SUPREME COURT COPY

No. S042660
Fresno County Superior Court
(No. 467951-0)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RONNIE DALE DEMENT,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Fresno County

(HONORABLE STEPHEN R. HENRY, JUDGE, of the Superior Court)

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RONNIE DALE DEMENT, Defendant and Appellant.	S042660 Fresno County Superior Court (No. 467951-0)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief ("AOB"). Statutory references are to the Penal Code unless otherwise noted.

ARGUMENT

I

THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT HAD NOT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN THE PROSECUTION'S EXERCISE OF PEREMPTORY CHALLENGES ON THE BASIS OF GENDER

In the Opening Brief, appellant argued that the trial court erred in its ruling that appellant had not established a prima facie case of discriminatory use of peremptory challenges by the prosecution against female potential jurors. Appellant demonstrated that the prosecution's use of 10 peremptory challenges, out of 13 such challenges exercised by the prosecution, to remove women from the jury established a prima facie case of discrimination under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). (AOB 76-85.) Appellant further demonstrated that the trial court's stated basis for finding otherwise was legally insufficient and based upon an erroneous legal standard. (AOB 74-75, 85-88.) Appellant also demonstrated that this Court must review the sufficiency of appellant's prima facie case de novo, without deference to the trial court's ruling. (AOB 74-75.)

Respondent argues, accompanied by a rather detailed review of the course of voir dire, flavored with speculation as to the prosecutor's reasons for exercising his challenges in such an apparently discriminatory fashion, that no prima facie case was established. (RB 106-120.) Further, respondent argues, the prosecution's targeting of women to be excluded from the jury mirrored the 10 peremptory challenges against male prospective jurors, out of the 13 such challenges exercised by the defense

by the time the *Batson/Wheeler* motion was made. Respondent argues that this demonstrates that the defense thought such discriminatory use was acceptable, and the prosecution should somehow be excused for its own misconduct. (RB 121-122.) No mention is made, however, of the absence of any objection on the part of the prosecution to the pattern of challenges exercised by the defense.

Respondent further argues that comparisons of the questionnaire and voir dire responses of the female jurors excused by the prosecution to the men who sat on the jury is not appropriate to appellate review in the absence of such comparisons having been raised in the trial court. (RB 111.) However, respondent fails to acknowledge that in denying appellant's motion, the trial court compared voir dire responses of women to those of men, as demonstrated by appellant in the opening brief. (AOB 87-88.)

Finally, respondent contends that, if this Court determines that a prima facie case of discriminatory challenges was established, the matter should be remanded to allow the trial court to conduct the second and third steps in the *Batson* analysis, i.e., to allow the prosecution to proffer its reasons for challenging each of the ten women whom it excused, and for the trial court to thereafter evaluate those explanations and determine whether appellant has proved purposeful discrimination. (RB 121-122.)

On this final point, since respondent's brief was filed, this Court, in *People v. Johnson* (2006) 38 Cal.4th 1096 (*Johnson II*), has determined that, where a trial court has erred in finding that no prima facie case has been established under *Batson*, the matter should be remanded for a hearing at which the trial court can conduct the second and third steps of the *Batson* analysis. However, as discussed below, the time lapse between appellant's trial and this Court's eventual resolution of his appeal will make a reliable

hearing on the facts impossible as a practical matter on any remand in this case. Reversal of the entire judgment is the appropriate remedy after such a lapse of time, and should be ordered in this case.

A. De Novo Review

In the opening brief, appellant demonstrated that the trial court had applied the standard which this Court had enunciated as the proper standard prior to and at the time of trial, i.e., that a prima facie case under *Wheeler* and *Batson* requires a showing of a "strong likelihood" of discrimination. Appellant further demonstrated that this standard was erroneous, and that the trial court's application of an erroneous standard requires that this Court review the question of whether appellant established a prima facie case under *Batson* de novo, without deference to the trial court's findings. (AOB 74-76.)

Respondent acknowledges, in a footnote, that the United States Supreme Court has rejected the "strong likelihood" standard as being "at odds" with *Batson's* "reasonable inference" standard. (*Johnson v. California* (2005) 545 U.S. 162, 173; RB 105, fn. 46.) As the Supreme Court stated, "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (545 U.S. at p. 170.)

Respondent does not argue that the trial court applied the "reasonable inference" standard. Instead, respondent argues that appellant failed to establish such a reasonable inference of discrimination. (RB 105-106.) While not explicitly conceding that de novo review is thus required, respondent provides no argument or authority demonstrating otherwise. As appellant demonstrated in the opening brief, de novo review of the question of whether a reasonable inference of discrimination was established is

therefore appropriate.

Moreover, since *Johnson v. California*, this Court has conducted de novo review of a trial court's ruling that no prima facie case has been established, where, as here, the standard applied by the trial court is not explicit.

> The trial court here failed to state what standard it was applying. As in [*People v.*] *Cornwell* [(2005) 37 Cal.4th 50], however, "[r]egardless of the standard employed by the trial court, . . . we have reviewed the record and, like the United States Supreme Court in *Johnson* [*v. California*], *supra*, . . . [we] are able to apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*Cornwell, supra*, 37 Cal.4th at p. 73, 33 Cal.Rptr.3d at 18, 117 P.3d 622.)]

(*People v. Gray* (2005) 37 Cal.4th 168, 187; *People v. Lancaster* (2007) 41 Cal.4th 50, 75; *People v. Avila* (2006) 38 Cal.4th 491, 554 [assuming arguendo that the trial court's decision not entitled to deference].)

In this case, this Court must apply the proper standard and resolve the legal question de novo, without deference to the trial court's decision. The facts of this case require that the resolution of the legal question be that the record supports an inference that the prosecution excused jurors on the basis of gender, and that the trial court erred in concluding that a prima facie case had not been established.

B. Comparative Analysis

Respondent argues that a comparative analysis of the 10 female prospective jurors which the prosecution excused to the six male jurors who were retained is procedurally barred, citing this court's rejection of the use of comparative juror analysis for the first time on appeal in *People v. Johnson* (2003) 30 Cal.4th 1302, 1306, 1319-1325 (*Johnson I*); RB 111-

112.)

Nothing in this Court's opinion in *Johnson I* bars comparative analysis in this case. In *Johnson I*, this Court confirmed that a trial court or objecting party may rely upon comparative analysis in the trial court, but rejected comparative analysis conducted for the first time on appeal as "inconsistent with the deference reviewing courts necessarily give to trial courts." (30 Cal.4th at p. 1318.) However, in this case, no deference is due the trial court. Rather, as explained above, in this case review is de novo. As a result, this Court must independently determine whether the record supports an inference of discriminatory exercise of peremptory challenges. This requires review of the entire record of the voir dire before the trial court, "the totality of the relevant facts." (*Johnson v. California*, *supra*, 545 U.S. at p. 168.)

As the United States Supreme Court made clear in *Miller-El v. Dretke* (2005) 545 U.S. 231 (*Miller-El II*), comparative juror analysis is one method of assessing the record of the voir dire, amounting to circumstantial evidence relevant to the determination of a *Batson* motion. (545 U.S. at p. 241, fn. 2.) "There is nothing that suggests that it is more difficult or less desirable to engage in such analysis at step one rather than step three of *Batson.*" (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1149-1150; see also *United States v. Esparza-Gonzalez,* 422 F.3d 897, 904-05 (9th Cir. 2005) [comparative juror analysis used in appellate review of step one *Batson* denial].) That such analysis is conducted on a cold record, "not privy to the unspoken atmosphere of the trial court – the nuance, demeanor, body language, expression and gestures of the various players," (*Johnson I*, *supra*, 30 Cal.4th at p. 1321 [quoting *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 683-684 (en banc)]) may limit its probative or persuasive force

somewhat in some instances, but does not eliminate its relevance. In any case, since review in this appeal is de novo, this Court's entire determination of whether a prima facie case exists is based solely upon the cold appellate record. That is no basis for denying comparative juror analysis in this case.

Since *Miller-El II*, this Court has conducted comparative analysis for the first time on appeal in review of denials of *Batson* motions at both the first and third stages of the *Batson* process, "assuming without deciding that appellate courts are obliged to undertake comparative analysis." (*People v. Williams* (2006) 40 Cal.4th 287, 312.) In *People v. Bell* (2007) 40 Cal.4th 582 (*Bell*), however, this Court held that where no reasons were given by the prosecutor or "hypothesized" by the trial court, and it could be determined by the reviewing court that no prima facie case had been established "without hypothesizing permissible reasons that might have motivated the prosecutor's challenges," comparative juror analysis is not compelled by *Miller-El II*. (40 Cal.4th at pp. 600-601.)

> . . . *Miller-El* does not mandate comparative juror analysis on a first-stage *Wheeler-Batson* case when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or have hypothesized any reasons.

(40 Cal.4th at p. 601.)

However, in *People v. Bonilla* (2007) 41 Cal.4th 313, and *People v. Howard* (Feb. 4, 2008, No. S029489) __ Cal.4th __ (2008 WL 282139), this Court, without explanation, extended the holding of *Bell* in this regard, to reject comparative analysis in any first stage review. In *Bonilla*, this Court found that no prima facie case was established, relying in part on upon the prosecutor's stated reason for a challenge, and in part upon this Court's own determination, after review of the record, that the record reflected

reasonable gender neutral bases for the prosecutor's peremptory challenges. (41 Cal.4th at pp. 346-349.) Despite this reliance on both stated and hypothesized reasons, this Court cited *Bell* for the proposition that comparative juror analysis is not required on appeal of a first-stage *Wheeler-Batson* denial. (41 Cal.4th at p. 350.)

Similarly, in *People v. Howard, supra*, __ Cal.4th __, on review of a first-step *Wheeler-Batson* denial, this Court relied upon reasons stated by the prosecutor and hypothesized by the trial court to determine that no prima facie case had been established. (2008 WL 282139, pp. 9-11.) *Howard* cited *Bell* and *Bonilla* as establishing that comparative analysis is not required on appeal of a first-stage *Wheeler-Batson* denial. (2008 WL 282139, p. 11.)

In neither *Bonilla* nor *Howard* did this Court mention the reasoning behind, or the limited nature of, the holding in *Bell*. Nor did the Court justify or explain its extension of that holding to reject comparative analysis where reasons were stated or hypothesized, and were relied upon by this Court. The reasoning of *Bell* simply does not support this Court's extension to the facts of *Bonilla* and *Howard*. *Miller-El II* establishes that comparative juror analysis is a relevant analysis to aid in determining the legitimacy of a prosecutor's stated reasons for exercising peremptory challenges. (545 U.S. at p. 241-248.) Whether those reasons were stated in the second stage of the *Wheeler-Batson* process, volunteered in the first stage without a finding of a prima facie case, or hypothesized by the trial court or the reviewing court, the relevance of comparative juror analysis is precisely the same, especially where appellate review is conducted de novo, as here. This Court's attempt, in *Bonilla* and *Howard*, to limit such analysis of the relevant record evidence to the third-stage of the *Wheeler-Batson*

process is not supported by any justification for that limitation. Assuming arguendo that there is some legitimate restriction on the availability of comparative analysis on appellate review of a first stage *Batson* denial, this Court should reconsider its extension of *Bell*, and confirm the reasoning and limitation of its holding, to ensure that, where supposed reasons, whether stated or hypothesized, are relied upon in the rejection of a *Wheeler-Batson* motion at the first stage, comparative juror analysis is relevant to a reviewing court's independent analysis of whether a prima facie case has been established.

Here, the trial court's own reasoning amounted to a use of comparative juror analysis:

> I doubt there's been a prima facie showing here . . . because it's been my evaluation that women seem to be *more certain* in the expression of their views both ways in this case and their leaning in this case *than men.*

(IV RT 950 (emphasis added).) Defense counsel had also addressed a difference between the women and men who had gone through voir dire "as a whole." (IV RT 948.) The trial court's own evaluation and comparison was in response to defense counsel's comparison.

The comparative analysis, such as it is, which appellant has put forward in the opening brief was included primarily to demonstrate that the trial court's "evaluation" and comparison of women's "certaint[y] in the expression of their views" versus men's expression of their views was not supported by the record.

To establish that the trial court was wrong in its comparative analysis, appellant demonstrated that there was no basis for determining that these 10 women expressed themselves with any greater certainty than the men who sat on the jury. (AOB 83; see also AOB 63-73.) Appellant in fact

demonstrated that "there is nothing in the record which establishes any differentiation between the 10 women excused by the prosecution and the men the prosecution accepted as jurors who actually sat on the jury which convicted appellant and sentenced him to death." (AOB 83-84.) Thus appellant did not raise comparative analysis for the first time on appeal, but has responded to the reasoning which the trial court stated for its denial of appellant's *Wheeler/Batson* motion. Nothing in *Johnson I* precludes such analysis on appeal. Moreover, appellant submits that barring him from demonstrating that a basis for the trial court's ruling was not supported by the record would deny appellant due process on appeal. (U.S. Const., Amends. V, XIV; Cal. Const., art. 1, sections 7, 15; see *Dobbs v. Zant* (1993) 506 U.S. 357, 358; *Parker v. Dugger* (1991) 498 U.S. 308, 319-320; *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

In contrast to appellant's rather modest comparisons, however, respondent's excursions beyond the matters addressed by counsel and the trial court are neither supportive nor contradictory of the trial court's "evaluation" and comparison. In apparent contrast as well to its own position that only arguments presented to the trial court may be considered on appeal, respondent has gone to great lengths to present detailed statistical and other breakdowns of the course of the voir dire and the exercise of peremptory challenges by both sides. (RB 78-79; Tables A-E.) None of these analyses were offered by either party in the trial court, nor did the trial court refer to any similar analysis during argument by the parties on the motion, or at the time the trial court denied the motion. Defense counsel was given no opportunity in the trial court to respond to the points now raised by respondent. Rather, in the trial court the prosecution relied *solely* upon the ultimate makeup of the jury, equally divided between men and

women, as defeating a prima facie case of group bias:

> And given the numbers of three versus ten, the fact that we have a – six members of the remaining members of the jury are women from all – all walks of life, Hispanic, African-American, white women, I just don't think you can make a viable claim of group bias.

(IV RT 952.) Respondent does not defend the argument made by the prosecutor and accepted by the trial court that the final makeup of the jury, evenly divided between men and women, negates a prima facie case. No cases are cited by respondent accepting such reasoning.[1/]

In attempting to identify grounds upon which the prosecutor *might* have challenged the jurors in question, respondent posits grounds which are based not only on the trivial and the highly speculative, but which were never raised by the prosecutor at trial. (RB 113-119.) Nor were any addressed by the trial court. (Compare with *People v. Lancaster* (2007) 41 Cal.4th 50, 77-78 [trial court noted possible grounds for excusing jurors in question]; *People v. Cornwell* (2005) 37 Cal.4th 50, 69 [trial court and prosecutor both discussed grounds for excusing juror in question].) Appellant was given no opportunity at trial to dispute the suggested grounds as unreasonable, or unsupported by voir dire.

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[1] In *People v. Bonilla* (2007) 41 Cal.4th 313, this Court found that a similar outcome, where the prosecution exercised twenty of 30 peremptory challenges against women, established that the prosecution did not deny the defendant a jury comprised of a fair cross-section of men and women. (41 Cal.4th at p. 346.) However, while *Wheeler* is based on the right to a representative cross-section (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277), *Batson* is based upon the equal protection clause, and the right to equal protection of each individual prospective juror as well as of the defendant. (*Batson*, *supra*, 476 U.S. at p. 89.) Nothing in *Batson* or its progeny suggests that the absence of a representative cross-section violation undermines a prima facie case of discriminatory use of peremptory challenges.

If comparative analysis in support of a prima facie case cannot be raised for the first time on appeal because it was not presented to the trial court in the first instance (see *People v. Johnson*, *supra*, 30 Cal.4th at pp. 1320-1325), there is no reasonable basis to allow speculation and conjecture about "possible" grounds for the prosecutor's challenges for the first time on appeal. Restricting appellant solely to the specific showing made by defense counsel at trial, while affirming the trial court ruling based upon speculation and conjecture about possible grounds for the prosecutor's challenges would be inconsistent with *Batson* and *Johnson v. California, supra*, as well as constituting a denial of due process on appeal and equal protection of the law. (U.S. Const., Amends. V, VI, XIV; Cal. Const., art. 1, sections 7, 15; see *Dobbs v. Zant*, *supra*, 506 U.S. at p. 358; *Parker v. Dugger*, *supra*, 498 U.S. at pp. 319-320; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343; cf. *Wardius v. Oregon* (1973) 412 U.S. 470, 479; *Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

Moreover, should this Court choose to rely on respondent's "hypothesized" reasons to independently find that no prima facie case existed, the reasoning of *Miller-El II*, as well as this Court's reasoning in *Bell*, compel the conclusion that those reasons must first be tested by comparative juror analysis. As demonstrated below, comparisons of the responses of the ten women excused by the prosecution to those of the six men who remained on the jury demonstrates that respondent's hypothesized reasons are not supported by the record as reasons why the prosecutor exercised those peremptory challenges.

As demonstrated below, respondent's speculations and analyses of voir dire are not sufficient to negate the inference of discriminatory strikes which this record establishes, nor is such speculation and conjecture

appropriate to the first stage of the *Batson* process. (*Johnson v. California*, *supra*, 545 U.S. at pp. 172-173.) Even assuming arguendo that appellant's comparisons of the women stricken by prosecution peremptory challenges to the men retained on this jury by the prosecution are disregarded by this Court, the record still establishes a reasonable inference the prosecutor exercised peremptory challenges in an unconstitutional manner.

C. The Record Establishes a Reasonable Inference That the Prosecutor Exercised Peremptory Challenges Against Women on an Unconstitutionally Discriminatory Basis

Most simply put, the issues are these: Where the prosecution has used 10 of 13 peremptory challenges to excuse women from the jury, has a reasonable inference of discriminatory use of peremptory challenges been raised? Is that reasonable inference negated by the fact that the resulting jury is composed of six men and six women?

The trial court held that "there's been no prima facie showing" (IV RT 954), but employed an erroneous standard, as demonstrated in the opening brief. (AOB 74-76.) Reviewed under the proper standard, it is abundantly clear that a reasonable inference of discrimination was raised, and that the ultimate gender composition of the jury did not negate that inference.

The only basis the trial court gave for finding that no prima facie case had been established was as follows:

> I doubt there's been a prima facie showing here because of that fact, – [that there are six women and six men on the jury] – and because it's been my evaluation that women seem to be more certain in the expression of their views both ways in this case and their leaning in this case than men have.

(IV RT 950.) Respondent attempts to defend the latter part of this statement as, not a statement of the trial court's own reasoning, but a response to

defense counsel Hart's statement

> that women as a whole on this jury panel have shown that they have tended to be – would be more compassionate and more likely to entertain life without possibility of parole as an option. That is certainly why a District Attorney would want to kick off the women because they seem to be more lenient and more in favor of life without possibility of parole as a punishment.

(IV RT 948-949[2]; RB 119-120.) Respondent omits the intervening question and answer between Ms. Hart's argument and the trial court's statement of his "evaluation":

> THE COURT: If your numbers were taken as true, that is a percentage you've give, how do you explain that there are six women and six men on this jury?
> MS. HART: Well, I notice that we do have six women and six men, but that – we still have challenges that have been disproportionately exercised.
> THE COURT: I doubt that there's been a prima facie showing here because of that fact and because it's been my evaluation that women seem to be more certain in the expression of their views both ways in this case and their leaning in this case than men have.

(IV RT 950.) It is clear that while the trial court was responding to Ms. Hart, it was doing so in the context of stating its reasoning, which did not address the voir dire or questionnaire answers of any specific juror, but did address the trial court's views of prospective women jurors in this case as a

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[2] Ms. Hart was not addressing possible specific bias on the part of any particular juror challenged by the prosecution; she was addressing the assumption of group bias upon which the prosecution's peremptory challenges appeared to be based, i.e., that overall, the women tended to be more compassionate and more likely to entertain life without possibility of parole as an option. While Ms. Hart did not attempt to suggest that all of the women who had been voir dired shared those characteristics, what she suggested was an overall group characteristic, a perceived group bias, which was probably the basis for the prosecutor's peremptory challenges, rather than a specific bias attributable to any of the specific jurors.

group. The trial court made no further statements describing its view of the evidence other than its ruling, "The Court finds that there's been no prima facie showing." (IV RT 954.) As set forth in the opening brief, the trial court's reasoning incorporated an improper determination of group bias, and suffers from the very impropriety against which *Wheeler* and *Batson* sought to protect jurors and defendants. (AOB 86-87.)

Respondent otherwise seeks to justify the trial court's ruling on this first-step *Batson* question not by defending the trial court's reasoning, but by speculating on matters primarily relevant, if at all, to the second and third steps of the *Batson* process, which have no place on appellate review of a first-step determination, especially where none of those matters raised by respondent were raised by the prosecution below or addressed by the trial court.

To defeat appellant's prima facie case, respondent relies upon this Court's statements in previous cases that a reviewing court will affirm a trial court's ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question. (RB 102-103, 113-119 [citing *People v. Davenport* (1995) 11 Cal.4th 1171, 1200; *People v. Howard* (1992) 1 Cal.4th 1132, 1155; *People v. Farnum* (2002) 28 Cal.4th 107, 135].[3]) In a footnote respondent quotes this Court in *Wheeler* recognizing that a peremptory challenge may be based upon "the obviously serious *to the apparently trivial*, from the virtually certain *to the*

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[3] *Davenport*, *Howard* and *Farnum* all predate *Johnson v. California, supra*, 545 U.S. 162 and *Miller-El II, supra*, 545 U.S. 231. As such, they reflect the application of the erroneous and overly burdensome "reasonable likelihood" standard, and are of little, if any, precedential value in appellate review, under the proper standard as clarified in *Johnson*, of a first step denial of *Batson* motion.

highly speculative." (22 Cal.3d at p. 275, emphasis added by respondent, quoted at RB 102, fn. 45.)

Respondent thereafter appears to meld two of these concepts, the apparently trivial and the highly speculative, relying upon trivial matters and highly speculative conjectures to provide this Court with "grounds" upon which, it is argued, the prosecutor *might* have challenged the jurors in question. (RB 113-119.) In doing so, respondent implicitly suggests that this Court will confirm the trial court's ruling where the record includes apparently trivial information or allows highly speculative "inferences" upon which the prosecutor *may* have based peremptory challenges, albeit without any basis for a reasonable belief that the prosecutor actually did base his challenges on such trivial or speculative grounds.

Respondent's theory is flawed in various fundamental respects. Assuming arguendo that such an approach may have been appropriate under a "strong likelihood" standard, it is incompatible with the "reasonable inference" standard of *Batson*. In rejecting this Court's "strong likelihood" standard as "at odds" with *Batson*, the Supreme Court made clear that speculation and conjecture as to the prosecutor's grounds for a particular challenge are unnecessary and inappropriate at the first step of the process, since the actual reasons for the prosecutor's challenges can be identified in the second and third steps of the *Batson* analysis.

> The *Batson* framework is designed to produce *actual* answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U.S., at 97-98, and n. 20, 106 S.Ct. 1712. The inherent uncertainty present in inquiries of discriminatory purpose *counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.* See *Paulino v. Castro*, 371 F.3d 1083, 1090 (C.A.9 2004) ("[I]t does not matter that the prosecutor might have had good

> reasons . . . [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn*, 355 F.3d 707, 725 (C.A.3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike). The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." [citation omitted.]

(*Johnson v. California*, *supra*, 545 U.S. at pp. 172-173 [emphasis added].)

In *Johnson v. California*, the trial court had identified from juror questionnaires possible race-neutral reasons for the prosecution's strikes, determined that these possible reasons constituted a sufficient basis for those strikes and on that basis determined that the defendant had failed to establish a prima facie case, despite a showing that the prosecutor had excused all three black potential jurors. (545 U.S. at pp. 165-166.) This Court deferred to and relied upon the trial court's " 'carefully considered ruling' " in upholding the determination that no prima facie case had been established. (545 U.S. at p. 167.) The Supreme Court specifically rejected such judicial speculation as a basis for denying the defendant's motion:

> The disagreements among the state-court judges who reviewed the record in this case illustrate the imprecision of relying on *judicial speculation* to resolve plausible claims of discrimination. In this case the inference of discrimination was sufficient to invoke a comment by the trial judge "that 'we are very close,' " and on review, the California Supreme Court acknowledged that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury." 30 Cal.4th, at 1307, 1326, 1 Cal.Rptr.3d 1, 71 P.3d, at 273, 286. Those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson*.

