3d at p. 480 and *People v. Johnson*, *supra*, 26 Cal.3d at p. 574 [both treating State's failure to address argument as conceding issue].)

C. The Unconstitutional Instruction, Which Prejudiced Battle's Chances for A Life-Without-Parole Verdict, Cannot Be Dismissed As Harmless Error

Battle sets forth the factors that preclude a finding that the instructional error was harmless under both state law and the federal Constitution: (1) the length of time the jury took to reach its death verdict; (2) the significance defense counsel placed on the execution impact evidence; (3) the jury's question about the meaning of "extenuate" in the key instruction guiding its penalty decision; and (4) that the aggravation did not so far outweigh the mitigation that no reasonable juror could have concluded that life without the possibility of parole was the appropriate penalty. (See AOB 232-234.) The State disputes many of these points, urging that any error was harmless under the state law standard. (See RB 55-56.) The issue is fully joined and needs no further elaboration. Whether

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[21](...continued)
exclusion of execution impact evidence did not raise the same question of Eighth and Fourteenth Amendment parity. In addition, this Court's decision in *Ochoa* was rendered before the high court in *Tennard* underscored the "low threshold" of relevance for mitigating evidence. (*Tennard v. Dretke*, *supra*, 542 U.S. at p. 285.)

judged under the state law standard (*People v. Brown* (1988) 46 Cal.3d 432, 447-448) or under the federal constitutional standard (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the error was not harmless, and the death sentence must be reversed.

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CONCLUSION

For the reasons stated above, as well as for the reasons stated in Appellant's Opening Brief on automatic appeal, the entire judgment of conviction, special circumstances findings, and sentence of death should be reversed.

Dated: December 29, 2015

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender

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Attorneys for Appellant

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

I, Nina Rivkind, am the Supervising Deputy State Public Defender who represents appellant, Thomas Lee Battle, 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, excluding tables and certificates is 18,175 words in length.

Dated: December 29, 2015.

Nina Rivkind

NINA RIVKIND

DECLARATION OF SERVICE

Re: *People v. Thomas Lee Battle*

Cal. Sup. No. S119296
San Bernardino County Sup. Ct.,
No. FVI012605

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California, 94607; that I served a copy of the attached:

APPELLANT'S REPLY BRIEF

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

Michael Pulos
Deputy Attorney General
Office of the Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101

Honorable Eric M. Nakata
San Bernardino County Sup. Ct.
14455 Civic Drive
Victorville, CA 92392

Clerk of the Court
San Bernardino County Superior Court
247 West Third Street
San Bernardino, CA 92415-0063

Each said envelope was then, on December 29, 2015, sealed and deposited in the United States mail at Oakland, California, in Alameda County in which I am employed, with the postage thereon fully prepaid.

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described documents will be hand delivered to appellant, Thomas Lee Battle, at San Quentin State Prison within 30 days.

I declare under penalty of perjury that the foregoing is true and correct. Signed on December 29, 2015, at Oakland, California.

DECLARANT