(545 U.S. at p. 173 [emphasis added].) Thus, respondent's speculations and conjectures are effectively irrelevant to the evaluation of appellant's prima facie case. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1108.)

Respondent's reliance on "possible" grounds for the prosecutor's challenges also improperly relies upon deference to the trial court, which is not applicable here. (See section A, *ante*; AOB 74-76.) The rule stated by this Court, and relied upon by respondent, that "[i]f the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm" (*People v. Howard*, *supra*, 1 Cal.4th at p. 155), is a rule based upon "the considerable deference" normally paid the trial court's ruling. (*Ibid.*) Where, as here, review is not deferential, but de novo, the legal question which this Court must resolve is not whether possible grounds for prosecutorial challenges might be gleaned from the record, but "whether the record supports an inference that the prosecutor excused a juror on the basis of [gender]." (*People v. Cornwall*, *supra*, 37 Cal.4th at p. 73; *Johnson v. California*, *supra*, 545 U.S. at p. 173.)

Moreover, even where deference is appropriate, more than speculation, conjecture and trivial concerns are needed to confirm a trial court ruling that no prima facie case has been presented. In *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, while acknowledging that courts considering a *Batson* motion at the prima facie stage may consider apparent reasons for the prosecution's challenges which are discernible on the record (421 F.3d at pp. 515-516), the Seventh Circuit clarified that

> After *Johnson* and *Miller-El II*, however, it is clear that this is a very narrow review. The Supreme Court made clear that the persuasiveness of the constitutional challenge is to be determined at the third *Batson* stage, not the first, and has rejected efforts by the courts to supply reasons for the questionable strikes. See, e.g., *Johnson*, 125 S.Ct. at 2414-18 (finding prima facie case established even though trial judge's examination of the record convinced him that the prosecutor's strikes could be justified by race-neutral reasons); *Miller-El II*, 125 S.Ct. at 2332 (noting that a *Batson* inquiry is not a

> "mere exercise in thinking up any rational basis"). In light of *Johnson*, an inquiry into apparent reasons is relevant *only insofar as the strikes are so clearly attributable to that apparent, non-discriminatory reason that there is no longer any suspicion, or inference, of discrimination in those strikes.*

(421 F.3d at p. 516, emphasis added.) In *People v. Davenport*, *supra*, for example, not only did the prosecutor explain that his reasons for excusing the three prospective jurors in question arose from their responses during *Hovey*[4] voir dire, but the trial court addressed its own observations and conclusions about the three jurors based on *Hovey* voir dire. (11 Cal.4th at pp. 1198-1199, 1201-1202.) This Court stated, "The record, reviewed independently by the trial court, *clearly established specific nonrace-related reasons*, i.e., the prospective jurors' aversion to the death penalty and their demeanor, why a prosecutor might want to excuse these prospective jurors." (11 Cal.4th at p. 1201 (emphasis added.) Similarly, in *People v. Lancaster*, *supra*, 41 Cal.4th 50, the trial court noted on the record specific "attitudes or family experiences making [the jurors in question] 'distinctive.' " (*Id.*, at pp. 74, 77-78.) In appellant's case, neither the prosecutor nor the trial court mentioned any reason related to a specific juror which justified any of the ten peremptory challenges to women. Nor are the "possible grounds" suggested by respondent such "clearly established specific non[gender]-related reasons" as were at issue in *Davenport*.

An example of the "apparently trivial" offered by respondent is the speculation that the prosecutor might have excused Ms. Horn because she didn't sign and date her questionnaire. Respondent further speculates that the prosecutor excused Ms. Mohler and Ms. Holik because they didn't give

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[4] *Hovey v. Superior Court* (1980) 28 Cal.3d 1

employment data for their ex-spouses on the questionnaires. (RB 115.) Apart from the triviality of these asserted bases for challenge, respondent overlooks the prosecution's failure to explore any concerns he might have had by questioning those prospective jurors about their questionnaires. (See III RT 618 [Mohler]; 604, 615-618 [S. Martin]; 826-827 [Horn]; 828, 831 [Ourlian]; 828 [Shephard]; 870 [Gillitzer]; 872, 874 [Sanders]; IV RT 907, 935 [Taylor][5].) While respondent contends that pursuit of efficiency in voir dire may explain the prosecutor's failure to question the women jurors whom he excused about concerns he might have had (RB 109-110), such minimal or non-existent questioning leaves the record devoid of any reliable indication as to any actual concerns the prosecutor had which might have led to their excusal. This, in turn, renders respondent's proffered "reasons" as nothing but speculation and conjecture.

Moreover, four of the six men who sat on the jury left one or more questions on the questionnaire unanswered or with requested information not provided.[6] (1 SCT2 165, 177-178 [Mr. Allen: didn't provide parent's former occupations on Questions 15, 16; left the explanation blank on question 75; didn't answer questions 82, 83]; 7 SCT2 2053, 2055-2056, 2067 [Mr. Perez: didn't provide any information about his wife on question 10; didn't answer questions 19, 22, 82, 83]; 6 SCT2 1528, 1540 [Mr. Konze: didn't provide parent's former occupations on Questions 15, 16; left

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[5] The prosecutor asked no questions of Ms. McDermott or Ms. Holik. (III RT 771.)

[6] As shown above, if this Court is to consider these hypothesized "reasons" for the prosecutor's peremptory strikes, presented by respondent for the first time on appeal, there is no reasonable basis to bar appellant from using comparative juror analysis to demonstrate that the hypotheses are not supported by the record.

the explanation blank on question 75]; 3 SCT2 857 [Mr. Cuttler: didn't provide parent's former occupations on Questions 15, 16].) Clearly, whether or not the questionnaires were fully completed by male prospective jurors did not concern the prosecutor, or lead him to conclude that these four men "demonstrated an inability to follow simple directions and pay attention to detail." (RB 115.) Either the prosecutor was concerned only with women who did not fill out their questionnaires completely, which disparate treatment would establish a prima facie under *Batson*, or this was simply not a concern of the prosecutor regardless of the gender of the juror. In either case, respondent's hypothesized "reason" is not reasonably supported by the record, and fails to provide any basis for determining that a prima facie case of discriminatory exercise of peremptory challenges did not exist.

An example of respondent's unwarranted speculation is the attempt to justify the prosecution's exclusion of Ms. Sanders on the grounds that "she may have identified too closely to the prosecution in some respects." (RB 115.) It is noted that Ms. Sanders "had taken courses in criminal investigation, legal evidence, and procedures of the justice system (9 SCT2 2432-2433, 2440) and her plan was to become an investigator for the DA's office (III RT 854)." (RB 115.) Thus, respondent argues, "[t]he prosecutor reasonably may have felt other jurors would not take Sanders' opinion seriously or that he had unfairly 'stacked the deck' against appellant given Sanders' career aspirations to become affiliated with his office. That provided grounds upon which the prosecutor might reasonably have challenged her." (RB 115-116.)

Such a fanciful creation of "reasonable grounds" for the prosecutor's peremptory challenge of Ms. Sanders cannot be considered as even

remotely undercutting the inference of discrimination raised on this record. While this is perhaps the most bizarre of respondent's "possible grounds," it highlights the uselessness of speculation where no basis for peremptory challenge other than gender was ever mentioned in the trial court. If after-the-fact speculation of a counter-intuitive thought process on the part of the prosecutor can provide such a "reasonable basis" for a challenge sufficient to defeat a prima facie case, it is hard to fathom how any prima facie case could ever be made, or a trial court's finding of no prima facie case could ever be overturned on appellate review.

Moreover, that such a "reasoning process" was behind the prosecution's challenge is not supported by this record. One of the male jurors, Mr. Cuttler, unchallenged by the prosecution, was, at the time of trial, a U.S. Customs officer, a law enforcement officer, with past experience as a military policeman. (II RT 483-484, 489-491.) He admitted on voir dire that the prosecution probably stood a better chance from the very beginning with him than the defense did because of his law enforcement experience. (II RT 483-484.) If the prosecution was worried about "stacking the deck," it is hard to see why Mr. Cuttler was left on the jury, other than the difference in gender between him and Ms. Sanders. Similarly, Mr. Fief had taken reserve officer training and hoped to become a California Highway Patrol officer. (4 SCT2 1046.) Respondent does not explain what differences other than gender between Ms. Sanders' hopes to work for the District Attorney as an investigator and Mr. Fief's hope to become a CHP officer led the prosecutor to peremptorily challenge Ms. Sanders, but not Mr. Fief.

Had the inquiry in the trial court proceeded to the second and third stages of the *Batson* process, and the prosecutor had given this reason as a

basis for excusing Ms. Sanders, both defense counsel and the trial court would have been thoroughly justified in concluding that it was pretextual.

Similarly, respondent notes that a number of the women whom the prosecutor excused had either themselves had contact or had close relatives who had adversary contacts with the criminal justice system, suggesting that this characteristic led the prosecutor to challenge them. (RB 114-115.) Respondent overlooks the prosecutor's decision to leave two male jurors with similar experience on the jury. (10 SCT2 2943 [Mr. Valles had been arrested 13 years before]; 3 SCT2 866 [Mr. Cuttler's nephew had been arrested, causing him concern for his sister's son; his son had been prosecuted in a trial, causing him concern].)

Respondent also proposes questions of Ms. Gillitzer's ability to hold firmly to her opinion against other jurors as a possible reason for the prosecutor to excuse her. (RB 116.) Respondent can only cite Ms. Gillitzer's questionnaire for this point, for the prosecutor failed to direct any questions to Ms. Gillitzer on this point. (III RT 868-870.)[7/]

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[7] Respondent engages in his own comparative analysis in this regard, noting that Mr. Kelly, one of the three men against whom the prosecutor exercised a peremptory challenge had also expressed and inability to hold firmly to his opinion. (RB 116, fn. 51.) If this Court determines that comparative juror analysis is not available on appeal in this case, it must disregard respondent's attempts to use it as well appellant's. In any case, review of Mr. Kelly's voir dire indicates that it is more likely that the prosecutor chose to excuse Mr. Kelly because he stated that he would not vote for the death penalty because he did not want to be responsible for it. (IV RT 892-893, 902-903.) Refusal to vote for the death penalty is generally a more undesirable trait for the prosecution than concerns about one's ability to hold firmly to one's opinion. Mr. Kelly's sharing of this particular attribute with Ms. Gillitzer does not provide any support for respondent's speculation as to the prosecutor's reasons for

(continued...)

Finally, respondent attempts to justify the prosecution's peremptory challenges against six of the women based upon responses which respondent claims indicate that these six jurors were inclined to not impose the death penalty. (RB 117-118.) As to Ms. Taylor, respondent cites her questionnaire response that she "would consider" the death penalty (10 SCT2 2749; RB 119) but does not mention that two of the male jurors who served on the jury gave the same answer on the questionnaire. (7 SCT2 2058 [Perez]; 4 SCT2 1049 [Fief].) Similarly, Ms. Taylor's opinion that the death penalty is used "Too Randomly – versus Consistent" (10 SCT2 2749) is characterized by respondent as a response "indicating [she was] inclined to not impose the death penalty" (RB 119), as are similar responses by Ms. Sanders (9 SCT2 2435) and Ms. McDermott. (6 SCT2 1616.) Yet both Mr. Perez and Mr. Cuttler also expressed the opinion that the death penalty is used too randomly (7 SCT2 2058; 3 SCT2 861), but both ended up on the jury, unchallenged by the prosecutor.

As a practical matter, where a defendant's prima facie case is based upon a showing of disproportionate strikes against a cognizable group, involving 10 of 13 strikes against that cognizable group by the prosecution, the presence in the record of "possible" grounds for each of those strikes becomes even less probative. The showing made by appellant in this case was not that three (see, e.g., *People v. Davenport*, *supra,* 11 Cal.4th at pp. 1197-1198) or four (see, e.g., *People v. Farnam*, *supra*, 28 Cal.4th at p. 134) members of a cognizable group were excused, but that ten members of such a group were excused, using 77% of the peremptory challenges

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[7] (...continued)
excusing her.

exercised by the prosecution, and that of the 19 women and 19 men against whom peremptory challenges could have been exercised as of the point that appellant's *Batson/Wheeler* motion was made, the prosecutor excused 53% of the women, but only 16% of the men. This substantial showing of disproportionate strikes itself raises such a strong inference of discrimination that it cannot be defeated at the first step of the *Batson* process by mere possibilities that each of the ten was excused for reasons unrelated to her gender. The inference of discrimination was established by these statistics. The trial court was therefore required to proceed to the second and third steps of the *Batson* process to determine whether there actually were non-discriminatory bases for the prosecution's strikes of these ten women, or whether, as the statistics strongly imply, the prosecution exercised its strikes in an unconstitutionally discriminatory manner.

Other than speculation on possible reasons for the prosecutor's strikes of particular jurors, respondent proposes a number of aspects of voir dire which, respondent contends, "tend to negate" an inference of discrimination. (See e.g., RB 106-108, 110-111.) None has merit. For the most part, these points do not "tend to negate" such an inference, and are fully consistent with discriminatory use of peremptory challenges. Certain arguments raised by respondent, rather than "tending to negate," actually bolster an inference of discriminatory use of peremptory challenges by the prosecution.

Respondent relies upon the fact that the prosecutor passed the challenge five times before the *Wheeler* motion was made. However, this Court has made clear that passing challenges does not undercut an inference of discrimination. (*People v. Snow* (1987) 44 Cal.3d at p. 225; see also *People v. Motton* (1985) 39 Cal.3d 596, 607-608.)

Respondent argues that the fact that the prosecutor had insight into 18 prospective jurors seated at a time for voir dire, as well as advance notice of the upcoming sequence of other prospects before each round of peremptories is significant because the prosecutor "*may have* exercised his peremptories, not because a prospect he excused was particularly undesirable from a prosecution standpoint, but because a future prospect was even more desirable." (RB 106 (emphasis added).) That circumstance, while not negating the inference of discrimination here, does tend to negate any significance of the prosecutor's "five *intervening* passes" (RB 78 (italics in original).) The prosecution would have been able to judge when he could pass while still maintaining an advantage over the defense in the number of remaining peremptory challenges. The prosecution's passes, early in the process of exercising peremptory challenges, is thus unlikely to have been a demonstration of satisfaction with the jury as constituted.

Moreover, such advance knowledge about which jurors were to be seated in the jury box for questioning in what order could as easily aid in a discriminatory purpose. It is as consistent with discriminatory as non-discriminatory purpose, and thus an effectively neutral "jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " (*Batson, supra*, 475 U.S. at p. 96 [citation omitted].) As such, this circumstance supports, rather than tending to negate, appellant's prima facie case under *Batson*. (*Ibid.*) Respondent here seeks to rely on the camouflage made available to the prosecutor by the peremptory challenge process to establish there was no discriminatory use. Such reliance is contrary to the law set forth in *Batson*, which provides that the moving party is entitled to rely on such circumstances in support of a prima facie case. (*Ibid.*)

Moreover, respondent's attempt to rely upon such speculation as "tend[ing] to negate a reasonable inference of discrimination" is an attempt to judge the establishment of a prima facie case not upon whether there is a reasonable inference of discrimination, but upon whether there is "strong likelihood" of such. That standard, of course, was rejected by the United States Supreme Court in *Johnson v. California*, *supra*, 545 U.S. at p. 173. If the prosecutor in fact used his advance knowledge of upcoming jurors in such a manner as respondent speculates, that is a matter for the second and third stages of the *Batson* process, not the first stage.

Respondent's next attempt to excuse the prosecutor's discriminatory use of peremptory challenges against women is similarly flawed. Respondent argues that seven of the women excused by the prosecutor were then replaced by another female prospective juror, and two of the men excused by the prosecutor were similarly replaced by female prospective jurors. (RB 107-108.) "Given that the parties could see which prospects would be seated next, the prosecutor did a poor job of excluding women, assuming arguendo, that was his goal." (RB 107.) Given the manner in which prospective jurors were seated, it would have been unrealistic of the prosecutor to expect to exclude all women from the jury, but the prevention of a jury in which women predominated was clearly within the prosecutor's reach, through the discriminatory use of peremptory challenges. Such use of peremptory challenges is just as much a violation of *Batson* as complete exclusion.

As demonstrated in *United States v. DeGross* (9th Cir. 1992) 960 F.2d 1433 (en banc) (*De Gross*), a goal of total exclusion of women is not necessary to a finding of discriminatory use of peremptory challenges; a goal of achieving a balance of men and women on the jury equally offends

Batson. (*Id.* at pp. 1442-1443.) Moreover, that the prosecutor apparently knew that nine of the 13 jurors whom he challenged would be replaced by female prospective jurors suggests strongly that in the absence of the discriminatorily based peremptories, the jury would not have been evenly divided between men and women, but would have had more women than men, a result which apparently no one at trial thought the prosecution wanted.

Respondent argues that the changing ratios of females to males in the prospective jury during jury selection, from 42% female to 25% female to 58% female to 50% female tends to negate a reasonable inference of discrimination, since the jury as sworn ended up with a higher percentage of females than were initially in the prospective jury. (RB 108.) Again, respondent's reasoning fails. In the absence of the discriminatorily based peremptory challenges by the prosecution, the percentage of women on the jury as sworn would have been even higher. While a defendant has no right under *Batson* to a jury of a specific gender makeup, *Batson* does guarantee the right to a jury whose makeup is not the result of discriminatorily based peremptory challenges by the prosecution. (*DeGross*, *supra*, 960 F.2d at p. 1443.)

Respondent also argues that the prosecutor's limited questioning of some of the excused female prospective jurors may have been simply a matter of efficiency. However, that the prosecutor may have had a goal of not wasting time of prospective jurors whom he had already decided to excuse does not mean that the prosecutor's decision to excuse those prospective jurors was based on valid considerations rather than assumptions of group bias or an attempt to manipulate the gender balance on the jury. The prosecutor's "efficiency" thus does not undercut or "tend

to negate" the reasonable inference of discrimination established by appellant. Moreover, such limited questioning has been long recognized as supporting a reasonable inference of discrimination. (*Wheeler*, *supra*, 22 Cal.3d at pp. 280 -281 ["the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."]) Respondent does not discuss, or even acknowledge this authority.

Respondent further argues that the fact that the prosecution had seven peremptories remaining, and could have continued to use peremptories to excuse women, tends to negate an inference of discrimination. (RB 106-107.) As respondent acknowledges, the *Batson/Wheeler* objection itself likely affected the prosecution's continued use of peremptories in that manner. (RB 107.) Respondent attempts to mitigate this point by pointing out that the prosecution passed numerous times before the *Wheeler* objection was made. However, respondent does not explain how that fact negates an inference of discrimination. As pointed out above, the prosecution's passes of peremptory challenge were as consistent with a reasonable inference of discrimination as not, and support, rather than negate, appellant's prima facie case.

Respondent argues that the prosecution's first six challenges, all against women, were not really six challenges against women "in a row," because of five intervening passes of the challenge. (RB 107.) In fact, the prosecution excused six women through peremptory challenge before excusing a man. Whether "intervening" passes mean those six challenges were "in a row" or not is primarily a quibble over semantics, an attempt to further camouflage the prosecution's pattern of striking women in a manner

which raises a reasonable inference of discriminatory use of peremptory challenges. Moreover, according to respondent's Table C, up until the sixth peremptory challenge by the prosecution (III RT 840), women made up less than half of the seated jurors, often only one-third, and at one point only one-quarter. Thus, the prosecutor's "intervening passes" took place primarily when women were proportionally underrepresented on the prospective jury. Additionally, during that period of underrepresentation of women, the six peremptory challenges the prosecutor *did* exercise were only against women. Such disparate treatment cannot be readily explained as a random occurrence. Rather, an inference of discriminatory intent and practice is raised.

Respondent also attempts to find some excuse for the prosecutor's actions in the manner in which the defense exercised its peremptory challenges, at one point excusing six men in a row. "Impliedly, the defense found it acceptable to excuse prospects of the same gender in a row." (RB 107.) Whether the defense "found it acceptable" or not is irrelevant to the question of whether or not the prosecution exercised its peremptory challenges in a discriminatory manner. "[T]he propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges." (*People v. Snow* (1987) 44 Cal.3d 216, 225; *People v. Reynoso* (2003) 31 Cal.4th 903, 927; *Wheeler*, *supra*, 22 Cal.3d 258, 283, fn. 30; see *Miller-El II*, 545 U.S. at p. 255, n.14 [defendant's conduct "flatly irrelevant" to the question of whether the prosecutor's conduct revealed a desire to exclude African-Americans].)

Respondent's attempt to suggest that no prima facie case was made because "the defense did it too" misses the point. If respondent is implying that the prosecution's challenges were conducted in some manner to balance

a perceived discriminatory use of peremptory challenges by the defense against men, and thus were not discriminatory themselves, respondent has misunderstood the basis of *Batson*. (See *Miller-El II*, *supra*, 545 U.S. at p. 255, n.14 ; *DeGross*, *supra*, 960 F.2d at 1443; see also *U.S. v. Stephens*, *supra*, 421 F.3d at p. 514 [rejecting suggestion that "that discrimination by the government in jury selection would be constitutional as long as the defendant also discriminated against prospective jurors"]; *Eagle v. Linahan* (11th Cir. 2001) 279 F.3d 926, 941- 942 [potential *Batson* violation by prosecutor not cured by court's observation that the defendant may have also been using peremptory challenges in a discriminatory manner; *Batson* is meant to vindicate the rights of venire members, not just defendants].)

Respondent's argument actually supports an inference of discrimination in this case. Peremptory challenges which are exercised against women to balance against peremptory challenges which were exercised by the opposing party against men constitute challenges based upon a prospective juror's membership in a protected class, not upon a specific bias. Such a practice therefore violates *Wheeler* and *Batson*. (*DeGross*, *supra*, 960 F.2d at p. 1436; *Eagle v. Linahan*, *supra*, 279 F.3d at pp. 941- 942; see AOB 82, fn. 63.)

If the prosecution felt that the defense was using its challenges in a discriminatory manner, the prosecution's remedy would have been to make its own *Wheeler/Batson* motion[8], not to engage in self-help by using unconstitutional methods. (*DeGross*, *supra*, 960 F.2d at pp. 1437, 1439-1442.) The prosecution made no such motion, and has thus waived any

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[8] See 5 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) § 497; *People v. Pagel* (1986) 186 C.A.3d Supp. 1.)

complaint against, or remedy for, the manner in which the defense exercised its peremptory challenges. The defense may have been able to fully justify its peremptory challenge to each of the male jurors they challenged. In the absence of an objection, the defense was never asked to do so.

In *DeGross*, cited in the opening brief (AOB 83, fn. 63), the prosecution stated that "his main reason for challenging [the only Hispanic juror on the veneer] was to achieve 'a more representative community of men and women on the jury.' [Footnote omitted.]" (960 F.2d at p. 1436.) The Ninth Circuit, en banc, held that the prosecutor's justification both established a prima facie case of gender discrimination and constituted an admission of purposeful gender discrimination in violation of *Batson*. (*Ibid.*) Respondent fails to address (or even acknowledge) *DeGross*, or its reasoning.

Nor does respondent present any authority for the proposition that a pattern of discriminatory peremptory challenges by the defense could justify discriminatory challenges by the prosecutor. On the other hand, *De Gross* establishes that such an exercise of challenges in a discriminatory manner in response to a defense pattern of discriminatory challenges would establish, rather than defeat, a prima facie case under *Batson*.

In the opening brief, appellant demonstrated that the 10 women excused by the prosecution had nothing but their gender in common. (AOB 79.) Respondent argues that, because the prosecutor exercised peremptory challenges against three males as well as the 10 females, the "excluded jurors" did not have their gender in common. (RB 120.) Respondent's point is mere manipulation of numbers to no effect, in an attempt to distort the argument made in the opening brief. Respondent ignores this Court's recognition, in *Wheeler*, of the relevance of such a showing as appellant has

made. This Court recognized in *Wheeler* that, in support of a challenge to discriminatory use of peremptory challenges, a party "may . . . demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole." (22 Cal.3d at p. 280.) The "jurors in question" here are the ten women excused by prosecution peremptory challenge, not the three men so excused. Respondent does not explain how adding the three men challenged by the prosecution into the calculation affects the determination of whether or not a prima facie case has been established. Nor does respondent refute the showing made in the opening brief regarding the heterogeneity of the ten women apart from their gender.

D. Conclusion

Appellant has demonstrated that a reasonable inference exists that the prosecutor's use of 10 of its 13 peremptory challenges to excuse women demonstrated an unconstitutional discriminatory use of such challenges. Nothing respondent has presented negates the inference raised by appellant. Therefore, the record establishes that the trial court erred in ruling that the no prima facie case had been established.

This Court has determined that, where the trial court has erroneously denied a *Wheeler/Batson* motion at the first step of the *Batson* analysis, the proper remedy is to remand the matter for a hearing at which the trial court can conduct the second and third steps of the *Batson* analysis. (*Johnson II*, *supra*, 38 Cal.4th at pp. 1103-1104.) However, the time lapse between

appellant's trial and this Court's eventual resolution of his appeal[9] will be substantially longer than in any case discussed in *Johnson II* (see 38 Cal.4th at pp. 1101-1102), making a reliable hearing on the facts impossible as a practical matter on remand in this case.

In *Johnson II*, this Court remanded the matter despite the lapse of between seven and eight years since jury selection had taken place. (38 Cal.4th at p. 1101.) Of the federal cases cited by the Court in which remand was ordered (38 Cal.4th at pp. 1100-1101), none involved a time lapse as long as that involved here. (*Batson*, *supra*, 476 U.S. at p. 100 [trial held two years prior to reversal of the judgment]; *Williams v. Runnels*, *supra,* 432 F.3d 1102 [trial held in March 1998; remand ordered in January 2006]; *Paulino v. Castro*, supra, 371 F.3d 1083 [remand ordered five years after the state appellate court decision and a longer time after trial]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073 [remand ordered about seven years after trial]; *United States v. Tindle* (4th Cir. 1986) 808 F.2d 319 [remand after more than three years].) In cases prior to *Johnson II* in which this Court considered and rejected remand, time lapses longer than involved here were considered too long to allow a realistic chance of a meaningful hearing on remand. (*People v. Snow* (1987) 44 Cal.3d 216, 226-227 [voir dire began approximately six years before reversal of judgment]; *People v. Hall* [(1983)] 35 Cal.3d 161, 170-171[trial held more than three years before reversal of judgment]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 4 [trial held nearly three years before reversal of judgment].) Other cases in California which resulted in remand involve substantially shorter time lapses than that involved here. (*People v. Hutchins* (2007) 147 Cal.App.4th

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[9] Over 13½ years as of the filing of this Reply Brief.

992, 996 [voir dire about 1½ years before reversal of judgment]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1121 [trial about a year before reversal of judgment]; *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1025 [voir dire about two years before reversal of judgment]; *People v. Gore* (1993) 18 Cal.App.4th 692, 706 [voir dire 17 months prior to reversal of judgment].)

Penal Code section 1260 provides that an appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." Remand is appropriate "if there is any reasonable possibility that the parties can fairly litigate and the trial court can fairly resolve the unresolved issue on remand. . . ." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.) In this case, no such reasonable possibility exists, due primarily to the lapse of time.

> Ordinarily, factors to be considered in determining whether remand is appropriate are the length of time since voir dire, the likelihood that the court and counsel will recall the circumstances of the case, the likelihood that the prosecution will remember the reasons for the peremptory challenges, as well as the ability of the trial judge to recall and assess the manner in which the prosecutor examined the venire and exercised other peremptory challenges.

(*People v. Williams*, *supra*, 78 Cal.App.4th at p. 1125.)

In this case, while trial counsel[10] may recall the circumstances of the case generally, the likelihood that they can reliably recall the circumstances of voir dire is essentially nil. Nor could a judge[11] who had not presided

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[10] James R. Oppliger, the deputy district attorney who prosecuted appellant, became a Judge of the Fresno County Superior Court in 2003.

[11] Hon. Stephen R. Henry, who presided at appellant's trial in 1994, retired from the bench in 2001. (Cal. Courts and Judges Handbook (2007-

(continued...)

over appellant's trial "recall . . . the manner in which the prosecutor examined the venire and exercised other peremptory challenges." In *Johnson II*, this Court noted that the fact that a hearing on remand would be held by a judge other than the one who presided over the trial "does not make a limited remand impossible." (38 Cal.4th at p. 1102.) However, it is a factor which weighs against a remand, for the trial judge's personal experience of the voir dire and the unrecorded nuances of the proposed jurors' responses and interactions with trial counsel are withdrawn from the totality of the evidence upon which appellant's motion is ultimately judged. The lapse of time alone necessarily limits the extent to which the original trial judge can accurately or reliably recall those experiences. The substitution of a judge who did not preside over the original voir dire guarantees that such non-record experiences – "the unspoken atmosphere of the trial court - the nuance, demeanor, body language, expression and gestures of the various players" (*Tolbert v. Page*, *supra*, 182 F.3d at p. 684) – cannot be considered at all. The factors relevant to the determination of whether or not to remand the case, therefore, weigh against such a remand and in favor of reversal.

Appellant submits that a remand in this case would be an exercise in futility and a waste of judicial resources. Rather, reversal of the entire judgment is the appropriate remedy after such a lapse of time, and should be ordered in this case. Should reversal not be ordered, then the matter should be remanded for further hearing pursuant to *Batson* and *Wheeler*, under the conditions specified in *Johnson II*. (38 Cal.4th at pp. 1103-1104.)

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[11] (...continued)
2008 Ed.) p. 513.)

II

ADMISSION OF EXTRAJUDICIAL STATEMENTS OF INMATE WITNESSES MARTINEZ AND JOHNSON VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION

In the opening brief, appellant argued that the trial court erred by allowing testimony of alleged prior extrajudicial statements of two inmate witnesses, Eric Johnson and Albert Martinez, who also testified, but did not confirm having made those statements and denied knowledge of the facts set forth in those statements. This denied appellant his rights to due process and to confrontation of the witnesses against him, and his rights to a fair jury trial and a reliable verdict on both guilt and penalty, in violation of the United States Constitution and the California Constitution, and requires that the guilt verdict and special circumstance findings, as well as the penalty verdict, be reversed. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const. Art. 1, sections 7, 15, 16; *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*); *Douglas v. Alabama* (1965) 380 U.S. 415; *Lee v. Illinois* (1986) 476 U.S. 530; *Chapman, supra*, 386 U.S. at p. 24; *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Respondent contends that because Johnson and Martinez were available for cross-examination at trial, appellant's confrontation rights were satisfied. (RB 134.) Respondent also argues that the claim of denial of confrontation as to Johnson's statement was not preserved for appeal because no objection on that ground was made by appellant at trial. Additionally, respondent argues that various of the constitutionally based arguments made in the opening brief were not preserved for appeal. (RB 123, 130-132.) Respondent further argues that if any error occurred, it was

harmless. (RB 138-143.)

Respondent concedes that the alleged statements to the detectives by Johnson and Martinez were testimonial in nature. (RB 133.) However, respondent contends that, because Johnson and Martinez testified at trial, they were available for cross-examination, and that the Confrontation Clause was thereby satisfied. (RB 134.) As appellant argued in the opening brief, the issue is not whether Johnson and Martinez were present in court for cross-examination, but whether they were available to defend or explain the statements attributed to them. (AOB 101-116.) Since both Johnson and Martinez denied having made the statements attributed to them by the prosecution, appellant was deprived of the opportunity to test the truth, accuracy or reliability of the statements themselves on cross-examination.

Respondent argues that appellant "essentially seeks a blanket rule that would prevent impeaching an available percipient witness with out-of-court statements reportedly made to law enforcement when the witness denies making the statements or claims/feigns lack of recall as to whether he had made them." (RB 123.) Appellant does not seek such a rule. In the first place, neither Johnson nor Martinez was a percipient witness to the Andrews homicide. Rather, their alleged prior statements were primarily "based upon statements made by the defendant while both the defendant and the informant [were] held within a correctional institution." (Pen. Code §1127a, subd.(a).) Based upon the statements themselves, Johnson and Martinez were jailhouse informers, or "in-custody informants,"[12] not

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[12] Respondent takes issue with appellant's use of the term "in-custody informants" in regard to Johnson and Martinez. (RB 133-134.) Appellant cited Penal Code section 1127a, which defines "in-custody

(continued...)

percipient witnesses.

Moreover, it is not impeachment per se that is the issue, for these statements were not admitted solely as impeachment. Rather, the out-of-court declarations were admitted as evidence of the truth of the "facts" stated within them, while the accuracy and reliability of those "facts" was effectively insulated from cross-examination.

The practical effect of appellant's position is no different than if the alleged declarant was unavailable to testify, through absence or invocation of a privilege, and there had been no prior opportunity for cross-examination of the declarant. In that situation, even respondent must concede the out-of-court declaration would be inadmissible under *Crawford.* (*Crawford, supra*, 541 U.S. at pp. 53-56.) Similarly, if the declarant testified, confirmed making the statement but claimed it was false, and then refused to answer any further questions, the out-of-court declaration would be inadmissible. Not only would the defendant be denied

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[12] (...continued)
informant" for purposes of that statute, as a reference to the legislature's acknowledgment of the credibility issues and potential for abuse which attach to inmate witnesses testifying for the prosecution. The terms "in-custody informant" or "jailhouse informer" (see, e.g., AOB 108-109, 111-113) are not precluded from use generally by the use of the term in the statute for particular purposes. Moreover, while section 1127a excludes percipient witnesses from its definition, as respondent notes (RB 133), according to the statements neither Johnson nor Martinez was a percipient witness to the Andrews homicide, as explained above. Their alleged prior statements to investigating officers, concerning statements supposedly made by appellant on F-pod, are the type of "evidence" which is the mainstay of the jailhouse informer's arsenal, often concocted from information gathered by the informer from sources other than the defendant.

cross-examination, but such refusal to answer questions would result in the entire direct testimony of that witness, and thus any basis for admission of a prior inconsistent statement, being stricken. (See *People v. Price* (1991) 1 Cal.4th 324, 420; *People v. Daggett* (1990) 225 Cal.App.3d 751, 760; see also *Denham v. Deeds* (9th Cir. 1992) 954 F.2d 1501, 1503; *United States v. Cardillo* (2d Cir. 1963) 316 F.2d 606, 611.)

Whether Johnson and Martinez were lying in their denials of the statements or not, the effect is the same – the out-of-court statements are insulated from challenge to the accuracy or reliability of their substance, or even to whether or not the information contained in the statements was based on personal knowledge or upon a collection of hearsay, rumor, conjecture and speculation.

If Johnson and Martinez were lying about having made the statements, their maintenance of that lie on both direct and cross-examination left appellant in the same position as if they had refused to answer questions about statements they confirmed making. The violation of appellant's right to confrontation is the same as if they simply refused to submit to cross-examination on those matters.

A witness' denial of having made a statement is substantially different from confirming, defending or explaining the statement in its effect on a defendant's confrontation rights. Had Johnson and Martinez confirmed having made the statements, but denied that they had personal knowledge of the facts contained therein, explaining that they had concocted the statements from information they heard from others on F-pod who were discussing the Andrews homicide, in an attempt to obtain a deal from the prosecution on their own cases, appellant's confrontation rights would have been satisfied. Had they confirmed making the statements and

that the contents were based on personal knowledge, or explained any part of the statements they considered inaccurate, again, appellant's confrontation rights would have been satisfied.

Whether their denial of the statements was true or false, the effect upon appellant's opportunity to effectively cross-examine them is the same. If Johnson and Martinez had not made the statements, appellant was unable to determine the source or reliability of the information contained therein. In that situation, it should be unquestionable that appellant's confrontation rights were not satisfied merely because Johnson and Martinez were available for cross-examination. Assuming arguendo that Johnson and Martinez had actually made the statements, as a result of their denials of having done so appellant was unable to determine the source of the information contained therein or the reliability or accuracy of that information. The effect on appellant' rights, and upon the reliability of the jury's ultimate determinations of guilt and penalty, is the same in either situation. In neither situation should the out-of-court declarations have been admitted as evidence of facts contained therein.

Assuming they did make the statements attributed to them, appellant was unable to explore the extent to which Johnson and Martinez concocted those statements, not from personal knowledge but from hearsay, rumors and speculation they had heard on F-pod regarding the Andrews homicide. Detective Christian testified that Martinez told him that he had talked to other inmates about the homicide, and mentioned some of what others had said about it. However, Detective Christian did not ask specific questions to tie down what Martinez knew versus what he had heard from others. Rather, he thought Martinez was specific in his responses about what he had heard himself. (VII RT 1801-1802.) There is no indication that Detective

Lee asked any questions of Johnson about the source of his information. Clearly, the investigating officers did not challenge Martinez or Johnson on this issue, nor did they share appellant's interest in doing so. Thus, the issue of personal knowledge of the events described in the statements was effectively insulated from any possibility of effective examination by appellant.

Respondent attempts to distinguish *Douglas v. Alabama* (1965) 380 U.S. 415 and *People v. Shipe* (1975) 49 Cal.App.3d 343 on the grounds that those cases involved codefendants who refused to testify, while Johnson and Martinez were not codefendants and did testify. (RB 135.) Respondent does not explain why or how the status of a declarant as a codefendant changes the analysis under the Confrontation Clause from that of a non-party witness. In fact, the distinction is irrelevant for these purposes. That Johnson and Martinez testified is not a compelling distinction either, under the circumstances of this case. They both denied having made the alleged statements attributed to them by the prosecution. As stated in *Douglas*, "[The declarant] could not be cross-examined on a statement imputed to but not admitted by him." (380 U.S. at p. 419.) Respondent's attempt to distinguish *People v. Rios* (1985) 163 Cal.App.3d 852 on the same ground is equally unavailing.

In discussing *Nelson v. O'Neil* (1971) 402 U.S. 622 (*O'Neil*) and *United States v. Brown* (2nd Cir. 1983) 699 F.2d 585 (*Brown*), respondent contends that the lack of a common interest between Johnson and Martinez on the one hand and appellant on the other "is a distinction without significance because Martinez and Johnson were not co-defendants." (RB 135.) Respondent fails to justify this contention, which betrays a lack of understanding of the holdings of both *O'Neil* and *Brown*.

In *O'Neil*, a testifying codefendant denied making an out-of-court statement, which was then admitted into evidence against the defendant. The United States Supreme Court found no Confrontation Clause violation because the codefendant testified fully and at length as to all his activities during the period described in the alleged statement, and testified favorably for the defendant concerning the underlying facts in a common alibi defense.

As *Brown* explains, *O'Neil* found no confrontation violation on the basis of a "joint trial and a common defense" of the defendant and the declarant/codefendant whose alleged statement was at issue. (*O'Neil*, *supra*, 402 U.S. at 629-630; *Brown*, *supra*, 699 F.2d at p. 592.) In *Brown*, the lack of a common defense in an otherwise similar situation rendered the use against the defendant of the testifying codefendant's alleged prior statement, which he denied making, constitutional error, denying the defendant his right to confrontation. (*Ibid.*) That Martinez and Johnson were not codefendants does not distinguish *Brown* in the manner intended by respondent. Rather, that fact confirms that the two were not acting in a common defense with appellant, or with common interests, as in *O'Neil*, and that the use of their alleged prior statements in this case denied appellant' s confrontation rights, as in *Brown*.[13]

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[13] Respondent argues that "their denials and failure to confirm making statements implicating him were indeed favorable to his defense." (RB 135.) As demonstrated in the opening brief, those denials were hardly favorable to the defense, for they were likely seen by the jury as feigned and contrived, providing appellant no ground for fully impeaching the substance and credibility of the statements. It is reasonably probable, even likely, that the jurors found the denials not to be credible, while crediting the contents of the statements. (AOB 115.) Moreover, their denials of the statements

(continued...)

Respondent cites two cases in support of the argument that no confrontation violation occurred here. (RB 137-138.) Both are distinguishable from the facts presented in this case. In *People v. Martinez* (2005) 125 Cal.App.4th 1035, the witness repudiated her prior statements on the stand. However, there is no indication in the opinion that she denied making the statements. Rather, she apparently *explained* the statements, stating that "she was jealous about the defendant's imagined infidelity and was drinking heavily throughout the episode." (125 Cal.App.4th at p. 1041.) That the witness was available to "defend or explain" the prior statements satisfied the Confrontation Clause under *Crawford*, but by the same token, substantially distinguishes that case from the facts in appellant's case. By denying ever having made the statements, Johnson and Martinez could not or did not defend or explain the statements attributed to them.

In *People v. Perez* (2000) 82 Cal.App.4th 760, while the witness professed an inability to recall, "[i]n fact, Perez's counsel succeeded in piercing her stonewall of "I don't remember" by leading her to testify that Perez was not the person who shot the victim." (82 Cal.App.4th at p. 766.) No such response was available from Johnson or Martinez in this case. Moreover, Johnson and Martinez did not profess an inability to recall, but denied making the statements. If they didn't make the statements, no amount of cross-examination, no matter how brilliantly done, can pierce that lack of knowledge of the "facts" contained in the statements.

Contrary to another of respondent's contentions, there was no waiver

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[13] (...continued)
were, at most, neutral in terms of implicating or exculpating appellant.

of appellant's confrontation rights, or to appellate review of the erroneous admission into evidence of Detective Lee's testimony about Johnson's alleged statement. Respondent argues that the change in the law resulting from *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), does not excuse the failure of defense counsel to object on confrontation grounds to the prior statement of Johnson. (RB 131-132.) Respondent contends that *Crawford* involved admission of testimonial statements of an absent declarant, while "Martinez [sic[14]] was present and testified at trial." (RB 132.) However, *Crawford* announced a new standard for determining when admission of out-of-court declarations violates the Confrontation Clause, overruling *Ohio v. Roberts* (1980) 448 U.S. 56, which was controlling on that issue at the time of appellant's trial. Prior to *Crawford*, analysis of a confrontation issue relating to hearsay involved considerations of whether the hearsay fell within a firmly rooted hearsay exception or otherwise bore adequate indicia of reliability. (*Ohio v. Roberts* , *supra*, 448 U.S. 56, 66.) After *Crawford*, such considerations were irrelevant to the right to confront the declarant, while the testimonial nature of the out-of-court declaration and the presence at trial of the declarant for cross-examination "to defend or explain" (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9) the statement became the central concerns of the analysis. As a result of the change in law under *Crawford*, it is Johnson's presence at trial "to defend or explain" a statement which he denies making which is at issue here. No objection is

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[14] That Martinez was present and testified at trial is irrelevant to any issue relating to the admissibility of the statement attributed to Johnson. Appellant assumes that respondent's argument in this regard was intended to refer to Johnson's presence and testimony at trial rather than Martinez's, and that this reference to Martinez was a typographical error of sorts.

necessary to preserve the issue in these circumstances.[15] (See *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, n.2; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208.)

Respondent's attempt to distinguish *People v. Johnson* because that case involved testimonial statements of an absent declarant rather than one who testified is unavailing. The issue here is whether the fact that Johnson and Martinez testified, but did not confirm having made the statements attributed to them, made them unavailable for cross-examination about the truth, accuracy or reliability of the testimonial statements attributed to them, rendering admission of those statements a violation of appellant's rights to confrontation under the Sixth Amendment under *Crawford*. That issue is as affected by the change in the law announced in *Crawford* as that involved in

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[15] Respondent also argues that appellant's constitutional claims of violation of his rights to due process, a fair jury trial and a reliable determination of guilt and penalty were no made at trial and thus not preserved for appeal. However, where an objection is made on specific grounds, counsel need not state each particular legal consequence of the error (e.g., denial of due process). The reviewing court may still consider claims not raised below if they are merely based on a "legal consequence" of the claim that was raised below. (*People v. Partida* (2005) 37 Cal.4th 428, 435-436.)

> As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal."

(*People v. Yeoman* (2003) 31 Cal.4th 93, 117.) Appellant's objection that his right to confrontation was violated by admission of the statements attributed to Martinez thus adequately preserves the claims that violation of his right to confrontation had the legal consequences of denial of due process, a fair trial and a reliable determination of guilt and penalty.

People v. Johnson.

Moreover, given the trial court's denial of appellant's objection on confrontation grounds to the prior statement attributed to Martinez (VII RT 1770-1774), any similar objection regarding the prior statement attributed to Johnson would have been futile, and thus unnecessary to preserve the objection for appeal. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1126; *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Whitt* (1990) 51 Cal.3d 620, 655, fn. 27; *People v. Johnson* (2004) 119 Cal.App.4th 976, 982-84; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1.)

Respondent further contends that even if Johnson's and Martinez's statements were admitted erroneously, the error was harmless. (RB 138-143.) Respondent first argues that the length of jury deliberations, the requests for readback, review of the autopsy, report and questions about instructions do not establish that the case was close. While length of deliberations can be consistent with a jury's "conscientious performance" of its civic duty (RB 140), the length of deliberations here, 12 hours over four days, demonstrates that the jury did not consider the case open and shut. While the conclusion that on the night of Andrews' death appellant was involved in a fight in the cell he shared with Benjamin, Bond and Andrews was the strongest part of the prosecution's case, the remainder of the prosecution's evidence had substantial weaknesses, including the credibility of the inmate witnesses upon whom the prosecution primarily relied.

Moreover, significant questions remained unanswered by the prosecution case, such as the question of how the towel got tied around Andrews' neck as tightly as it did without being noticed by Benjamin and Bond. Respondent suggests in a later argument that Benjamin and Bond simply didn't notice that the towel was tied around Andrews' neck when he

was placed under the bunk, because he was mostly covered with a blanket. (RB 290.) Respondent also notes that responding medical personnel did not at first realize the towel was around Andrews' neck when he was pulled out from under the bunk. (RB 291.) However, given the testimony of how difficult it was for medical personnel to remove the towel,[16] substantial effort would have been required to tie the towel that tightly in the first place. It would have been unlikely in the extreme that it could have been done without having been noticed by the other occupants of the 17½ x 6½ foot cell while appellant, Benjamin and Bond were all locked down in the cell.

Respondent dismisses the trial court's statement, quoted in the opening brief, summarizing the evidence as showing that there were four suspects in this case and that those other than appellant were "at least suspect in their testimony," had been "impeached from wall to wall on a variety of subjects," and "could also be found to be co-participants as far as that's concerned, whose testimony may require corroboration by the jury." (X RT 2796.) Respondent suggests that because the trial court made those comments in the context of ruling on the admissibility of the kites, and the kites served to corroborate the other suspects' testimony by establishing that

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[16] The towel was tied once, but was extremely tight. Opal Lewis, a nurse who responded to the cell, could not untie it by herself, and determined that she would not be able to cut it off. It took both Lewis and Officer Delgado, working at it together for either 15 to 20 seconds (according to Lewis) or two minutes (according to Officer Delgado) to loosen the towel enough to get it off. It was a typical jail-issue towel, which Lewis described as damp and dingy, although Officer Delgado described it as dry. It was twisted, as when a towel is held by opposite corners and twisted, about three times. (VII RT 1897-1898, 1913-1918, 1920-1922, 1933-1934, 1953-1954, 1957, 1980-1984.)

appellant killed Andrews, the trial court's comments are somehow less meaningful. (RB 139.) Appellant has established that the kites were erroneously admitted, and in any case did not establish that appellant killed Andrews, which undercuts respondent's argument. (AOB, Arg. V; Arg. V., *post*.) Moreover, nothing in the kites corroborated any details of the other suspects' testimony, or rebutted the possibility of co-participants in the homicide.

Respondent also quotes the trial court in ruling upon appellant's motion to modify the sentence of death as stating that there was no evidence to suggest that "either of those people [presumably Benjamin and Bond] . . . participated in the act of killing." (XV RT 3860; RB 139.) However, the trial court overlooked evidence of their participation which was presented – their efforts to suppress evidence, demonstrating consciousness of guilt (VI RT 1480-1481, 1525, 1565, 1584-1585, 1643, 1662); testimony of Benjamin that Bond participated, at least in the assault on Andrews (VI RT 1460-1461, 1514-1516, 1521-1522, 1568, 1570, 1661; IX RT 2480; X RT 2680, 2703); testimony of Bond that Benjamin aided appellant by pulling Bond off of him when Bond claimed to be trying to stop appellant (IX RT 2392, 2508, 2544-2545.) The trial court also appears to have forgotten its ruling during trial that the evidence supported instructions on Benjamin and Bond as accomplices as a matter of law, as well as an instruction allowing conviction of appellant for a lesser included non-homicide offense of assault by means likely to cause great bodily injury. (3 CT 602-607, 679-685, 845, 847; 4SCT1 153.)

Respondent argues that the prosecutor's offer during deliberations to dismiss the two felony-murder special circumstances being considered by the jury was a reflection of the complexity of the legal issues involved

rather than of the closeness of the facts. (RB 140.) However, the prosecutor also acknowledged before the jury during argument and to the trial court during deliberations that the jury could find the oral copulation to be incidental to the murders, negating the special circumstance. (XI RT 2967; XII RT 3177.) The prosecutor thus acknowledged the closeness of the facts relating to the special circumstance, not merely the complexity of the legal issues.

The evidence in support of appellant's conviction of first-degree murder was not overwhelming, as has been demonstrated in the opening brief. There were substantial weaknesses in the prosecution's case, as described above. As demonstrated in the Opening Brief, the kites did not constitute a confession of murder as the prosecutor repeatedly argued they did. (See AOB Arg. V; Arg. V, *post.*) Furthermore, as appellant has demonstrated, the evidence was insufficient to sustain the jury's findings of either the oral copulation or the Second Special Circumstance. (AOB Args. VI, VII; Args VI, VII, *post.*) Even assuming that there was evidence to establish that appellant was involved in a fight with Andrews, the details of that fight and of the homicide relied primarily upon the testimony, and the credibility and reliability, of Benjamin and Bond, whose credibility (and sobriety at the time) had been substantially impeached and whose testimony left important questions about Andrews' death unanswered, as described above. That state of the evidence cannot reasonably be characterized as strong. The evidence from the other inmate witnesses, used to corroborate Benjamin and Bond, was inherently suspect and far from compelling.

The erroneous admission of the out-of-court statements attributed to Johnson and Martinez cannot be considered harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana, supra,*

508 U.S. at p. 279.) The judgment must therefore be reversed.

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III

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF STATEMENTS MADE BY APPELLANT IN RESPONSE TO DETECTIVE CHRISTIAN AFTER APPELLANT HAD INVOKED HIS FIFTH AMENDMENT RIGHTS UNDER *MIRANDA V. ARIZONA*

In the Opening Brief, appellant argued that the trial court erred in admitting into evidence statements made by appellant at Valley Medical Center which were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and its progeny after appellant had invoked his right to consult with an attorney prior to any questioning, and before appellant had been provided with counsel. The admission of these statements violated appellant's rights under both the California and United States Constitutions (U.S. Const. Amends. V, XIV; Cal. Const. Art.1, §§ 7, 15; *Miranda*, *supra*, 384 U.S. 436; *Rhode Island v. Innis* (1980) 446 U.S. 291 (*Innis*); *People v. Sims* (1993) 5 Cal.4th 405; *People v. Crittenden* (1994) 9 Cal.4th 83) and require reversal of the judgment as to both guilt and penalty.

Respondent contends that appellant's statements arose during casual conversation, not interrogation. Respondent concedes, as the prosecution did in the trial court, that the statements were a product of Detective Christian's remarks.[17/] However, respondent contends that Detective

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[17] Respondent qualifies this concession, describing the statements as "in part a product of Detective Christian's remarks." (RB 144.) In the trial court, the prosecutor stated no such limitation on his concession that appellant's statements were "a product of a statement by the detective." (X RT 2657.) Respondent does not explain or justify this apparent attempt to limit the prosecutor's concession. Respondent provides no argument or authority to suggest that this limitation on the prosecutor's concession affects the analysis of the trial court's ruling or the outcome of this Court's (continued...)

Christian's "remarks" which provoked appellant's statements were not reasonably likely to elicit an incriminating response, nor made under circumstances in which Detective Christian should have known they were reasonably likely to do so. (RB 144.)

Respondent acknowledges the rule set forth in *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301, excluding from evidence statements obtained after a suspect has requested counsel, through any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. (RB 150.)

Respondent contends that although the determination of whether the police should have known their actions were reasonably likely to elicit an incriminating response "require[s] an objective review, both the suspect's perception and the officer's subjective intent are relevant," citing *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 242, and *People v. Wader* (1993) 5 Cal.4th 610. Respondent appears to imply that the relevance of the suspect's perception and the officer's intent are essentially equal. Such a contention is contrary to *Innis*, however. *Wader*, while noting that the officer's intent is relevant but not conclusive (5 Cal.4th at p. 637), does not support respondent's implication of equal relevance to the perceptions of the suspect. *O'Sullivan* provides no support either, noting that the officer's

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[17] (...continued)
review thereof. Respondent later acknowledges the prosecutor's concession without providing any limitation upon it. (RB 148.) However, respondent also argues that appellant initiated conversation about this case, when he asked what Andrews' name was. (RB 161.) In any case, respondent forfeited any such limitation and should be estopped from raising for the first time on appeal, bound by the explicit concession of the issue by the prosecutor in the trial court. (See *People v. Hobbs* (1994) 7 Cal.4th 948, 955 -957; *In re Moser* (1993) 6 Cal.4th 342, 350, fn. 7)

intent does not govern the issue of whether an interrogation took place. (217 Cal.App.3d at p. 242.)

Innis states that the question "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." (*Innis*, *supra*, 446 U.S. at p. 301.) To the extent that *Innis* does not totally exclude consideration of the intent of the police, it does establish that any relevance of that intent to the ultimate question of whether an interrogation took place is substantially subordinate to consideration of the suspect's perception. The latter is the focus of the analysis; the former is not. (*Ibid.*)

Appellant urged in the Opening Brief that this Court should review de novo the issue of whether Detective Christian's conduct constituted an interrogation because: 1) the trial court applied the wrong standard, 2) there is no factual dispute about the underlying facts, including that the *Miranda* warnings were given, appellant requested counsel, that the interactions with appellant were initiated by Detective Christian, and appellant's statements were a product of Detective Christian's words and conduct. (AOB 128-131.) Respondent presents no valid argument that de novo review is inappropriate in this case.

Appellant demonstrated in the Opening Brief that the trial court applied an erroneous legal standard in ruling on appellant's motion to exclude these statement, in that the trial court relied upon *People v. Siegenthaler* (1972) 7 Cal.3d 465 (*Siegenthaler*) and *People v. Amos* (1977) 70 Cal.App.3d 562 (*Amos*). (AOB 125, 130-140.) Respondent notes that the trial court stated the view that the facts here were "remarkably similar to" *Innis* (X RT 2659; RB 152.) Respondent concludes, therefore, that the trial court "impliedly applied *Innis*' standard," and dismisses the trial court's contemporaneous statement that *Amos* and *Siegenthaler* "are also on

point" (X RT 2659) as mere "remarks." (RB 153.)

As demonstrated in the Opening Brief (AOB 130), *Siegenthaler* and *Amos* predated *Innis* and were based upon a standard which focused on the police officer's intent, which focus is incompatible with *Innis*. Respondent, however, states that the "limited propositions" for which the prosecutor cited those cases in the trial court are "compatible with *Innis*." (RB 153.) Respondent does not explain how those "limited propositions" could be interpreted as consistent with *Innis*. Nor does respondent provide any analysis or refutation of appellant's demonstration of the incompatibility of those propositions with *Innis*. Instead, respondent's "analysis" amounts to no more than an unsupported assertion. The prosecution relied upon cases which were based on an erroneous standard, and the trial court cited those cases as "on point" in making its ruling. As demonstrated in the opening brief, the trial court's application of an erroneous standard requires that this Court conduct de novo review of appellant's motion to exclude these statements.

In support of the trial court's ruling, respondent relies upon the facts resolved by the trial court, to which, respondent contends, this Court must defer. However, due in part to the trial court's misunderstanding of the proper standard, the facts found by the trial court are essentially peripheral to the determination of whether an interrogation within the meaning of *Innis* took place. Respondent notes that the trial court found that Detective Christian had a basis for taking appellant to Valley Medical Center other than to interrogate appellant. (RB 154-155.) However, under *Innis*, Detective Christian's intent, or purpose, is not the issue. To be sure, if there was an intent to interrogate ab initio, it would resolve the matter, against respondent. The absence of such an intent, especially at the point of

deciding to take appellant to the hospital, would not reasonably suggest a finding that Detective Christian's conduct at the hospital did not amount to an interrogation. Respondent, like the trial court, has focused upon the *Siegenthaler/Amos* standard, i.e., upon Detective Christian's intent, rather than on the perceptions of the suspect and the objective determination of whether Detective Christian should have known that his words and conduct were reasonably likely to elicit an incriminating response.

Similarly, the trial court's implied finding that Detective Christian was credible, which respondent contends this Court must accept (RB 155), does not resolve anything. The issue before the trial court was not whether Detective Christian was lying, and actually intended to elicit incriminating statements, but whether he should have known his words and conduct were reasonably likely to elicit an incriminating response. Whether Detective Christian's explanation that he was just "making conversation" was credible was not the issue. Detective Christian's characterization of his own conduct, even if believed, does not establish that his conduct did not constitute an interrogation under *Innis*.

Respondent does not cite any finding by the trial court that Detective Christian's words and conduct were not reasonably likely to elicit an incriminating response. The only findings of fact made by the trial court related solely to Detective Christian's intent, belief, or credibility. The limited nature of those findings of fact demonstrates the trial court's misapprehension of the proper standard to be applied to the legal question before it. The trial court applied the *Siegenthaler/Amos* standard rather than the *Innis* standard, and reached its legal conclusion that there was no interrogation without consideration of the facts properly relevant to that question. The trial court thus never resolved the facts necessary to a proper

decision. Thus, in reviewing the issue, this Court is not presented with factual findings sufficient to determine the issue, and need not defer to the trial court.

On the other hand, as demonstrated in the Opening Brief, there is no dispute as to the facts relevant to a finding that Detective Christian should have known that his words and conduct were reasonably likely to elicit an incriminating response. (AOB 126.) De novo review of that ultimate fact, based upon undisputed facts, is therefore appropriate in this case.

Respondent cites Detective Christian's testimony that he didn't talk to appellant about Patricia Dement's relationship with Rutledge. (RB 157) and concludes that he did not talk about her "involvement" with Rutledge. This is disingenuous at best. Detective Christian testified that he had investigated a homicide in which the defendant was Thomas Rutledge. Rutledge had been arrested in South Lake Tahoe with appellant's wife, Patricia Dement. (IX RT 2362.) Thus Detective Christian knew of Rutledge's involvement with appellant's wife, and should have known that discussion of that subject was reasonably likely to elicit an emotional response from appellant.

With that knowledge, Detective Christian testified that he told appellant that he had interviewed Patricia Dement regarding a homicide which was under investigation. According to Christian, appellant responded that he knew about it, "and that he was going to take care of Tom Rutledge for getting her involved in that incident." (IX RT 2363.) Appellant's knowledge of the situation Detective Christian had raised, including Rutledge's involvement, and his threat against Rutledge "for getting [appellant's wife] involved in that incident" put Detective Christian on unambiguous notice that appellant knew something of his wife's

involvement with that homicide investigation and with Rutledge, and that it was a subject which raised emotions in appellant about Rutledge. Detective Christian then extended the discussion regarding Rutledge, knowing the context of that discussion for appellant involved not just Rutledge, but Patricia Dement's involvement with Rutledge, and appellant's emotional reaction to that entire situation. Detective Christian didn't have to guess that discussion of Rutledge with appellant was a subject that would elicit an emotional reaction from appellant. It had just been demonstrated for him. Yet he extended the discussion about Rutledge.

Respondent cites *Arizona v. Robeson* (1988) 486 U.S. 675 to argue that the police "are free to inform a suspect who has requested counsel of the facts of a second investigation as long as such communication does not constitute interrogation." (*Id.*, at p. 687; RB 150, 157.) As pointed out in the Opening Brief, *Robeson* holds that

> the presumption raised by a suspect's request for counsel – that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance – does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation.

(486 U.S. at p. 683; AOB 126.)

Robeson provides no support for the trial court's ruling, for it does not resolve the question of whether or not Detective Christian's conduct amounted to an interrogation. That Detective Christian brought up a second investigation is not enough per se to render his conduct a violation of appellant's rights. However, neither does the fact that the second investigation was assertedly separate from the case for which appellant had just been arrested insulate Detective Christian's conduct from a finding that it constituted an interrogation.

The question before this Court is whether or not Detective Christian's conduct amounted to an interrogation, not whether he should or should not have discussed another investigation. The ultimate issue remains: was Detective Christian's conduct such that he should have known that his conduct was reasonably likely to elicit an incriminating response? *Robeson* does not resolve that issue. The violation of appellant's rights arose, not from mention of another case, but from the entire context: derisive comments about appellant's tattoos, raising the issue of appellant's wife and her involvement with both Rutledge and a murder investigation at a time when appellant was incarcerated, and the manner in which Detective Christian extended the conversation when the likelihood of an incriminating response rose higher, after appellant exhibited an emotional response to the information Detective Christian was discussing.

Respondent cites Detective Christian's testimony claiming not to have known of any connection of Rutledge, Patricia Dement or the other homicide investigation to the Andrews homicide. Whether he knew of a connection or not does not define the relevant inquiry. The proper inquiry is whether Detective Christian should have known this was reasonably likely to elicit an incriminating response. An incriminating response, as that term is meant in *Innis,* need not have amounted to a confession, or to information connecting the Andrews homicide to Rutledge, Patricia Dement or Detective Christian's investigation of the other homicide. An incriminating response under *Innis* would have included any response which the prosecution may seek to introduce at trial. (*Innis*, *supra*, 446 U.S. at p. 301, fn. 5.)

The question is not whether Detective Christian should have known his words and conduct were reasonably likely to elicit the specific

incriminating response which it did, in fact, elicit. The question is whether he should have known it was reasonably likely to elicit *any* response which the prosecution might seek to introduce at trial – either the guilt trial or the penalty trial. That Detective Christian actually elicited a response which arguably drew a connection between Detective Christian's other homicide investigation and the Andrews homicide is perhaps a fortuity for the prosecution. The fact is that the "conversation" initiated by Detective Christian, especially in conjunction with his other "small talk" such as insulting appellant about his tattoos, was reasonably likely to elicit some response which the prosecution would seek to use at trial against appellant, and Detective Christian should have known it. Thus, his words and conduct amounted to an interrogation under *Innis*.

Clearly, this was not a discussion about routine matters, but one which any police officer would have known was reasonably likely to elicit an emotional reaction, and that once the emotional reaction began, the likelihood of obtaining a statement which the prosecution could use against appellant increased. Appellant does not dispute that incriminating statements volunteered during casual conversation are not barred under *Innis*. However, the subject matter of Detective Christian's choice of conversation cannot be reasonably characterized as casual.

Respondent's attempt to pass Detective Christian's conduct off as mere small talk includes a citation to *United States v. Satterfield* (11th Cir. 1984) 743 F.2d 827, 848-849. *Satterfield* is somewhat instructive. In *Satterfield*, an FBI agent and the defendant engaged in "small talk" or "casual conversation" about sports, a concert, and the county. Incriminating statements made in that context were held not to be the product of an interrogation. Detective Christian's choice of topics was not sports, or a

concert, or the local area – relatively neutral subjects often the subject of small talk" or "casual conversation." Instead, Detective Christian, who had just arrested appellant for murder, chose as his subject of conversation appellant's wife. Detective Christian knew that appellant was already serving a life sentence for killing his brother, and chose to discuss appellant's wife, in the context of meeting her with another man, and their involvement with a murder investigation, all of which occurred while appellant was incarcerated. There is no way that Detective Christian reasonably could have believed that such subject matter would have been considered "casual" by appellant. It was not a neutral subject. It was a subject which was reasonably likely to evoke an emotional response from appellant.

This was not mere conversation between two people about something they had in common. This was not, "I happened to meet your wife recently. She seems like a nice person." This was a police officer to the person he had just arrested, saying, "I arrested your wife recently in another homicide investigation. She was with this guy Rutledge when I arrested him. You know him?" This was not the sort of conversational topic such as sports or music in *Satterfield* that one normally chooses as possible subjects which might allow for casual conversation. In a bar, it would be more likely picked as a topic designed to provoke a fight, or at least with the knowledge that the risk of a fight or some emotional reaction was high. While the conversation didn't take place in a bar or other casual circumstance, the differential in power between Detective Christian and his prisoner made it even more loaded. This information was not something Detective Christian and appellant "had in common." It was a subject about appellant's personal and emotional life which Detective Christian, who was

not a casual acquaintance but the officer who arrested appellant for murder, knew about. It was the kind of subject which anyone, but especially an experienced officer such as Detective Christian would approach carefully in conversation with a prisoner he had just arrested, rather than casually.

Respondent suggests that the "query appears to have been based upon mere curiosity." (RB 158.) Again, Detective Christian's motivation is not the issue. The issue is whether or not Detective Christian should have known this was reasonably likely to provoke an incriminating response, i.e., something which could be used against appellant at trial. At the very least it cannot be questioned that Detective Christian should have known that this subject was not a topic for "casual conversation" or "small talk." He should have known that it was likely to evoke an emotional response of some sort, and that the likelihood that appellant's defenses against making an incriminating remark would be lessened.

Respondent cites *Burgess v. Alabama* (Ala. 1988) 827 So.2d 134, 173-176, as demonstrating that, where, during casual conversation, a defendant volunteers or initiates discussion of the case, it is not the result of interrogation under *Innis*. Respondent then contends that "appellant initiated further conversation about the instant case when he asked Detective Christian what the name of the subject was, 'you know, the guy that went to sleep.'" (RB 161.) However, it was conceded by the prosecutor in the trial court that appellant's statements were a product of Detective Christian's conduct and the trial court made no finding to the contrary. Respondent's attempt to change conceded facts for the first time on appeal should be rejected. In any case, appellant did not initiate the conversation, nor did his question about Andrews' name initiate conversation about this case. His question was a product of Detective Christian's statements about

Rutledge and continued the "conversation" rather than initiating it. Respondent's assertion that it initiated further conversation requires that the question be divorced from the context in which it arose, yet respondent cites no authority for such a sentence-by-sentence determination of who initiated a discussion about the case. *Burgess* provides no support for that concept.

In fact, *Burgess* provides an example of an appropriate response to a defendant's question about the case. In *Burgess*, after answering two questions related to the charges against the defendant, but unrelated to the facts of the case, the officer reminded the defendant of his *Miranda* rights before the defendant continued and made incriminating statements. (827 So.2d at pp. 173-174.) Detective Christian did no such thing. Instead, he extended the discussion at a point he should have known doing so was reasonably likely to elicit incriminating statements from appellant. Unlike *Burgess*, Detective Christian's response to appellant's question was not a repetition of the *Miranda* warnings, but conduct amounting to interrogation under *Innis*.

Appellant does not contend that merely providing Andrews' name in response to appellant's question constituted interrogation, as respondent suggests. (RB 161.) Rather, it constituted a continuation of the conduct which constituted interrogation, extending the conversation at a point where the likelihood of an incriminating response became clear, even assuming arguendo that it had not been clear before that. Again, respondent's attempt to analyze a particular statement without reference to its context should be rejected as inconsistent with the analysis laid out in *Innis*. Respondent cites *United States v. Payne* (4th Cir. 1992) 954 F.2d 199, 202 for the proposition that declaratory statements by officers concerning the nature of the charge and the evidence relating to the charge do not necessarily constitute

interrogation under *Innis*. *Payne* does not, however, excuse every such declaratory statement regardless of the context in which it was raised: "whether descriptions of incriminating evidence constitute the functional equivalent of interrogation will depend on circumstances that are too numerous to catalogue." (954 F.2d at p. 203.)

Finally, respondent argues that Detective Christian's statement in his report that "Ronnie would say no more regarding the incident," is consistent with an interpretation that what Detective Christian really meant was that appellant said no more. (RB 161.) Of course, if that is what Detective Christian meant, he could have written that. Instead, what he wrote in his report strongly suggests that Detective Christian tried to get appellant to say more. Whether he did so by directly interrogating appellant or by extending the conversation further in hopes of further incriminating responses does not appear in his report or his testimony.

As demonstrated above and in the opening brief, the conversation with appellant which Detective Christian initiated and extended was not "small talk" or "casual conversation." Prior "conversation" between the arresting officers and appellant while at the hospital had included derisive comments about appellant' tattoos, and the conversation which immediately preceded and ultimately elicited the incriminating statements from appellant was on a subject more likely to cause a fight or other emotional reaction than to pass as "casual conversation" to an experienced detective. Detective Christian initiated the conversation, and should have known that his conduct was reasonably likely to elicit an incriminating response, a response which the prosecution could use against appellant at trial. When appellant responded in part by asking what Andrews' name was, Detective Christian should have known (and no doubt did), that his prior conversation had

elicited appellant's reference to Andrews, and that further "conversation" was reasonably likely to elicit a response which the prosecution could use against appellant. Christian then extended the conversation, and obtained the incriminating response which was then used at trial against appellant as demonstrating motive.

The statements made by appellant at the hospital were, therefore, elicited in violation of appellant's right to counsel, and should have been excluded from evidence. Respondent does not attempt to argue that the error in admitting this evidence could be considered harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Such an argument would be meritless, as demonstrated in the opening brief. (AOB 140-141.)

For the reasons stated above and in the opening brief, the judgment must therefore be reversed.

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IV

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL BASED UPON NELSON'S STATEMENT THAT APPELLANT HAD BOASTED ABOUT KILLING HIS BROTHER

In the opening brief, appellant demonstrated that the failure of the trial court to grant the defense motion for mistrial which followed Brad Nelson's violation of an explicit court order by testifying that appellant had bragged about killing his own brother, resulted in a trial which violated appellant's rights to due process of law and to a fair and reliable adjudication at all stages of a death penalty case.

Respondent contends that the trial court's denial of the motion was within its discretion, that the trial court's admonitions to the jury to disregard the testimony cured any prejudice, and that the delay in admonishing the jury to disregard the testimony was attributable to the defense. (RB 163, 172-178.) Respondent contends further that there was no harm from Nelson's disclosure because it was cumulative of other admissible evidence, i.e., the jailhouse kites which the prosecutor characterized as confessions. (RB 177-183.) Finally, respondent contends that, assuming arguendo that the trial court's admonition was ineffective, the error was harmless. (RB 183-185.)

Respondent's argument that the disclosure was cumulative of other admissible evidence relies solely upon the characterization of the kites as establishing that appellant had killed his brother. As a result, respondent's argument must be rejected. As demonstrated in the opening brief (AOB, Arg. V), the kites (Exhibits 35, 36) were admitted in error. Moreover, the kites made no mention of appellant having killed his brother, let alone

murdered him, as the prosecutor argued below and respondent contends on appeal. (RB 181-182.) At most, the kites contained an implication of some crime involving appellant and his brother for which appellant was "doing 29 to life." While the prosecution attributed the conclusion that appellant had killed his brother to the kites rather than to Nelson's stricken testimony, in fact only Nelson's testimony actually referred to appellant having killed his brother. The prosecutor's repeated references to appellant having murdered his brother effectively reiterated Nelson's testimony and negated any effect the trial court's admonition might have had.

The kites were admitted on the prosecution's theory that they constituted a confession to murder of Andrews by reference to appellant's prior homicide of his brother. The kites themselves do not support the prosecution's reasoning.

Exhibit 35 refers to appellant "doing 29 to life" on something having to do with his brother. It then refers to "this other trip." It later states, "I'm looking at the chair but I don't think they will get me on this trip anyway." The assumption is that both uses of the word "trip" refer to the same thing. Since the second use of "trip" is in a sentence which also refers to appellant "looking at the chair," the prosecution assumed that "trip" must mean the murder of Andrews. Thus the first use of the word "trip" must also refer to the murder of Andrews. In the statement following the first use of the word "trip," that "Dude had it coming, both of them," the prosecution concluded that "Dude" must therefore refer to Andrews and "both of them" refers to appellant's brother. The assumption was then made that because Andrews was murdered, that was what he "had . . . coming." Consequently, because "both of them" "had it coming" appellant's brother must have been murdered as well.

There are various flaws in this reasoning. First, the assumption that the tacked-on phrase "both of them" establishes that "both of them" got the same thing, i.e., murdered, is, at best, only a possible interpretation of the kite, but by no means a compelling one. A more likely interpretation is that appellant felt that both of them got what they had coming, whatever that was in each instance. Appellant at no time refers to his brother having been killed, much less murdered.

The conclusion that the kite intends a detailed parallel between the "the 1st one" and "this other trip," that what happened to one happened to both, is more weight than this ungrammatical and cryptic note can bear. More likely, the reference to "the 1st one" is primarily intended to indicate the chronology of events, rather than that the two matters share specific details, such as that they were both murders. There was, in fact, another commonality between "the 1st one" and "this other trip," i.e., that both involved criminal charges. The "1st [case]" resulted in appellant serving a sentence of 29 to life, and on "this other [case]," appellant was "looking at the chair," i.e., was charged with capital murder. It is conjecture and surmise, rather than deduction, that the commonality the kite intended to communicate was a detail of the crimes involved, e.g., that both involved homicide or murder, rather than that matters involved criminal charges brought against appellant.[18]

At no point does appellant acknowledge or claim that *he* gave "both

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[18] In effect, the prosecution equated appellant's acknowledgment that he was charged with the two crimes with an acknowledgment that he was guilty of the two crimes. Of course, being charged with a crime does not equate to guilt of that crime. The prosecution essentially bootstrapped the charge that appellant murdered Andrews into a supposed confession that he had done so.

of them" what they "had . . . coming." At no point does appellant acknowledge or claim that the criminal charges brought against him in each instance are true. Rather, appellant only claims that it doesn't bother him that both of them got what they had coming, or that there are consequences which affect him because they got what they had coming, i.e., a life sentence on one and a possible death sentence on the other. He does not acknowledge that he deserves those consequences. In fact, the final line of the kite is that he doesn't "think they will get me on this trip anyway." This is entirely consistent with the knowledge that he is not responsible for "this other trip."

The prosecution below, and respondent on appeal, have grafted onto the actual language of the kite the assumption that appellant was acknowledging in the kite that he killed both his brother and Andrews. That assumption has been grafted onto the kites based upon knowledge that the jury did not legitimately have before it, that appellant killed his brother. The prosecution's interpretation also, without any actual basis other than conjecture, concludes that any reference in the kite suggesting any similarity between the the crime involving appellant's brother and the death of Andrews was therefore a declaration that both were murders. On top of these conjectural leaps, the prosecution's interpretation concludes that because appellant is serving a life sentence for the crime involving his brother, which the prosecution has, without evidence in the record, "established" as appellant having killed his brother, any reference in the kite suggesting any similarity between that homicide and Andrews' homicide therefore constitutes a confession that appellant killed Andrews as well.

Only by reference to Nelson's testimony, which was not stricken

until after the kites were admitted into evidence, was appellant's crime against his brother identified to the jury as homicide. At the time that the jury was presented with the evidence of the kites, Nelson's testimony was still in evidence. As a result, it was necessarily incorporated into the jurors' understanding of Exhibit 35's reference to "doing 29 to life on the 1st one. Dude was my brother." Upon Nelson's testimony being stricken, no evidence that appellant killed his brother remained before the jury. Yet the prosecution continued to argue to the jury as if it did. No admonition could have been realistically expected to cause or enable the jurors to extract that stricken information from their interpretation of the kites.

Respondent contends that appellant may not complain of the prosecutor's mischaracterization of the kites as admission that appellant murdered his brother because there was no objection to the mischaracterization at the time of trial. (RB 182.)

However, appellant did not raise the prosecutor's mischaracterization as misconduct, as a separate issue on appeal. Rather, the prosecutor's mischaracterization demonstrates the effect upon the trial of Nelson's inflammatory disclosure, and at the same time demonstrates the ineffectiveness of the trial court's admonitions in this case. Knowledge of the prior killing affected the prosecutor's, as well as the trial court's, interpretation of the kites. It is impossible that the knowledge did not similarly affect the jurors' interpretation of that evidence, despite the admonitions given.

Respondent contends that the prosecutor's mischaracterization of the kites was done in good faith "given Ms. Hart's concession outside the jury's presence that appellant's prior for 'killing of the brother' was a 'second-degree murder conviction.'" (RB 182.) However, appellant has not alleged

that the prosecutor acted in bad faith. Nor does absence of bad faith reduce the prejudicial effect which Nelson's disclosure had on this trial. The prosecutor, defense counsel and the trial court all knew that appellant had been previously convicted of second degree murder of his brother. That conviction was the basis of the (bifurcated) First Special Circumstance, alleging, under Penal Code section 190.2, subdivision (a)(2), that appellant had been previously convicted of a second degree murder. (1CT 171-173, 181-184) What Ms. Hart conceded outside the jury's presence is completely irrelevant to either the probative value of the kites as admitted into evidence in this case or to the prejudice appellant's defense suffered from Nelson's disclosure and the prosecutor's repeated emphasis that appellant had previously murdered his brother.

In support of the argument that Nelson's disclosure was harmless, respondent cites cases in which inadmissible information about a defendant's status as a parolee was deemed harmless. (See *People v. Williams* (1981) 115 Cal.App.3d 446, 453 [parole status]; *People v. Morgan* (1978) 87 Cal.App.3d 59, 76, overruled on other grounds in *People v. Kimble* (1988) 44 Cal.App.3d 480 [parole status, argument about splitting proceeds of unrelated robbery]; *People v. Stinson* (1963) 214 Cal.App. 2d 476, 479, 481-482 [reference to parole officer]; RB 171.)

None of these cases involve a situation comparable to appellant's trial.[19/] In this capital murder trial, a prosecution witness told the jury that

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[19] *People v. Bonin* (1988) 46 Cal.3d 659, 680-698, fn. 2, also cited by respondent RB 178), involved inadmissible evidence of that defendant's admission of an additional 14 killings. In the face of the strength of the evidence in *Bonin*, including actual confessions to having killed the victims (46 Cal.3d at pp. 668-661), the defendant's admissions to further killings

(continued...)

appellant had bragged about having killed his brother, who was not the alleged victim in this case. The inflammatory and prejudicial effect of such testimony is unquestionably more substantial than information that a defendant is on parole, or spent time in prison. Nelson's testimony was not just that appellant acknowledged having killed his brother, but that he bragged about it.

As pointed out by respondent (RB 174-176), on two occasions the trial court instructed the jury to disregard Nelson's testimony that appellant bragged about having killed his brother. Nelson's testimony took place on June 23, 1994. (2 CT 482-484.) The first admonition was given at the end of the defense case on July 13, 1994 (XI RT 2928-2929[20]), and the second, during instructions after closing arguments before the case was submitted to the jury for decision, on July 15, 1994. (XI RT 3109-3110.) As demonstrated in the opening brief, even assuming arguendo that

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[19] (...continued)
may well have had little or no prejudicial effect in that case. The suggestion that because evidence of additional murders was found harmless in *Bonin*, revelation of appellant's prior homicide of his brother should be found harmless in this case is not persuasive. Any comparison of the overwhelming evidence in *Bonin* to the strength of the prosecution's evidence against appellant is less than compelling. As discussed below, and throughout both the opening brief and this brief, the prosecution's case against appellant had substantial weaknesses, and left many crucial questions unanswered. The prejudicial effect of Nelson's disclosure cannot be found harmless in this case as it was in *Bonin*.

[20] In the opening brief, appellant failed to mention the first admonition. This was an oversight, and not intended to misrepresent the record. In any case, the fact that two admonitions were given on this subject rather than one did no more to cure the prejudice than had only the second admonition been given. Rather, if anything, the repeated admonitions reinforced the jurors' cognizance of the prior killing.

immediately striking the testimony and admonishing the jury could have cured the prejudice from Nelson's disclosure, the delay in striking the testimony and admonishing the jury, coupled with the the prosecutor's argument focusing upon appellant having murdered his brother, guaranteed that the admonitions could not, and did not cure the prejudice. The real effect of the admonitions was more likely to confirm for the jury that what Nelson said was true.

Respondent cites cases in which inadmissible information was deemed cured by an admonition to the jury to disregard it. (*People v. Price* (1991) 1 Cal.4th 324, 428-431 [witness's brief reference to having taken a lie detector test, but not to results of the test cured by admonition]; *People v. Gonzalez* (19901) 51 Cal.3d 1179, 1237 [improper impeachment of defense witness by prosecution "gang expert" on rebuttal; no motion for mistrial, "the issue was tangential" and admonition "fully sufficient"]; *People v. Morris* (1991) 53 Cal.3d 152, 194 [reference to witness taking polygraph]; *People v. Wharton* (1991) 53 Cal.3d 552 [admonition that jury not only disregard prejudicial implication by witness, but take it as a fact that it was not true, coupled with admission by witness that it was not true, cured prejudice]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374 [violent rap lyrics – jury admonished not to consider against defendant]; RB 177.) Again, none of these cases is comparable to the revelation from Nelson that appellant had bragged about killing his brother.

People v. Wharton, supra, is somewhat instructive, however, as a contrast to this case. Nelson did not merely imply some wrongdoing on the part of appellant, as was done in *Wharton.* (53 Cal.3d at pp. 565-566.) In admonishing appellant's jury, the trial court did not dispute the truth of Nelson's statement, as the trial court did in *Wharton.* (*Id.*, at p. 565.) If

anything, the admonitions given by the trial court here confirmed the prejudicial information. Nor did Nelson testify that his disclosure was untrue. Rather than having a prejudicial allegation negated both by the trial court's admonition and the witness's testimony as in *Wharton*, in appellant's case, the prosecutor actually repeated and reinforced the prejudicial information disclosed by Nelson.

Respondent contends that when the trial court gave the jury a limiting instruction concerning the use of evidence in the kites that appellant had committed a crime other than that for which he was on trial, the jury must have understood the limiting instruction to apply to Nelson's testimony as well, since Nelson's testimony was still in evidence at that point. (RB 180.)

Rather than supporting respondent's claim that any prejudicial impact of Nelson's disclosure was thereby "alleviated," respondent's point confirms trial counsel's concern that the jury's receipt of evidence after Nelson's disclosure was unavoidably colored by that disclosure (X RT 2843), since Nelson's testimony had not yet been stricken. The jury considered Nelson's testimony as competent evidence at the time they were presented with the kites. As a result of the delay by the trial court in ruling on appellant's mistrial motion and striking the testimony, the jury's receipt of and consideration of evidence, especially the kites, was distorted in the interim by its knowledge that appellant had killed his brother and bragged about it. This undoubtedly predisposed the jurors to interpret the kites as the prosecution intended, as establishing that appellant had killed his brother. When the jury was presented with the kites, which referred to some prior criminal act by appellant involving his brother, the jury had information from Nelson that appellant had bragged about killing his

brother. Thus, while the kite excerpts standing alone do not establish a killing, let alone a murder, of appellant's brother, Nelson's testimony provided a prejudicial and inflammatory context which no doubt led the jury to interpret the kites as talking about murder, just as the prosecutor did.

The inflammatory disclosure by Nelson of inadmissible, prejudicial information that appellant had bragged about killing his brother was not merely an isolated glitch in the trial which could be rectified by an admonition to the jury to unring that bell. The disclosure remained in evidence while other evidence was received, and undoubtedly affected the jurors' evaluation and interpretation of that evidence. The admonition not to consider it could not realistically root out of the jurors' minds the effects the disclosure caused any more than it was rooted out of the prosecutor's mischaracterization of the kites. That mischaracterization negated any possible beneficial effect an admonition may have had, by reintroducing and reinforcing the prejudicial impact of the disclosure.

The trial court's eventual denial of the mistrial motion was an abuse of discretion. The trial court gave inadequate consideration to the effect of the delay in striking the testimonyand the ineffectiveness of an admonition to cure the prejudicial effect introduced into the jurors' reception, interpretation and consideration of other evidence before the disclosure was finally stricken.

Respondent argues that the delay in admonishing the jury to disregard the testimony is attributable to the defense. (RB 172-174.) However, the record demonstrates that the delay in ruling on the defense motion was made at the request of the prosecution. The prosecution wanted the trial court to delay the decision on the motion until it had ruled on the admissibility of the kites, which the prosecution claimed would also reveal

that appellant had killed his brother. (VIII RT 2097.) The defense did not agree to the delay, and argued that the trial court should rule on the motion for mistrial based upon the state of the evidence as it stood at that time, rather than waiting for a determination of the admissibility of the kites. The defense argued that there was a risk that delaying any ruling on the mistrial motion would affect the trial court's decision on the admissibility of the kites. The defense also argued that even if the kites were admissible, the information in the kites relating to appellant's brother should be redacted to avoid the extraordinary prejudice to appellant which would result. (VIII RT 2098-2100, 2102-2104.) The trial court, however, complied with the prosecution request to defer ruling. (VIII RT 2101, 2104.) When forced to make a choice on whether to have the jury admonished in the interim, the defense made it clear that the only remedy which would be effective would be a mistrial, but that while the trial court delayed ruling, they chose not to have the jury admonished, to avoid having the prejudicial disclosure emphasized.[21] (VIII RT 2103-2104.)

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[21] Cf. *People v. Stinson, supra,* 214 Cal.App. 2d at p. 481:

> In this case defendant's attorney promptly moved for a mistrial. A ruling was deferred. The motion was renewed at the close of the prosecution's case. It was denied, not on the merits, but with the notion that the improper remark would be considered in connection with a new trial motion. The effect of the delayed ruling on the merits was to alter the subsequent course of the trial. Denial of the mistrial motion put defense counsel to an immediate and difficult choice. The jury had knowledge of DeMello's criminal past. Should defense counsel sweep the matter under the rug by putting on no case? Or, having nothing to lose, should he put DeMello on the stand to make frank disclosure of his past and to pick up such crumbs of saving testimony as DeMello might be able to muster? Counsel
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> (continued...)

However, at that time, defense counsel could not have known that it would take five days of trial over 19 calendar days, for the trial court to finally rule on the motion for mistrial.[22] Thus while a decision not to have the jury admonished pending the trial court's ruling on the mistrial motion was made by the defense, that is not the same as the defense having caused the delay before the testimony was finally stricken and admonition was given. The delay was in the first instance requested by the prosecution. Whether the length of the delay was caused by a decision by the prosecution on when to present the evidence regarding the kites or the trial court's failure to control how soon that evidence was presented to avoid delay, it is clear that the defense did not cause the inordinate delay in the trial court's ultimate rulings and admonitions.

Thus, the defense did not want any delay in the ruling on the motion, and could not have foreseen the inordinate delay which followed, and had no control over the length of that delay. To lay the blame for the delay on the defense, as respondent does, is a distortion of the record.

Moreover, at the time the trial court finally ruled on the motion for

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[21] (...continued)
chose the latter course. There was no waiver here in the sense of a free choice by defense counsel. His hand was forced.

[22] Nelson testified on June 23, 1994, the 16th day of trial. (2CT 482-484.) The trial court denied appellant's mistrial motion on July 12, the 21st day of trial. (2CT 500-503.) The trial court's first admonition to the jury that Nelson's testimony that appellant had bragged about having killed his brother was stricken and to disregard it was given at end of the defense case on July 13, 1994, the 22nd day of trial. (2CT 504-505.) The trial court's second admonition to disregard the testimony was given during instructions to the jury immediately before deliberations, on July 15, the 24th day of trial. (2CT 508-509; RT 3110.)

mistrial, one of the facts that had to be factored into that ruling was whether or not an admonition would be effective after such a delay, regardless of who was responsible for that delay. Respondent contends that it was within the trial court's discretion to determine that an admonition would cure the prejudice from Nelson's disclosure. (RB 176-177.) However, as argued by the defense, the effectiveness of any admonition after such a delay was substantially diminished. (X RT 2843-2845.) The delay was not attributable to appellant, and, as demonstrated in the opening brief (AOB 145-152) and above, the admonition was ineffective and insufficient to cure the prejudice from Nelson's disclosure. The trial court's decision to deny the motion for mistrial, in favor of a delayed, but ineffective, admonition, was, in this case, an abuse of discretion.

> A jury admonition to disregard evidence of a prior crime is sometimes mentioned as a factor in reversal or affirmance. The limited value of the admonition is implicitly recognized by the tendency of the courts to give it weight when the evidence of guilt is convincing (*People v. Jordan*, *supra*, 188 Cal.App.2d 456) and to disregard it when the case is a close one (*People v. Bentley*, *supra*, 131 Cal.App.2d 687).

(*People v. Stinson* (1963) 214 Cal.App.2d 476, 482-483.)

Respondent contends that any error was harmless due to the strength of the evidence. (RB 183-185.) As shown above, while sufficient to sustain the verdict of first-degree murder, the prosecution's evidence had significant weaknesses. It is reasonably probable that the inflammatory disclosure by Nelson effectively served to bolster the prosecutor's case and to patch the holes in it, not through probative force, but through prejudicial effect. The inflammatory and prejudicial effect of the disclosure was not cured by the admonitions to disregard it, nor can it be deemed, beyond a reasonable doubt, not to have contributed to the verdicts in this case.

As discussed in the opening brief and above, in Argument II, however, the prosecution's evidence against appellant cannot be considered strong, for there were substantial weaknesses throughout the prosecution case.

None of the prosecution's evidence was without substantial impeachment or doubt as to crucial details, other than appellant's presence in the cell in which Andrews was killed, and the abrasions and bruises on appellant's body which support the conclusion that appellant was involved in a fight in the cell that night. As explained in the opening brief (AOB 149-150), whether appellant was in the cell at the time the towel was tied around Andrews' neck is open to substantial doubt. Substantial unanswered questions remain: When/how was the towel tied around Andrews neck? If appellant did it before he left the cell that morning, how did neither Benjamin nor Bond see him do it? Not even the time of Andrews death was known in this case. (V RT 1308.) The trial court determined that the evidence was sufficient to justify instructions not only on second degree murder but also on attempted murder and assault by means likely to produce great bodily injury, apparently on the theory that appellant was not the person who killed Andrews. (3 CT 602-607, 679-685, 895, 897; XI RT 3125, 3127-2130, 3133-3136.)

Each of the prosecution's inmate informer witnesses was impeached to one degree or another, and such witnesses are inherently suspect as a general matter. At least three of the inmates who testified for the prosecution are alternative suspects in the killing of Andrews – Benjamin, Bond and Nelson. Appellant presented evidence that Bond had admitted killing his cellmate. (XI RT 2905.) The kites, as explained above, are of dubious value. (See also Arg. V, *post.*) Appellant's statements to Detective

Christian at the hospital, while interpreted as admissions of motive, are open to interpretation, and no other substantial evidence of motive was presented. The oral admissions attributed to appellant by inmate informers must be viewed with caution, i.e., there is inherent doubt as to whether or not appellant said the things he is alleged to have said. The "oral copulation," the basis of the Second Special Circumstance, was dependent *entirely* upon the testimony of Bond and Benjamin. There was no physical corroboration of their testimony in that regard.

The disclosure by Nelson infected and distorted the jury's view of the evidence, as well as the manner in which evidence was admitted and argued to the jury. It further indirectly and improperly bolstered the credibility of Benjamin's and Bond's version of the events and the suspect testimony of the various inmate informers who testified. As even the trial court acknowledged in denying appellant's motion for mistrial,

> I agree however that this kind of evidence, sometimes the decision making is a little easier for [the jurors]. I don't think it's so much of a disposition but if the evidence of guilt is there, I agree with you, that it may make it a little easier for them and that's an influence.

(X RT 2845-2846.)

The evidence would have supported findings of second degree murder, attempted murder or assault by means likely to cause great bodily injury. It is reasonably probable that a result more favorable to appellant would have occurred in a trial free of the inflammatory information disclosed by Nelson to appellant's jury. Under either the *Watson* or the *Chapman* standard, the judgment must be reversed.

For the reasons stated above and in the opening brief, the judgment should therefore be reversed.

V

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF WRITTEN STATEMENTS BY APPELLANT OBTAINED BY THE PROSECUTION IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHTS

In the opening brief, appellant argued that the trial court committed reversible and prejudicial error by admitting evidence of written statements ("kites") by appellant obtained by the prosecution through violations of appellant's Sixth Amendment right to counsel. (*Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*); *United States v. Henry* (1980) 447 U.S. 264 (*Henry*); U.S. Const., Amend. 6, 14; Cal. Const. Art. 1, §§ 1, 7, 15.) The trial court's ruling admitting the statements was also state law error because the statements contained irrelevant and prejudicial evidence, and were more prejudicial than probative, requiring either exclusion from evidence or further redaction to prevent prejudice to appellant. (Evid. Code §§ 210, 350, 351, 352, 1101.) The admission and use of the evidence also denied appellant due process, a fair trial and a reliable adjudication at all stages of a death penalty case. (U.S. Const., Amend. 5, 6, 8, 14; Cal. Const. Art. 1, §§ 1, 7, 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 67; *In re Winship* (1970) 397 U.S. 358, 364; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *McKinney v. Rees* (9th Cir. 1993) 993 F.3d 1378.)

Respondent contends that the trial court did not err in concluding that Ybarra had not acted as a governmental agent in eliciting the kites from appellant. (RB 205-211.) Respondent also contends that the kites were relevant, the trial court did not abuse its discretion in admitting them into evidence (RB 212-217) and that if error occurred it was harmless. (RB 217-218.)

Standard of Review

Respondent contends that this Court must review the trial court's denial of appellant's motion to exclude the kites under a deferential standard. (RB 205.) The authority upon which he relies, however is flawed. In support of a deferential standard, respondent cites *People v. Fairbank* (1997) 16 Cal.4th 1223, 1247-1248 [*Fairbank*], which states, in discussion of a *Massiah/Henry* claim, that "[w]hether to allow an informant's testimony is 'an essentially factual question, and we review it on a deferential standard.'" The sole support cited in *Fairbank* for this statement is *People v. Memro* (1995) 11 Cal.4th 786, 828 [*Memro*]. *Memro*, in turn, concerned a defendant's objections that the testimony of a jailhouse informant was more prejudicial than probative (Evid. Code §352) as well as that the informant was a government agent and obtained statements from the defendant through a violation of his right to counsel. *Memro* held, without extended analysis, that

> [t]he court's ruling allowing a jailhouse informant's testimony to be introduced presents an essentially factual question, and we review it on a deferential standard. There was no abuse of discretion (Evid.Code, § 352; *People v. Clair* (1992) 2 Cal.4th 629, 660, 7 Cal.Rptr.2d 564, 828 P.2d 705) in admitting [the informant]'s testimony.

(11 Cal.4th at p. 828.) The cited page in *People v. Clair*, though, deals, not with Sixth Amendment issues and *Massiah*, but with a trial court's rulings on relevance and undue prejudice relating to crime scene and autopsy photographs. (2 Cal.4th at p. 660.) In that context, *Clair* stated,

> "The appropriate standard of review is abuse of discretion. The ruling comprises determinations as to relevance and undue prejudice. The former is reviewed under that standard. So is the latter." (*People v. Benson, supra*, 52 Cal.3d at p. 786, 276 Cal.Rptr. 827, 802 P.2d 330, citation omitted.)

(2 Cal.4th at p. 660.)

Clair did address a *Massiah* issue a few pages prior to the above quoted passage. (2 Cal.4th at pp. 656-657.) In that section of the opinion, *Clair* dealt with the issue of whether or not the right to counsel had attached. In reviewing the trial court's determination that the defendant's right to counsel had not attached, this Court stated,

> Such a determination is reviewed thus: the conclusion itself is examined independently, the underlying findings are scrutinized for substantial evidence. (E.g., *People v. Leyba* (1981) 29 Cal.3d 591, 596-597, 174 Cal.Rptr. 867, 629 P.2d 961 [dealing with a determination that a defendant's Fourth Amendment rights had been violated].)

(2 Cal.4th at pp. 657-658.) Appellant submits that *Memro* erroneously cited to the wrong portion of *Clair*, and erroneously adopted a standard of review not appropriate to the constitutional issues involved in a determination of a *Massiah/Henry* claim. The proper standard here is independent review, and *Memro*'s error should not be followed.

A trial court's determination that a violation of *Massiah* has occurred is a classic mixed question of law and fact, i.e., historical fact must be determined and the controlling legal standards applied thereto. Generally, a trial court's finding of fact in such a determination, where the facts are in dispute, is reviewed by an appellate court with some deference, if those findings are supported by substantial evidence. (*People v. Cromer* (2001) 24 Cal.4th 889, 900 [*Cromer*].) The trial court's application of the law to those facts, however, is examined independently by the appellate court, with no deference to the trial court's conclusion. (*Id.*, at pp. 894-896.)

Where mixed question determinations affect constitutional rights, this Court's usual practice is to conduct independent review. (*Id.*, at pp.

901-902; *People v. Ault* (2004) 33 Cal.4th 1250, 1264-1265, fn. 8, 1267 ["As the People observe, California and federal cases have deemed the independent review standard appropriate for a diverse array of mixed law and fact questions, often on the ground, among others, that such questions were constitutionally significant and/or 'predominantly legal.' "]; see also *Thompson v. Keohane* (1995) 516 U.S. 99; *Ornelas v. United States* (1996) 517 U.S. 690; *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195 (en banc).)

Where the events at issue occur in the presence of the trial court, such as during voir dire, or questions of the competence of a defendant to stand trial, deferential, substantial-evidence review is appropriate. Where the events "occur outside the courtroom and must be reconstructed in the courtroom from witness testimony and other evidence" (*Cromer*, *supra*, 24 Cal.4th at p. 902), independent review of the mixed question determination is the rule. (*Ibid.*) Independent review further serves to unify precedent and to clarify the applicable legal principles. (*Id.*, at p. 901.)

The determination of whether Ybarra's interrogation of appellant violated appellant's Sixth Amendment rights under the *Massiah/Henry* line of cases is a mixed question of law and fact which affects constitutional rights, and involves determinations of fact which occurred outside the presence of the trial court. Independent review of the trial court's determination that no Sixth Amendment violation occurred is the appropriate standard of review.

Fairbank and *Memro*, however, without any discussion of the considerations relevant to the question, apply a deferential abuse-of-discretion standard. It appears that the source of this otherwise unexplainable deviation from the general rule of independent review is an

erroneous citation, in *Memro*, to the wrong portion of *Clair*. Rather than a citation to the portion of *Clair* which dealt with *Massiah* and Sixth Amendment issues and properly employed independent review of the mixed question involved (2 Cal.4th at pp. 656-658), *Memro* erroneously cited a portion of *Clair* dealing with questions of relevance and prejudicial effect of particular evidence, which employed a deferential abuse-of-discretion standard. (2 Cal.4th at p. 660.) As a result, *Memro* imported an erroneous standard of review into determinations affecting defendants' Sixth Amendment rights. *Fairbank* simply followed *Memro*, without addressing the error introduced into the analysis by *Memro.*

Appellant submits that *Memro* and *Fairbank* are in error in identifying the applicable standard which this Court must employ in review of appellant's motion to exclude the kites as having been procured by the prosecution through violation of appellant's constitutional rights. This Court should reject the erroneous deferential standard, and conduct independent review in this matter.

A. The Kites and the Statements Contained Therein Were Obtained in Violation of Appellant's Right to Counsel

In the opening brief, appellant argued that Ybarra acted as an agent of the state in obtaining the kites both by virtue of his commitment to the CDC gang debriefing process (AOB 172-175) and as a result of his first meeting with Detective Christian, before he obtained one of the kites (Exhibit 35) which was admitted into evidence. (AOB 176-179.)

Respondent does not deny that the statements were a product of interrogation of appellant by Ybarra. Respondent contends only that Ybarra was not an agent of the state in interrogating appellant, but acted solely on his own initiative. Respondent contends that Ybarra's gang debriefing with

the California Department of Corrections did not render him an agent of the state, despite Ybarra's understanding that the debriefing process was a lifelong commitment, and that he would have to obtain and provide more information about gang members and activities to protect himself in the event of his return to CDC custody. (RB 206-208.) Respondent also contends that Ybarra's first meeting with Detective Christian did not amount to an agreement or encouragement from Detective Christian to Ybarra to obtain further statements from appellant. (RB 208-211.) Respondent further contends that the kite containing the statements in Exhibit 36 was obtained by Ybarra before he met with Detective Christian, and Ybarra's actions regarding that kite were thus not affected by that meeting.[23] (RB 206.)

a. Ybarra Was a State Agent by Virtue of His Lifelong Commitment to the CDC Debriefing Process

Respondent contends that "no evidence was presented that 'less onerous prison housing' was ever offered, let alone given to Ybarra." (RB 207.) Respondent is incorrect. Castro testified that assignment of gang status versus unaffiliated status carries with it substantial effects upon the inmate's prison classification and housing, as well as the level of supervision on parole. (X RT 2608-2609.) An inmate to whom CDC has assigned gang status will be housed in maximum-security, Level 4 institutions such as Pelican Bay, where, for prison gang members, restrictions are significantly harsher, and the inmates are substantially isolated, with very little movement outside their cells. Inmates, as a rule, don't want to be housed at Pelican Bay, and avoiding it is generally the

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[23] The trial court made no findings regarding when particular kites were obtained by Ybarra.

main motivation for debriefing. (X RT 2613, 2618, 2621-2623.) CDC will provide an inmate who successfully debriefs protection from retaliation by the gang, in protective custody, with the possibility of being assigned to the mainline prison population after some time has passed. (X RT 2609-2610.)

As Castro's testimony shows, successful completion of the debriefing process involves benefits to the debriefing inmate, in this case, to Ybarra. Avoidance of the harsh restrictions in maximum security, Level 4 institutions to which gang members are subjected, and the possibility of being assigned to the mainline prison population, as Castro testified, are significant incentives to debrief. (X RT 2609, 2613 , 2621-2623.)

Nothing in Castro's testimony refuted Ybarra's testimony that his responsibilities under the debriefing process were lifelong. That Ybarra went to Castro to continue the debriefing process while on parole demonstrates Ybarra's belief that he was under a lifelong commitment. Castro was not the CDC official from whom Ybarra received his understanding of his responsibilities in the debriefing process, and could not testify to what that official told Ybarra. Castro never contacted any institutional coordinator at any state prison about Ybarra's debriefing status. (X RT 2615.) Castro's testimony does not establish that Ybarra was not acting as he was instructed by the institutional gang coordinator at Corcoran State Prison, who had tasked Ybarra to gather information from other inmates undercover while still incarcerated at Corcoran. (IX RT 2288-2289.)

Respondent acknowledges that Castro told Ybarra that if he went back to prison, he should contact an institutional investigator and make it known he wanted to provide specific *and additional* information related to gang activity. (RB 207; X RT 2614-2615, 2620.) Respondent contends,

however, that Castro's "remark was specific to Ybarra's going back to prison, [fn. omitted] as opposed to jail, which is the scenario here." (RB 207.) However, at the time Ybarra began interrogating appellant, he was facing a return to prison for either the crime he committed or for parole violation. His need to obtain "specific and additional information" was thus rather immediate. Neither Castro nor anyone else told Ybarra that the information Ybarra was to provide must be obtained in prison, not in jail while facing a return to prison. Ybarra understood that he needed new information, "additional" information, to continue debriefing if he returned to prison. At the time he faced such a return to prison, he was in jail, and the opportunity to comply with his instructions, as he understood them, was presented. It was to obtain additional information for debriefing that he began interrogating appellant. Nothing Castro testified to undercut Ybarra's testimony to such a motivation, and Castro himself contributed to that motivation. Thus, Ybarra did not act solely on his own initiative, as respondent claims. He was motivated by the CDC debriefing process to act as he did. The issue at the crux of the matter is not the government's intent or overt acts. "[R]ather, it is the 'likely ... result' of the government's acts. *Henry,* 447 U.S. at 271, 100 S.Ct. 2183." (*Randolph v. People of the State of California* (9th Cir. 2004) 380 F. 3d 1133, 1144 [*Randolph*].) Here, as in *Randolph*, "[i]t is clear that [Ybarra] hoped to receive leniency and that, acting on that hope, he cooperated with the State. Oppliger and [Christian] either knew or should have known that [Ybarra] hoped that he would be given leniency if he provided useful testimony against [appellant]. (*Ibid.*)

Respondent does not address the point made in *Maine v. Moulton* (1985) 474 U.S. 159, 179-180 (*Moulton*) and cited in the opening brief.

(AOB 176-177.) Appellant noted that the *Massiah/Henry* line of cases does not conflict with CDC's interest in tasking inmates to obtain and report information for general law enforcement or institutional security purposes. However, where such a task violates an individual defendant's Sixth Amendment rights, as here, statements made by that defendant in response cannot be used against him in a prosecution on pending charges:

> . . . incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.

(*Moulton*, *supra*, 474 U.S. at p. 179-180; see also *Massiah*, *supra*, 377 U.S. at p. 207.)

That is what occurred here. Ybarra was tasked to obtain additional information which he could turn over to CDC debriefers if he had to return to prison. He performed his task well, and obtained statements from appellant about his pending charges. Because appellant's Sixth Amendment rights had attached, those statements could not be used against him at trial. (*Moulton*, *supra*, 474 U.S. at p. 179-180; see also *Massiah*, *supra*, 377 U.S. at p. 207.) The trial court's ruling admitting the kites into evidence was therefore error. As shown in the opening brief, the error cannot be found harmless beyond a reasonable doubt. The judgment must therefore be reversed.

b. Assuming Arguendo That Ybarra's Process of Debriefing for CDC Did Not Make Him an Agent for Law Enforcement for Purposes of *Massiah/Henry* at the Time of His Initial Interrogations of Appellant, the Proscriptions of *Massiah*, *Henry*, and Their Progeny Render Inadmissible the Results of Ybarra's Interrogations of Appellant *after* Ybarra's First Meeting with Detective Christian

Respondent contends that Ybarra's contact with Detective Christian did not make him an agent of law enforcement. (RB 208.) Respondent argues that Ybarra "may have hoped to receive some benefit in exchange for his ongoing receipt of information, but he nevertheless continued to act on his own initiative." (RB 208.) Respondent cites Ybarra's testimony that no one told him to report any statements appellant made about Andrews' murder, that he had done that on his own (IX RT 2320), and Detective Christian's testimony that he told Ybarra not to elicit information from appellant about this case "on our behalf." (VIII RT 2161.) However, respondent glosses over Detective Christian's admission that Ybarra told him that he was communicating with appellant almost daily through these kites, that Detective Christian didn't tell him to stop writing to appellant, but that he did tell Ybarra to keep any kites he received from appellant. (VIII RT 2160-2161.)

Respondent relies in large part upon *Fairbank, supra,* 16 Cal.4th 1223. *Fairbank* is distinguishable on two crucial points. The informer in *Fairbank* did not initiate any contacts with the defendant, apparently acting in the capacity of a "listening post." (See *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 456, 459.) There was no evidence that the informer elicited any information from the defendant. (*Fairbank, supra*, 16 Cal.4th at p.

1249.)

In appellant's case, on the other hand, after meeting with Detective Christian, Ybarra continued to "interrogate" appellant, and obtained, *inter alia*, the kite represented by Exhibit 35 (page 3 of Exhibit 32) as a result of that "interrogation." (IX RT 2327.) Ybarra thus did take action "that was designed deliberately to elicit incriminating remarks." (*Kuhlmann v. Wilson*, *supra*, 476 U.S. at p. 459.) The prosecution made no contention otherwise in the trial court, conceding that the kites were the product of interrogation by Ybarra. (X RT 2741.) Respondent makes no contention to the contrary on appeal.

Moreover, the facts relevant to the interactions between law enforcement and the informer in *Fairbank* are materially different from those facts regarding Detective Christian's interactions with Ybarra. In *Fairbank*,"[t]he detectives told [the informer] the deputy district attorney handling his case was not inclined to make a deal . . . ." (16 Cal.4th at p. 1246.) The trial court in *Fairbank* found that

> "law enforcement . . . made deliberate and direct efforts and attempts to do everything they could to dispel the fact that they would be able to be of any help [to [the informer]] and that there was any implied promise of leniency."

(*Id.*, at pp. 1248-1249.)

In contrast, although initially telling Ybarra he couldn't promise anything in exchange for the kites, and that Ybarra's attorney would have to talk to the district attorney about it, Detective Christian was soon thereafter involved in discussions with Ybarra's attorney, who was, in turn, in negotiation with the district attorney for a deal for Ybarra. (VIII RT 2163-2167, 2179-2180.) Rather than "dispel the fact that [he] would be able to be of any help to [Ybarra]" Detective Christian and the district attorney began

negotiations for a deal with Ybarra's attorney.

Respondent's position that, even after meeting with Detective Christian, Ybarra acted wholly on his own initiative and without an implicit agreement with law enforcement and the prosecution is not supported by *Fairbank.*

Respondent seeks to distinguish *Randolph v. People of the State of California* (9th Cir. 2004) 380 F. 3d 1133, on the ground that the prosecution did not put Ybarra in appellant's cell, as was done in *Randolph.* (RB 211.) However, appellant cited *Randolph* for the proposition that an explicit agreement to compensate a jailhouse informer is not necessary to find that the informer worked as a state agent. In *Randolph*, the prosecution told the informer not to expect a deal. (380 F.3d at p. 1144.) The Ninth Circuit held, however, that this did not make a difference.

> For purposes of our holding, we accept as true the State's contention that Moore was told not to expect a deal in exchange for his testimony. However, *Henry* makes clear that it is not the government's intent or overt acts that are important; rather, it is the "likely ... result" of the government's acts. *Henry,* 447 U.S. at 271, 100 S.Ct. 2183. It is clear that Moore hoped to receive leniency and that, acting on that hope, he cooperated with the State. Oppliger and Chavez either knew or should have known that Moore hoped that he would be given leniency if he provided useful testimony against Randolph. (Indeed, that is precisely what happened. After providing useful testimony against Randolph, Moore received a sentence of probation instead of a prison term.)

(380 F. 3d at p. 1144.) Here, on the other hand, Detective Christian held out the possibility of a deal with the district attorney, and negotiations between Ybarra's attorney and the district attorney had commenced before Ybarra turned anything over to Detective Christian. (VIII RT 2163-2167.) In neither case was an explicit deal made initially, yet the incentive for a

deal was much clearer between Ybarra and Detective Christian than in *Randolph*. Ybarra testified that he knew if he obtained something useful from appellant, he could get some kind of a deal from the prosecution. (IX RT 2348.) He also testified that Detective Christian told him that he couldn't tell Ybarra to obtain information from appellant about the homicide, but if he did obtain information, to write a request to see Detective Christian and turn the information in. (IX RT 2302-2303, 2341.) As in *Randolph*, a deal was reached, and Ybarra received a paper commitment to state prison, to be served in local facilities, and was released from custody, rather than being returned to state prison. (IX RT 2316-2319, 2321-2323, 2331-2335; Defendant's Exhibit H.) The prosecution and Detective Christian, rather than dispelling Ybarra's expectations, acted in a manner which confirmed them. Detective Christian and the prosecution had to know the "likely ... result" was that Ybarra would continue to interrogate appellant, seeking a confession to the Andrews homicide. Detective Christian and the prosecution then participated in negotiations for a deal for Ybarra, "knowing[ly] exploit[ing] . . . an opportunity to confront the accused without counsel being present." (*Moulton*, *supra*, 474 U.S. at p. 176.)

As a result, the prosecution obtained the kite which was the basis of Exhibit 35. The trial court erred in ruling that the kite was admissible. As demonstrated in the opening brief (AOB 182, 190-194), the error cannot be determined to be harmless beyond a reasonable doubt, given its importance to the prosecution's case, the prosecution's repeated reference to the kites in argument to the jury, and the weaknesses in the prosecution's case. The judgment must therefore be reversed.

B. The Statements Contained in Exhibits 35 and 36 Were More Prejudicial than Probative, Contained Irrelevant and Prejudicial Information, and Should Have Been Excluded from Evidence or Further Redacted to Prevent Undue Prejudice to Appellant

In the Opening Brief, appellant argued that Exhibits 35 and 36, which contained the statements from the kites which were presented to the jury, should have been further redacted or completely excluded from evidence to prevent substantial prejudice from the statements which was either irrelevant to the issues in this case or had such minimal probative value that it was far outweighed by the prejudicial effect of the statements. (AOB 179-188.)

1. Exhibit 35

As explained in the Opening Brief, Exhibit 35,[24] comprised of a transcription of a portion of page 3 of Exhibit 32,[25] does not support the trial court's conclusion that, without a reference to appellant's brother, the passage from page 3 of Exhibit 32 "doesn't show that they [appellant and Ybarra] were talking about a killing when they were talking about trips and tags." (X RT 2796.) The trial court's conclusion rests on an assumption

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[24] Exhibit 35 reads as follows:

> I'm doing 29 to life for the 1st one, dude was my brother but was on the other side of the fence. On this other trip, hey shit happens Homme. [sic] The shit ain't over but I'll say this, Dude had it coming, both of them. I feel no different, it don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway.

(2SCT1 379.)

[25] Exhibit 32, which was not admitted into evidence for the jury's consideration, consisted of photocopies of all the handwritten kites collected by Ybarra through his interrogation of appellant.

that the reference to appellant's brother constitutes a reference to a homicide. In fact, the statement does not refer to homicide in relation to appellant's brother, and there was no independent evidence of that homicide before the jury.[26] Thus the trial court's analysis was based upon misreading or misinterpretation of the content of the written statement. (AOB 180-181.)

Furthermore, defense counsel proposed a redaction which omitted mention of prior criminal conduct regarding appellant's brother but which included sufficient information to relate the statement to the charges appellant faced at this trial. (AOB 181-182.) Respondent does not directly address the effectiveness of this redaction to avoid the prejudice attendant on the introduction of evidence of uncharged crimes by appellant.

Moreover, as explained in the Opening Brief, the statement had little probative value as an admission, let alone a confession as the prosecutor regularly characterized it. The only remotely inculpatory phrase, "dude had it coming, both of them," is as consistent with innocence as with guilt.[27] The real effect of the statement as presented to the jury and argued by the

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[26] The only "evidence" that appellant had killed his brother which was presented to the jury during the guilt phase trial was Brad Nelson's improper disclosure thereof (VIII RT 2095), which was itself the subject of an unsuccessful defense motion for mistrial. (VIII RT 2096; see AOB Arg. IV.) However, that evidence was stricken by the trial court (XI RT 2929; 3CT:643) and was thus unavailable to support any inference that appellant was serving 29 years to life for killing his brother.

[27] Assuming arguendo that appellant was referring to Andrews and the capital charge he was facing, the statement that Andrews "had it coming" does not constitute an admission that appellant had done whatever Andrews had coming. Rather, it is a statement which shows hostility to "both of them" – "they had it coming, both of them, [whoever did it to them]."

prosecution was a prejudicial and inflammatory reference to an uncharged[28] crime against appellant's brother, which the prosecution proclaimed to have been a murder, along with language which could be read as a lack of remorse and which invited speculation as to motive. Despite these prejudicial and inflammatory effects, the statement did not establish any real likelihood that it constituted an admission of culpability for the Andrews homicide.

Respondent first contends that the trial court's analysis of Exhibit 35 was in fact analyzing both Exhibits 35 and 36. (RB 212.) However, respondent does not explain how that would refute appellant's arguments or support the trial court's decision to admit the evidence as it did.

Respondent contends that it is reasonable to infer that the reference to "the 1st one" refers to a murder because of the statement "Dude had it coming, both of them," which respondent asserts, "implied that the same fate that befell the second 'Dude' befell the first 'Dude'" (appellant's

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[28] Respondent seeks to correct appellant's use of the term "uncharged" in relation to the prior homicide, since, as pointed out, appellant had been both charged with and convicted of that prior homicide. (RB 214, fn. 78.) However, it was not charged *in this case*, other than the prior conviction's role as a predicate for the special circumstance allegation pursuant to section 190.2, subdivision (a)(2). The trial of that allegation was bifurcated from the guilt trial in this case. At the guilt trial, the prior homicide, and the facts surrounding it, were, as far as the jury knew, uncharged. Regardless of whether it had resulted in a conviction, the admissibility and relevance of evidence of the prior homicide in this trial is analyzed as evidence of "other crimes" or "uncharged crimes." (See, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 403 ["To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses."") It was in this sense that appellant has (properly) referred to the prior homicide as "uncharged."

brother, according to the prosecution's interpretation.) (RB 213.) Respondent argues that the language in Exhibit 36 also supports a finding that it refers to appellant killing both his brother and Andrews because "I'll tag a few more" in conjunction with references in Exhibit 35 indicate that "tag" means "kill," and the reference to "the vato here" and "my carnales" are two people appellant has killed. (RB 213.)

Respondent then concludes that the trial court's finding that the reference to appellant's brother was necessary to "show that they were talking about a killing" (X RT 2796), and to have it make sense, was sound, and the probative valued of the statements as a confession were extremely high and outweighed any prejudicial effect. (RB 214.)

As explained above (see Arg. IV, *ante*), this reasoning is circular and does not support respondent's or the trial court's conclusions. Respondent's reasoning is essentially that the kites establish that appellant is admitting to having killed Andrews because appellant refers in the kite to doing time on something having to do with his brother, who had it coming. Having thus established that appellant admits having killed Andrews, who also had it coming, the crime against appellant's brother must have been homicide, and, because Andrews was murdered, appellant must have murdered his brother.

Respondent does not explain how defense counsel's proposed redaction of Exhibit 35 would not make the same sense as the unredacted Exhibit 35, but without the prejudicial effect of incorporating mention of other crimes. Respondent does not challenge appellant's argument concerning the prejudicial effect of the unredacted exhibit, arguing only that the "very extremely high" probative value outweighed its prejudicial effect. (RB 214.)

Therefore, respondent apparently concedes that if the probative value of Exhibit 35 is determined to be minimal or non-existent, or if the redacted version proposed by the defense has substantially the same probative value, the prejudicial effect of the unredacted Exhibit 35 must have outweighed the probative value, and the trial court erred in admitting Exhibit 35.

2. Exhibit 36

In the Opening Brief, appellant argued that the bulk of the section of page 4 of Exhibit 32 which is reflected in Exhibit 36[29/] is irrelevant and without probative value in this case. The only portions arguably relevant to this case, "The vato here was a gava," and "Ain't no thing, brother, before its over I'll tag a few more, got to keep these fools in check at times," can be interpreted as relevant only by ignoring the context of the remainder of the section quoted, and by employing assumptions and inferences which are unwarranted. (AOB 186-189.) The phrases "on my carnal[es] he was a runner" and "the vato here was a gava" can only be interpreted as referring to appellant's brother and to Andrews by resort to unwarranted speculation. (AOB 187-188.) Without reference to Exhibit 35, and without making the unwarranted assumption that the two kites are referring to the same thing, there is no basis for a conclusion that Exhibit 36 has any reference to Andrews or to appellant's dead brother. (AOB 188-189.)

Respondent contends that, because the defense stipulated to the

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[29] Exhibit 36 reads as follows:

> The vato here was a gava. On my carnales. he [sic] was a runner. See I'm a half-breed myself so there's more to that story than the paper says, tu sabes. Mikio pulled me down for his trial, that [sic] why I was here. Ain't no thing brother before its over I'll tag a few more, got to keep these fools in check at times.

language used in Exhibit 36, appellant should not be permitted to complain about any of the language or the punctuation in that Exhibit. (RB 215-216) The trial court ruled that, in regard to Exhibit 36, "I would not intend to admit just, 'he is a blank.' That would invite speculation. You can either leave out the entire sentence or argue further with respect to leaving it in in its entirety." (X RT 2797.) The trial court also ruled that, as to the second sentence of Exhibit 36,[30] "I think the point is well taken. It adds nothing." (*Ibid.*) As to the rest of Exhibit 36, the trial court ruled, "The rest of it may be admitted . . . ." (*Ibid.*) Thereafter, the prosecution and defense conferred to reach a stipulation "in light of the Court's ruling." (X RT 2800.) Given that the stipulation was entered into after the defense objections to the evidence had been made and denied, appellant has not waived appellate review of those objections or the prejudicial effect of the evidence. It is clear that defense counsel did not intend, by entering into a stipulation regarding the transcription and modification of Exhibit 36, to waive any challenge to the admissibility or the evidence or any objection to its prejudicial effect. Rather, defense counsel indicated that they reached the stipulation in part to avoid Ybarra getting on the stand and disclosing something he should not, as Nelson had, despite prior admonitions from the trial court not to do so, while at the same time preserving for appeal objections already made concerning the admissibility of the kites. (X RT 2806-2807.)

The strongest import of these two exhibits as used at appellant's trial was an improper and prejudicial suggestion of criminal or homicidal

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[30] The second sentence referred to, apparently, was "See I'm a half-breed myself so there's more to that story than the paper says, tu sabes." (Exhibits 32, 36; CT 436.)

propensity, and future dangerousness. The trial court erred in assessing the probative value of these kites, and consequently erroneously and unreasonably concluded that the probative value outweighed the substantive prejudice admission of this evidence would entail. The trial thus abused its discretion in admitting the evidence.

C. The Erroneous Admission of Exhibits 35 and 36 Requires Reversal of the Judgment

In the opening brief, appellant explained that, despite the absence of any evidence before the jury at the guilt phase trial that appellant had committed a prior homicide, the prosecution argued that the kites, as represented by Exhibits 35 and 36, referred to appellant having previously murdered his brother. The prosecutor relied heavily upon the kites as constituting "confessions" to killing Andrews. Without this evidence, the jury would not have heard that appellant was serving 29 to life for a crime involving his brother, would not have heard the inflammatory statement of no remorse, "I feel no different, it don't bother me." Without Exhibit 35, the jury would not have heard the misleading and inflammatory suggestion of a motive, "dude was my brother but was on the other side of the fence." Without Exhibit 36, the jury would not have heard the inflammatory, if inherently ambiguous, statement that "I'll tag a few more" or the inscrutable "he was a runner."

Respondent contends that if the admission of the kites was error, it was harmless, due to the strength of other evidence of appellant's guilt. (RB 217-218.)

As demonstrated in the opening brief, the prosecution's case against appellant had substantial weaknesses. The kites and the prosecution's use of them, had the effect of disguising those weaknesses and bolstering

evidence of questionable probative value, thus artificially strengthening the prosecution case. The evidence arising from the kites, as presented to the jury, is "the sort of evidence likely to have a strong impact on the minds of the jurors." (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1386.) Especially combined with the prosecution's heavy and unfounded reliance upon the kites as establishing that appellant had murdered his brother, the erroneous admission of this evidence so infected the trial with unfairness as to constitute a due process violation, denying appellant a fair trial and a reliable determination of guilt, as well as penalty. (*Ibid.*)

Respondent disputes a statement in the opening brief which says that in argument to the jury, the prosecutor "'apparently relied on the stricken testimony of Nelson that appellant had bragged that he had killed his brother.' (AOB 191, citing Appellant's Arg. IV)." (RB 217.) Respondent attempts to refute that statement by noting that "the prosecutor's closing arguments made no mention of Nelson's stricken testimony (see XI RT 2949-3002, 3079-3103.) Appellant never claimed that the prosecutor directly mentioned Nelson's stricken testimony in argument. Rather, respondent has taken the quoted statement out of context, and ignores the point actually made in the opening brief.

Appellant argued in the opening brief, in Argument IV, that, despite the fact that the trial court ultimately struck from evidence Nelson's disclosure that appellant had bragged about killing his brother, that information continued to be used by the prosecution, not in direct attribution to Nelson, but by attributing it to the kites, which do not support it. (AOB 150, fn. 90.) In Argument V of the opening brief, appellant again argued that the prosecution's argument relied primarily upon speculative inferences and the substantial prejudicial effect of otherwise inadmissible evidence

contained in the statements. The only evidence admitted at trial which actually indicated that appellant had killed his brother was Nelson's testimony, which had been stricken. The prosecutor kept the prejudicial effect of that testimony before the jury by attributing it, without support, to the kites. (AOB 191.)

Appellant did not argue that the prosecution attributed his argument to Nelson's stricken testimony. However, it was the only real basis for his argument. While the prosecutor attributed it to the kites, his source was the stricken testimony of Nelson.

The erroneous admission of this evidence, and the prosecution's use of it in argument, was undoubtedly prejudicial, whether considered alone or in conjunction with the other errors in this case. (See, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally unfair.].) Respondent has not established that the evidence of the kites as presented to the jury in argument by the prosecution was "did not contribute to the verdict obtained." (*Chapman v. California*, supra, 386 U.S. at p. 24.)

For the reasons stated in the opening brief and above, the trial court's error in admitting the kites cannot be found harmless beyond a reasonable doubt. (*Ibid.*) The judgment must therefore be reversed.

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VI

THE VERDICT OF GUILT AS TO COUNT TWO, FOR A VIOLATION OF PENAL CODE SECTION 288A, AS WELL AS THE SECOND SPECIAL CIRCUMSTANCE, MUST BE VACATED, AND THE JURY FINDING OF FELONY MURDER MUST BE STRICKEN, AS HAVING BEEN BASED UPON AN ACT NOT PROHIBITED BY THAT STATUTE.

In the Opening Brief, appellant argued that the evidence presented to establish that an act of oral copulation took place was insufficient to establish that Penal Code section 288a, subdivision (e) (hereinafter §288a(e)) was violated, and that as a result, the conviction on Count Two and the Second Special Circumstance must be vacated. Appellant further argued that the instruction given to the jury (XI RT 3131; CALJIC No. 10.14) affirmatively misstated the elements of the crime and special circumstance, unconstitutionally lightening the burden of the prosecution and depriving appellant of a fair trial, due process of law and a reliable determination of both guilt and penalty. If this Court finds that the evidence is sufficient to establish a violation of §288a(e), still, the erroneous instruction given the jury requires reversal of Count Two and the Second Special Circumstance.

The only evidence presented to establish a violation of §288a(e) was that appellant told Andrews to kiss his penis, and that Andrews then did so. The instruction given to the jury stated that "any contact however slight, between the mouth of one person and the sexual organ of another person" (XI RT 3131; CALJIC No. 10.14) was sufficient to constitute oral copulation. The only rational construction of the language of section 288a is that something more than fleeting contact between the mouth and sexual organ is required to violate that section. Whether that "something more" is

defined as penetration, "substantial contact," sexual stimulation or gratification, or some other construction consistent with the ordinary meaning of "copulation," a mere kiss, or fleeting contact, such as shown by the evidence here, is insufficient as a matter of law. Even if the evidence were to support a finding of some additional element of the offense, the instructions given to the jury not only failed to require a finding of such element beyond a reasonable doubt, but affirmatively instructed the jury that no additional element need be found.

Respondent argues that no additional element need be found, and that even if some additional sexual component is an element of the offense, the evidence is sufficient to sustain the jury's verdicts.

Respondent attempts to justify an interpretation of section 288a which prohibits any oral-genital contact, no matter how slight, by focusing not upon the language of the statute, but upon the legislature's intent, "the spirit of the act," and the avoidance of absurd consequences. (RB 231.) Respondent argues that any interpretation other than that any oral-genital contact, no matter how slight, constitutes oral copulation "would abrogate the Legislature's purpose in enacting the statute, the gravamen of which is punishment for the harm or revulsion felt by a victim who is forced to touch his or her mouth to the genitals of another, or to be forcibly touched in the genitals by the mouth of another." (RB 231.)

In support of the contention that such was the legislature's purpose, respondent cites *People v. Catelli* (1991) 227 Cal.App.3d 1434, at p. 1450. (RB 231-232; see also RB 226.) In *Catelli*, the offense being discussed was forcible oral copulation in violation of section 288a, subdivision (c)(2). In reference to that charge, *Catelli* indeed states that "[t]he gravamen of the offense [of forcible oral copulation] is the revulsion and harm suffered by

one who is forced to unwillingly touch his or her mouth to the genitals of another." (227 Cal.App.3d at p. 1450.) However, the charge against appellant, violation of section §288a, subdivision (e), was not forcible oral copulation, but "participat[ion] in an act of oral copulation" in a detention facility. Violation of subdivision (e) does not require force, nor does it require that either of the participants be unwilling. The gravamen of a crime which can be committed through consensual acts of the parties involved can hardly be "revulsion and harm." On this point, *Catelli* is inapposite. Respondent's reliance upon *Catelli*, and upon an underlying purpose to section 288a to protect against unwilling oral-genital contact, is thus unavailing. No other statutory purpose is proposed by respondent which would otherwise justify the deviation from the literal reading of the statutory language. The prohibition on consensual oral copulation in detention facilities has been held to have the purpose of maintaining prison discipline and order.

> The obvious governmental purpose behind the statute is the maintenance of prison discipline and order. The statute appears to be rationally related to that purpose because homosexual contacts between prisoners can lead to violent altercations (see *People v. Frazier* [(1967)] 256 Cal.App.2d 630, 631, 64 Cal.Rptr. 447). . . . Furthermore, even consensual acts of oral copulation between prisoners might have a disruptive effect when viewed by the other prisoners who may constitute a captive audience.

(*People v. Santibanez* (1979) 91 Cal.App.3d 287, 291; *People v. West* (1991) 226 Cal.App.3d 892, 898-899.) There is no basis for a determination that "oral copulation," as prohibited by section 288a, subdivision (e) means anything other than the plain and ordinary meaning of the term, involving either penetration, substantial or prolonged contact, or

contact effecting sexual stimulation. Such an interpretation leads to no absurd result, nor does it undermine the legislative intent behind the statute.

Moreover, such an interpretation is supported by the rules of statutory construction. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute. (*People v. Overstreet* (1986) 42 Cal.3d 891, 896-897; *People v. Weidert* (1985) 39 Cal.3d 836, 848; *People v. Davis* (1981) 29 Cal.3d 814, 828; *In re Jeanice D.* (1980) 28 Cal.3d 210, 217.) When language which is susceptible of two constructions is used in a penal law, the courts construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. (*People v. Ralph* (1944) 24 Cal.2d 575, 581; *In re Christian S.* (1994) 7 Cal.4th 768, 780; *People v. Overstreet* (1986) 42 Cal.3d 891, 896-897.) While appellant does not agree that the language of the statute is reasonably susceptible to the meaning ascribed to it by the terms of CALJIC No. 10.14, if it were, that construction of the statute still must fall to an interpretation more favorable to appellant.

In arguing that the interpretation embodied in CALJIC No. 10.14 is the proper one, respondent also relies upon the line of cases, discussed at length in the opening brief, which have, through superficial analysis, sloppy writing and/or blind adherence to prior case law without reference to the facts and reasoning which underlie prior holdings, maintained against challenge an erroneous interpretation of the plain meaning of "oral copulation."

In the opening brief, appellant demonstrated the flaws in those cases, or in the way later courts have used them.[31] Appellant demonstrated that many of the cases relied upon by respondent cited prior cases for propositions which were not supported by those cases. Appellant also demonstrated the utter lack of analysis or application of the principles of statutory construction in most of those cases. Appellant further demonstrated that the facts in many of the cases did not require application of "any contact, no matter how slight" to uphold the acts at issue as oral copulation. (AOB 206-214.) Respondent has failed to justify any reliance upon these cases, or to demonstrate any error in appellant's analysis of those cases.

Of those cases cited which actually described the conduct which was held to be sufficient evidence of oral copulation, all involved conduct which was significantly more substantial than the fleeting contact in this case. No case has ever explicitly considered the adequacy of the minimal contact such as both Benjamin and Bond testified to at appellant's trial.

People v. Coleman (1942) 53 Cal.App.2d 18, 23 (*Coleman*), involved contact between the defendant's mouth and the victim's sexual organ lasting five or ten minutes.

People v. Harris (1951) 108 Cal.App.2d 84 (*Harris*) involved evidence which was described as "copulating the defendant's mouth the

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[31] Respondent cites one case addressing the elements of §288a which was not cited in the Opening Brief. *People v. Carter* (1983) 144 Cal.App.3d 534, 537-540 (disapproved on other grounds, *People v. Coronado* (1995) 12 Cal.4th 145, 159), undertakes no analysis, but simply relies on *People v. Minor* (1980) 104 Cal.App.3d 194 to hold that "[t]he offense of forcible oral copulation is complete when the victim's mouth is forcibly placed upon the genital organ of another." (144 Cal.App.3d at 539.)

sexual organ of the prosecutrix," defendant "having placed his mouth on the *os uteri* of [the victim's] body," and having "lewdly and lasciviously 'placed his mouth on her private parts.' " (108 Cal.App.2d at pp. 86-88.)

People v. Wilson (1971) 20 Cal.App.3d 507, involved evidence that the defendant "placed his mouth on [the victim]'s private parts" and "kissed [the victims] in the vaginal area with his tongue." (20 Cal.App.3d at pp. 509-510.)

In *People v. Carter* (1983) 144 Cal.App.3d 534 (disapproved on other grounds, *People v. Coronado* (1995) 12 Cal.4th 145, 159) the victim "testified on direct examination she put her mouth on defendant's penis. On cross-examination she testified she tried to avoid touching his penis and was 'faking it' at various times." (144 Cal.App.3d at 539.)

People v. Grim (1992) 9 Cal.App.4th 1240 (*Grim*) did not address section 288a or the sufficiency of the evidence to sustain a conviction under that statute. Rather, it addressed the instruction given relating to Section 1203.066, subdivision (a)(9), which bars probation for "[a] person who occupies a position of special trust and commits an act of substantial sexual conduct." (9 Cal.App.4th at p. 1241.) Because "substantial sexual conduct" includes oral copulation (*ibid.*; § 1203.066, subd. (b)) the Court of Appeal addressed the definition of oral copulation in CALJIC No. 10.10. That instruction, as given at trial, required only contact, but had been changed by the CALJIC Committee while the case was on appeal, to require either penetration or substantial contact. (9 Cal.App.4th at p. 1242.) The conduct at issue in *Grim* is not described in any detail. Rather, the Court of Appeal states only that "it was clear from the victim S.G.'s testimony there was no penetration by appellant's penis into S.G.'s mouth." (*Ibid.*) The *Grim* court did not determine whether the contact was sufficient as

"substantial contact." In fact, the government conceded that "the evidence was not clear as to whether there was substantial contact or minimal contact between appellant's penis and [S.G.'s] mouth ...." (*Ibid.*) Nor did the court determine whether the contact constituted "substantial sexual conduct" for purposes of section 1203.066 regardless of the definition of oral copulation. The *Grim* court merely held that the definition given at trial, "Any contact, however slight . . ." was not erroneous.

Neither *People v. Bennett* (1953) 119 Cal.App.2d 224 nor *People v. Minor* (1980) 104 Cal.App.3d 194 ["the mouth [was] forcibly placed upon the genital organ of another"] provide sufficient detail of the conduct to determine what precisely occurred. *People v. Massey* (1955) 137 Cal.App.2d 623, 625, similarly provides insufficient detail of the conduct, but it is likely that the conduct involved more than slight contact, including penetration. (See AOB 212, fn. 114.)

People v. Hunter (1958) 158 Cal.App.2d 500, involved evidence that the defendant "licked and rubbed [the victim] between her legs" and "told her to lick him between his legs; she did what he told her to do." 158 Cal.App.2d at p. 502. Relying solely upon *People v. Harris*, *supra*, and without further analysis of the issue, the court found the evidence sufficient, declining to follow *Angier*. (158 Cal.App.2d at p. 505.)

Respondent also cites *Catelli*, quoting dictum in a footnote concerning whether licking of the scrotum constitutes copulation within the meaning of section 288a. The Court of Appeal in *Catelli* states that it does, but notes that the defendant did not contend that it did not. (227 Cal.App.3d at p. 1450, fn.7; RB 227-228.) The language cited by respondent from *Catelli* is dicta, relating to an issue not before the court, and not necessary to its decision. Aside from the limitation on the precedential value of dicta, it

should be clear that, whether licking a sexual organ comes within the legitimate ambit of the term "oral copulation," such conduct is substantially different from the conduct presented by the facts in appellant's case. Licking a sexual organ would clearly be "substantial" contact, not slight, and would involve sexual stimulation of the organ.

"It is well settled that language contained in a judicial opinion is 'to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered.' " (*People v. Banks* (1993) 6 Cal.4th 926, 945 [citations omitted]; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66.) " '[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.' " (*People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202, 1212 [citations omitted].) None of the cases which have adopted the concept that any contact, however slight, is sufficient to constitute oral copulation has directly considered facts equivalent to those described by Benjamin and Bond. As a result, the holdings in those cases which would otherwise appear to apply to the facts here, are broader than the facts before them, and of little to no precedential value in addressing the sufficiency of the evidence to sustain appellant's conviction.

In contrast to the cases relied upon by respondent, other cases have found that penetration was required, and that the evidence supported a finding that penetration occurred. *People v. Hickok* (1950) 96 Cal.App.2d 621 (*Hickok*) involved evidence of insertion of the defendant's penis past the victims's lips, although then blocked by clenched teeth. This was held to be sufficient evidence of penetration to constitute oral copulation. (96 Cal.App.2d at p. 628.) Respondent acknowledges *Hickok* (RB 228), but

inexplicably fails to acknowledge its holding that penetration is required to constitute oral copulation.

In *People v. Milo* (1949) 89 Cal.App.2d 705 (*Milo*), the court did not decide whether penetration was required. It did find that evidence that the defendant's "lips got around the top of [the victim's] penis," and that the defendant "had [the victim's] penis in his mouth" constituted evidence of oral copulation. (89 Cal.App.2d at p. 706.) Respondent fails to mention *Milo.*

In *People v. Chamberlain* (1952) 114 Cal.App. 2d 192, the court found the evidence sufficient to sustain the conviction, applying *Hickock*'s interpretation of the statute as requiring penetration. (114 Cal.App.2d at p. 194 (also citing *Milo.*) The court of appeal's description of the evidence in *Chamberlain* is as follows: "Without relating further gruesome details, the circumstantial evidence produced by the prosecution was clearly sufficient to show a violation of section 288a of the Penal Code, as charged." (114 Cal.App.3d at p. 192.) Respondent fails to mention *Chamberlain.*

At most, as recognized in Witkin & Epstein (2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Crimes, §§ 32, p. 342), there is conflicting authority on the interpretation of the term oral copulation in section 288a, rather than uniformity, as respondent seems to suggest. This Court has yet to rule on this issue and resolve the conflict.

Respondent contends that even assuming arguendo that some sexual component is necessary, there is evidence of a sexual motivation on the part of appellant. Respondent cites testimony that appellant called Andrews a punk and made reference to other sexual acts. Respondent also cites testimony by Dr. Eric Hickey, a criminologist who testified for the defense. (RB 221, 232-233.) The particular testimony upon which respondent relies

is Dr. Hickey's testimony regarding the meaning of the term "punk" in prison, as often used to refer to someone used sexually by other prisoners. (XI RT 2878-2879, 2888.) Respondent then draws the inference that the conduct that was found to constitute oral copulation was sexually motivated. (RB 232-233.)

However, appellant made his motion pursuant to section 1118.1 at the conclusion of the prosecution's case in chief, and Dr. Hickey did not testify until the defense case was presented, after the section 1118.1 motion was made. (2 CT 503-504.) As a result, Dr. Hickey's testimony is not available to support the sufficiency of the evidence as it stood at the end of the prosecution case, as this Court must review it. (*People v. Cole* (2004) 33 Cal.4th 1158,1213 ["Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point."]; *People v. Belton* (1979) 23 Cal.3d 516, 520-523 [same].)

Respondent also concocts a scenario to which neither Benjamin nor Bond testified, claiming that because Benjamin testified appellant's penis was flaccid when Andrews kissed it (VI RT 1460), and Bond testified it was "semi-erect" when Andrews kissed it (IX RT 2479), that therefore "appellant's penis apparently went from a flaccid to a semi-erect state" (RB 233) which respondent then reasons "creates a reasonable inference that the act involved sexual stimulation and sexual gratification (i.e., sexual satisfaction)." (*Ibid.*)

There is no indication from the testimony of either Benjamin or Bond that the condition of appellant's penis changed in any way during the act. Respondent has taken two different descriptions of the condition of appellant's penis at the same point in time -- during an act which was "fast"

(VI RT 1514 [testimony of Benjamin]) and "fleeting" (IX RT 2480 [testimony of Bond]) -- and concocted a conclusion that the different descriptions show a change in the condition of appellant's penis from flaccid to semi-erect.

Respondent does not explain how the difference in the descriptions shows a change in one direction, but not in the other; in other words, the same difference in the two descriptions would equally, under respondent's logic, show that appellant's penis went from semi-erect to flaccid.

It cannot be reasonably contended that the difference in the two descriptions of the condition of appellant's penis constitute substantial evidence i.e., evidence that "reasonably inspires confidence" (*People v. Bassett* (1968) 69 Cal.2d 122, 139; *People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of solid value" (*People v. Green* (1980) 27 Cal.3d 1, 55 (*Green)*; see *People v. Bolden* (2002) 29 Cal.4th 515, 533), that the contact involved sexual stimulation and sexual gratification. Moreover, there is no evidence that the contact itself caused any sexual stimulation or gratification.

Respondent also contends that appellant's "reference to other sexual acts," including stating "I ought to fuck him" (VI RT 1474-1476), and asking if Bond or Benjamin "want[ed] to fuck" Andrews or "get their dicks sucked" (IX RT 2387-2388, 2563), "further adds to a reasonable inference that appellant intended the forced kiss to be a sexual assault." (RB 233.)

What appellant intended is not the point of the argument here. Violation of section 288a requires only a general criminal intent. (*People v. Thornton* (1974) 11 Cal.3d 738, 766.) The question is whether the act committed violates the statute, i.e., whether the *contact* between Andrews lips and the tip of appellant's penis constituted oral copulation. In

appellant's reference to sexual gratification or stimulation as possible alternate requirements for contact to constitute oral copulation, the point is whether the contact itself involved physical stimulation of the organ, not whether the intent or expectation of a participant was of sexual gratification. The physical act is at issue here, not the mental state of the participants. Respondent's attempt to justify a characterization of this act as a sexual assault does not resolve the question of the sufficiency of the evidence to constitute a specific sexual act, i.e., oral copulation.

Here, the evidence is that the only contact was a "fast" "fleeting" kiss on the tip of appellant's penis, not a sex act.[32] In the opening brief, appellant argued that "something more than fleeting contact between the mouth and sexual organ is required to violate" section 288a. (AOB 195.)

> Whether that "something more" is defined as penetration, "substantial contact," sexual stimulation or gratification, or some other construction consistent with the ordinary meaning of "copulation," a mere kiss, or fleeting contact, such as shown by the evidence here, is insufficient as a matter of law.

(*Ibid.*)

Contrary to Respondent's argument, prior – or even contemporaneous or subsequent – statements by appellant which do not reflect on the specifics of physical contact involved do not support a finding that the fleeting contact here amounted to copulation.

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[32] See VI RT 1514 [testimony of Benjamin]:

> Q. Was this a fleeting thing or was it prolonged? In other words, was it fast or was this a sex act?
>
> A. It was fast.

The jury was told that "any contact, however slight" was sufficient to constitute oral copulation. Thus, even assuming arguendo that respondent's interpretation of a sexual component of Andrews' kiss on the tip of appellant's penis were considered as sufficient to sustain a conviction of oral copulation under section 288a, subdivision (e), the jury was not informed of this additional component of the crime. The jury was not required to evaluate any possible sexual component of the contact. It is unlikely that the jury would have found the contact to have been oral copulation if any additional element beyond mere contact was required. In any case, the conviction of violation of section 288a, subdivision (e) and the Second Special Circumstance finding would have to be reversed, for the instruction, requiring only slight contact, omitted a required element of the offense.

Respondent does not address the instructional error, other than to argue that "there is a basis for a determination that the jury would have returned the verdicts it did had it been instructed that, e.g., . . . contact involving sexual stimulation or satisfaction was required." Referring to the "evidence that appellant called Andrews a punk, that appellant's penis went into a semi-erect state at the time of the act, and appellant's referenced other sexual acts," respondent contends that assuming arguendo there was instructional error, the error was harmless beyond a reasonable doubt. (RB 234.)

Respondent's contention is wholly without merit. Even if the jury could have returned the verdicts it did if instructed as respondent posits, there is no way that this Court could determine, beyond a reasonable doubt, that the jury would have done so. Respondent cites *Chapman v. California*, and gives lip service to its requirement that constitutional error requires

reversal unless harmless beyond a reasonable doubt, but the proposed determination of harmlessness is completely unreasonable.

The instructions failed to properly define the elements of the offense and to include all necessary elements of the offense. It further allowed a finding of guilt based on evidence which was insufficient, withdrawing an element of the crime from the jury's considerations. The instructions therefore unconstitutionally lightened the burden of the prosecution, misstated the elements of the offense, effectively eliminated any jury determination of an element of the offense, and allowed a verdict of guilt based upon acts not prohibited by section 288a. The instruction therefore violated appellant's right to a fair and reliable trial, to a determination by a properly-instructed jury of each element of Count Two, as well as of the Second Special Circumstance and of felony murder as to Count One, to the benefit of the presumption of innocence and the requirement of proof beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 8-15; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521; *People v. Flood* (1998) 18 Cal.4th 470, 479-482.) Given the nature of the evidence, it is not reasonable to conclude that the erroneous instruction did not contribute to the jury's verdict and finding. There is no basis for a determination that the jury would have returned the verdicts it did had it been instructed that, e.g., penetration, or substantial contact, or contact involving sexual stimulation or satisfaction was required. The erroneous instruction was not therefore, harmless beyond a reasonable doubt. (*Neder v. United States*, *supra*, 527 U.S. at pp. 12-15; *Pope v. Illinois* (1987) 481 U.S. 497, 503; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Count Two and the Second Special Circumstance must therefore be vacated.

VII

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE FINDING OF THE TRUTH OF THE SECOND SPECIAL CIRCUMSTANCE

In the opening brief, appellant argued that, assuming arguendo that this Court finds the evidence sufficient to sustain a conviction of oral copulation by a person confined in a local detention facility (section 288a, subd. (e)), the evidence was insufficient to establish that the murder was committed while engaged in the commission of that act of oral copulation. (section 190.2, subd. (a)(17)(F).) Further, appellant argued that the evidence relevant to the finding of the oral copulation special circumstance does not rationally distinguish appellant from other murderers sufficient to justify subjecting appellant to the death penalty. (U.S. Const. Amends. V, XIV; *Jackson v. Virginia* (1979) 443 U.S. 307; *Gregg v. Georgia* (1976) 428 U.S. 153, 189; *Furman v. Georgia* (1972) 408 U.S. 238.) The finding of the Second Special Circumstance must therefore be vacated, and the penalty judgment must be reversed.

Respondent contends that the evidence is sufficient to sustain the special circumstance finding, based primarily upon a theory of concurrent intents. (RB 242-243.) Respondent also contends that the evidence is sufficient to sustain a finding that appellant killed Andrews to avoid detection for the oral copulation. (RB 242.) Respondent further contends that the oral copulation and the special circumstance finding rationally distinguish appellant sufficiently to justify the death penalty. (RB 243.)

Citing *People v. Clark* (1990) 50 Cal.3d 583, 608, respondent argues that the evidence is sufficient to sustain a finding that appellant had a purpose for committing the oral copulation which was independent of the intent to commit murder, such that the oral copulation was not merely

incidental to the murder, but constituted an independent, if concurrent goal. (RB 239, 242.) Yet in discussing that supposed independent purpose, respondent asserts a common motivation to the entire episode, that "appellant's apparent motive to attack, sexually assault, and ultimately kill Andrews was based on appellant's animosity towards Andrews' friend Rutledge, who was an associate or friend of appellant's wife. (X RT 2671-2674.)" (RB 240-241.)

Appellant acknowledges that this Court has established that a felony-murder special circumstance may be properly found based upon evidence of concurrent independent intents as well as evidence that the murder was committed to further the underlying felony. The evidence does not support either conclusion here.

The evidence in this case is unlike that in *People v. Guerra* (2006) 37 Cal.4th 1067, or *People v. Carpenter* (1997) 15 Cal.4th 312 (RB 242-243), both of which found sufficient evidence that rape, not murder, was the primary motivation in the attack on the victim, or at least that attempted rape was an independent purpose of the attack. Here, the evidence was of an oral copulation incidental to the overall attack, and ultimately, to the murder of Andrews.

This case is more like the situation in *People v. Marshall* (1997) 15 Cal.4th 1, 40-41, in which this Court rejected as insufficient to sustain a robbery-murder special circumstance evidence that the defendant took a letter as a token of a rape and killing. This Court correctly characterized that evidence as constituting a robbery committed in the course of a murder, rather than a murder in the course of a robbery, and thus incidental to the murder. (*Ibid.*) Yet the robbery was not committed to facilitate the murder or to facilitate escape, or to avoid detection.

From *Marshall*, it appears that for the commission of a felony to be incidental to a murder, that other felony need not be a means of committing or concealing the commission of the murder or the means of evading discovery. Nor does the mere fact of concurrent intents to commit the murder and a separate felony necessarily make the murder one committed while engaged in the commission of that separate felony. If the overriding or primary intent of a defendant was the commission of murder and/or a second crime in addition to the murder, the commission of a third crime in the same continuous transaction may be incidental to that primary intent if it is not the focus of the murder or the second crime, but shares the overriding intent behind the murder and the other crime. If the primary or overriding motivation of appellant was to assault and ultimately kill Andrews, the oral copulation was incidental to that primary motivation, and ultimately to the murder. Even if the original primary intent in this case was assault on Andrews, which then transformed into intent to kill, the oral copulation was incidental to the assault. The assault was not intended to facilitate or advance the oral copulation.

Respondent argues that "the oral copulation special circumstance finding rationally distinguishes [appellant] from other murderers so as to justify subjecting him to the death penalty." (RB 243.) In support of this argument, respondent relies upon the characterization of oral copulation as a sexual assault and repeats the contention that "the gravamen of the offense [of oral copulation] is the harm or revulsion felt by the victim who is forced to touch his or her mouth to the genitals of another (or to be forcibly touched in the genitals by the mouth of another). (*Catelli*, *supra*, 227 Cal.App.3d at p. 1450.)" (RB 243.)

As pointed out above (see Arg. VI, *ante*), the offense for which appellant was convicted and which was the basis of the special circumstance finding was not forcible oral copulation. He was charged with and convicted of participation in an act of oral copulation while confined in a local detention facility (section 288a, subd. (e)). That offense can be committed by consensual acts of the parties involved, with no revulsion or harm intended or experienced. *Catelli*'s description of the gravamen of "the offense," referring to forcible oral copulation under section 288a, has no relevance to the statute which appellant has been convicted of violating, and upon which the special circumstance finding is based. Nor does it have any relevance to the question of whether the special circumstance finding rationally distinguishes appellant from other murderers sufficient to justify subjecting him to the death penalty.

The goal of the felony special circumstance is to distinguish who will be exposed to the death penalty, and limits that class to those who kill in order to advance an independent felonious purpose. (*People v. Green*, *supra*, 27 Cal.3d at p. 61.) "To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes ... one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court plurality in *Gregg* [*v. Georgia*, *supra*,] 428 U.S. at p. 189." (*Green*, 27 Cal.3d at pp. 61-62.)

Had appellant beaten, choked and ultimately killed Andrews, as he was convicted of having done, but without the fleeting contact which occurred when Andrews kissed the tip of appellant's penis, no special circumstance would have applied to the murder. The fact, if such it was,

that such fleeting contact occurred, is not a rational or sufficient basis upon which to transform a non-capital assault and murder into a special circumstance murder, subjecting appellant to the death penalty. On that basis alone, the oral copulation should be considered incidental to the murder.

That Benjamin and Bond claimed that appellant told Andrews to kiss his penis, followed by the fleeting contact which they described, is not evidence that "reasonably inspires confidence" (*People v. Morris* (1988) 46 Cal.3d 1, 19; *People v. Marshall* (1997) 15 Cal.4th 1, 35) that appellant killed Andrews for reasons relating to that contact. Benjamin and Bond were hardly the most credible of witnesses – they were themselves the most obvious alternate suspects, each testified to involvement of the other in, at least, the assault on Andrews, and the evidence establishes that they were both drunk at the time. Moreover, there is no physical or other evidence to corroborate that any such contact occurred. That state of the evidence is an insufficient basis upon which to determine that appellant is eligible for the death penalty.

Respondent again presents his interpretation of the difference betwen Benjamin's characterization of appellant's penis as flaccid and Bond's characterization of it as semi-erect as somehow demonstrating that appellant's order to Andrews to kiss his penis, and Andrews doing so "creates a reasonable inference that the act involved sexual stimulation and sexual gratification (i.e., sexual satisfaction)." (RB 241.) As demonstrated above (see Arg. VI, at pp. 112-113, *ante*), respondent's interpretation of the difference between the two descriptions of the same thing as demonstrating a change over time from one state to another, in response to a specific stimulus, is based purely on speculation and not on any reasonable inference

from the evidence. The evidence does not support any reasonable inference that sexual stimulation, sexual gratification or sexual satisfaction was involved in any part of the assault on Andrews or his eventual murder.

Respondent contends that a finding that "appellant had a purpose for committing the forced oral copulation apart from the murder, such that the oral copulation was not merely incidental to it" (RB 240) is supported by the fact that the trial court's "clarification" of CALJIC No. 8.81.17 (XI RT 3138-3139; 3 CT 703) explained that, inter alia, "the murder must also have been committed to carry out or advance the oral copulation, to facilitate escape therefrom, or to avoid detection." (RB 240.)

However, that instruction did not require the jury to determine whether appellant had a purpose in committing the oral copulation independent from the murder. Thus, the instruction given does not support a conclusion that the jury found that appellant had concurrent but independent intents to commit the oral copulation and the murder, or that the jury based its verdict on the special circumstance on such a finding.

The instruction to the jury allowed for the special circumstance to be found if the murder was committed 1) to further or advance the oral copulation, 2) to avoid detection of the oral copulation, or 3) to facilitate escape.

Respondent does not explain how the murder may have been committed to further or advance the oral copulation. Nor does respondent explain how the murder may have been committed to facilitate escape. Respondent thus apparently concedes the insufficiency of the evidence to support a finding that the murder was committed for either of those purposes.

Respondent instead raises a new theory, not advanced by anyone at trial, that the evidence supports a conclusion that appellant killed Andrews to silence him to avoid detection of the oral copulation. (RB 242.) This is a wholly unreasonable characterization of the evidence, amounting to pure speculation. The evidence respondent cites – that after Andrews kissed the tip of appellant's penis, appellant first began saying, "I ought to kill you"; that appellant said he was choking Andrews because Andrews "was a punk , and . . . couldn't handle business being here" – do not support an inference that the killing was done to avoid detection of the "sexual assault" which, according to the descriptions of Bond and Benjamin, was a relatively minor detail of a longer, violent assault.[33]

For the reasons discussed in Argument VI, *ante*, no reasonable person would have reasonably understood the act which occurred as an oral copulation separately punishable as a felony from the overall assault. Appellant would not have had any reason to conceal the "oral copulation." More to the point, killing a cellmate, with whom one is locked in a cell along with two other cellmates, so that no one will find out that the victim was made to kiss the tip of the killer's penis is so absurdly counterproductive that it cannot be considered a reasonable inference on this record that such was appellant's purpose.

Respondent's theory is based purely upon speculation, not upon evidence that "reasonably inspires confidence" (*People v. Morris*, *supra*, 46

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[33] Respondent does not appear to rely here upon the testimony of Dr. Hickey regarding the meaning of "punk," as in Arg. VI, *ante*. Dr. Hickey's testimony is unavailable in a determination of the sufficiency of evidence where appellant made a motion under section 1118.1 at the close of the prosecution's case. (*People v. Cole* (2004) 33 Cal.4th 1158,1213; *People v. Belton* (1979) 23 Cal.3d 516, 520-523; see Arg. VI, *ante*.)

Cal.3d at p. 19; *People v. Marshall, supra,* 15 Cal.4th at p. 35) or reasonable inferences therefrom.

> A reasonable inference . . . "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence." [citations omitted]

(*People v. Morris, supra,* 46 Cal.3d at p. 21.)

Respondent also cites a statement in the kites, "before it's over I'll tag a few more, got to keep those fools in check at times." (Exhibit 36.) Respondent contends this statement supports the theory that the murder was committed to avoid detection of the oral copulation. (RB 242.) However, respondent does not explain the reasoning process by which the quoted comment supports the conclusion that appellant killed Andrews to avoid detection of the oral copulation. Appellant cannot conceive of anything other than sheer speculation which would support such a conclusion.

In *People v. Bolden* (2002) 29 Cal.4th 515, this Court upheld a robbery-murder special circumstance on the basis that there was substantial evidence that the murder was committed "primarily and perhaps solely to facilitate the robbery, by preventing [the victim] from resisting or from alarming neighbors or others" while noting also that there was no substantial evidence "of any motive for the murder apart from accomplishing the robbery." (29 Cal.4th at p. 554.) Unlike the situation in *Bolden*, to the extent there was evidence of motive, that evidence suggested a motive other than to facilitate or prevent detection of the fleeting kiss on appellant's penis. The prosecution at trial, and respondent on appeal, rely upon antagonism against Andrews because he was a friend of Rutledge,

who had some relationship with appellant's wife while appellant was incarcerated. There was also testimony that during the the assault on Andrews, appellant was very emotional and "rambling on" about his mother and his brother's death (VI RT 1463), which suggests that there was something else entirely involved in the motivation for the assault. What there was not in appellant's case was any substantial evidence that the murder was motivated by an intent to avoid detection of the oral copulation. Nor was there substantial evidence that the murder was motivated by an intent to facilitate the oral copulation, which was complete and had involved only fleeting contact, or to facilitate escape.

Fundamentally, the evidence here cannot reasonably be characterized as establishing the commission of murder "while the defendant was engaged in . . . the commission of" an oral copulation. (Pen. Code §190.2, subd. (a)(17)(F).) Setting aside the various phrasings and constructs this Court has devised since *Green* to describe the scope of the felony-murder special circumstance, and considering the actual language of the statute, the reality of this case is that what appellant was found by the jury to have done in that cell on the morning of April 9 cannot reasonably be characterized as the commission of murder while engaged in the commission of an oral copulation. To conclude otherwise is to rely on technicalities, divorced from the reality of this case and from the purpose of the felony special circumstance in the California death penalty scheme.

There is no reasonable basis for determining the applicability of the special circumstance here other than that both the act found to be an oral copulation and the homicide were committed in a continuous transaction. That, however, is insufficient to sustain a finding of death eligibility under *Green*.

Moreover, the jury was not instructed that the special circumstance could be found based upon concurrent, independent intents. Therefore, the special circumstance finding cannot be upheld on that basis. While a judgment can be upheld where the matter was submitted to the jury under alternate theories even though the evidence is insufficient to sustain one of those theories, reversal is required if the record affirmatively indicates that verdict actually rested on the inadequate ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130.) Here, the special circumstance was submitted on only one theory, and the jury was not given an alternate basis upon which to base its finding. This conclusively establishes that the verdict rested upon the inadequate theory.

Respondent noted that there is no notice problem regarding the application of concurrent intents as sufficient to support a felony-murder special circumstance in this case because this Court's first recognition of that concept in *People v. Clark*, *supra*, 50 Cal.3d 583, 608, which was decided two years before the offense in this case. However, nothing in the instructions informed the jury of this theory as a basis for finding that the special circumstance applied. (See Arg. VIII, *post.*) If the evidence is found to be sufficient to sustain the special circumstance finding on the basis of concurrent intents, still, it must be reversed due to the insufficiency on any other theory, and the absence of instructions under which the special circumstances could be found on such a basis. The jury here, not having been so instructed, necessarily made no such finding.

As demonstrated in the opening brief and above, the evidence is not sufficient to sustain a finding beyond a reasonable doubt of a felony murder special circumstance. That the jury did find the special circumstance to be true is most reasonably explained not by the strength of any evidence

supporting the finding, but by the confusion the jurors experienced with the instructions which they were told governed that finding. (See Argument VIII, *post*.) The jury's finding of the Second Special Circumstance must therefore be vacated.

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VIII

THE INSTRUCTIONS GIVEN DEFINING WHEN A MURDER IS COMMITTED "WHILE ENGAGED IN THE COMMISSION OF" AN ORAL COPULATION BY A PERSON CONFINED IN A LOCAL DETENTION FACILITY WERE DEFECTIVE, AND REQUIRE REVERSAL OF THE ORAL COPULATION SPECIAL CIRCUMSTANCE

In the opening brief appellant argued that the trial court's instructions concerning the Second Special Circumstance, including its response to juror questions and requests for clarification regarding the determination of whether the murder was committed "while engaged in the commission of" an oral copulation, were inadequate, erroneous and misleading, leaving the jury to "indulge in unguided speculation" (*People v. Failla* (1966) 64 Cal.2d 560, 564), violating appellant's rights to trial by jury, to have a properly instructed jury determine each element of the special circumstance allegation, to due process of law, to a fair trial, to the benefit of the presumption of innocence, to the requirement of proof beyond a reasonable doubt, and to a fair and reliable determination of both guilt and penalty. (U.S. Constitution, Amends. VI, VIII, XIV; Cal Constitution, art. I, sections 7, 15-17.)

Respondent contends that the trial court properly exercised its discretion in responding to the jury's inquiries by repeating already given instructions, which were full and complete, and by giving further explanation where needed. (RB 251.) Respondent contends that the record shows that the jury's confusion was "cleared" by the trial court's responses to its inquiries (RB 247) and that the trial court's responses did not dissuade the jury from pursuing further clarification. (RB 253.) Respondent further contends that if there was error, it was harmless. (RB 256-258.)

While acknowledging the jury's confusion after receiving the initial instructions, respondent contends that

> the jury's confusion arose from Defense Counsel Hart's argument, which inverted and convoluted CALJIC number 8.81.17's requirements by arguing for there to have been special circumstance murder, the oral copulation would have to advance and further the murder. (XI RT 3046-3047.)

(RB 251.) Whether or not Ms. Hart's misstatement of the instruction[34] contributed to the confusion, the source of the confusion was the instructions, both as given originally and as supplemented by the trial court's responses to juror requests for clarification. As demonstrated in the opening brief, those instructions and responses failed to provide adequate guidance to the jurors concerning how to apply the law in this case.

Moreover, the specific source of the confusion does not determine the issue. The question is, whether upon the jurors expressing their confusion about the meaning and application of the law to the facts in this case, the trial court adequately instructed the jury, i.e., whether the confusion was remedied and replaced with a correct understanding of the law to be applied and how to apply it to the facts of this case.

Respondent acknowledges the trial court's duty to clear up confusion expressed by the jury, but argues under section 1138 that the trial court is to consider whether further explanation is desirable or whether it should

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[34] At one point in her argument, Ms. Hart stated, "there is not a special circumstance murder because we do not have an oral copulation and an attempted sodomy that were to try to advance and further the murder. . . ." (XI RT 3046-3047.) Prior to that, Ms. Hart stated the requirement as "the murder must have been committed in order to carry out or advance the commission of the oral copulation and attempted sodomy and that the special circumstance could not be found if oral copulation and attempted sodomy were incidental to murder." (XI RT 3046.)

merely repeat the instructions already given, citing, inter alia, *People v. Beardslee* (1991) 53 Cal. 3d 68, 97, which found error under section 1138, but determined that it was harmless. (RB 249-250.) Respondent argues "the court's instructions were full and complete and thus, it appropriately re-stated them to the jury." (RB 251.) Respondent cites *People v. Moore* (1996) 44 Cal.App.4th 1323, 1330-1331, in support of the contention that the trial court fulfills its duty under section 1138 by telling the jurors to reread instructions.[35] Respondent fails to mention a further holding in that case. *Moore* held that instructing a jury that a particular question of law, rather than of fact, was for the jury to decide violated the trial court's "mandatory duty to help the jury understand the legal principles in the case." (44 Cal.App.4th at p. 1332; see AOB 245.)

At appellant's trial, the trial court, in at least two instances in response to jury questions, not only failed to clarify the law, but left what were essentially questions of law for the jury to decide. The trial court stated,

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[35] Respondent does not acknowledge or address cases cited by appellant in the opening brief (AOB 236-232), including *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 574-575 [court's refusal to clarify instruction after specific jury requests, coupled with implication that no future clarification would be forthcoming, violated section 1138 and due process]; *People v. Weatherford* (1945) 27 Cal.2d 401, 420 [section 1138 violation implicates defendant's right to fair trial]; *United States v. Frega* (9th Cir. 1999) 179 F.3d 793, 808-811 [confusing response to jury's questions infringed on defendant's Sixth Amendment rights]; *United States v. Warren* (9th Cir. 1993) 984 F.2d 325, 330 [error, not harmless beyond a reasonable doubt, from trial court's failure to provide a supplemental instruction sufficient to clear up uncertainty which question from deliberating jury had brought to court's attention].

> In other words, the special circumstances referred to in these instructions are not established if the unlawful oral copulation by a prisoner or attempted unlawful sodomy by a prisoner was merely incidental to the commission of the murder. [¶] Now that's for your determination, of course, depending on the circumstances of the case you have before you. I've heard counsel give some examples on both sides on this . I've thought about it, but I'm declining to do that because this case has its own peculiar particular circumstances. And this is one of the issues that will be for your decision.

(XII RT 3165.) Thereafter, in responding to a request for further explanation of "what advancing the crime of oral copulation in special circumstances means," (XII RT 3167), the trial court replied,

> Again, using that in its most plain and ordinary meaning, that would mean furthering that crime or facilitating that crime, advancing that crime. Again that has to be viewed in the context of this case as you folks see it.

(*Ibid.*)

Essentially, the trial court was leaving to the jury the question of how to determine the meanings of the terms in the instruction, such as "incidental to," from the jury's determination of the facts. As appellant argued in the opening brief, the difficulty in applying the instructions to the oral copulation and the murder in this case stems from their inapplicability. The murder was not committed to further the "oral copulation." The oral copulation was incidental to the assault and murder. (See Arg. VII, ante.) Trying to fit the facts in this case to the terms used in the instructions without additional clarification of the legal issues involved left the jury to determine for itself how the terms with which they had been instructed could fit the facts of this case, or how the facts of this case could be made to fit the terms, but without a firm or clear understanding of the meaning or

applicability of those terms in determining whether the special circumstance should be found true.

The jury's questions were about the law, which they were to apply to the fact as they found them. Their questions were not about the facts. The trial court failed to resolve the jury's confusion about the applicable law, and left both the law and the facts to the jury. This Court can have no confidence that the jury's finding that the special circumstance was true is based upon an accurate understanding of the applicable law.

Respondent also defends the trial court's castigation of the jury in response to the jurors' inquiry about "primary objective." (RB 252.) In the opening brief, appellant argued that the trial court's responses to the jurors distorted the jurors' understanding of the applicable law and deflected the jurors from considering relevant circumstances, and dissuaded the jurors from requesting further clarification of the legal principles relevant to the special circumstance determination. (AOB 239, 243-246.) Respondent argues that the court's deviation from CALJIC No. 8.81.17 was responsive to the inquiry and meant to keep the jury on the right track. (RB 252.) Whether or not it was meant to keep them on the right track, it failed to do so, as demonstrated in the opening brief. (See AOB 239, 243-246.)

Respondent argues that the trial court's analogy to "when did you stop beating your wife" was proper because the trial court did not want the jury to presume that the trial court was indicating oral copulation or sodomy *had* occurred. (RB 253.) That is not a reasonable interpretation of what the trial court said, or of the question to which the trial court was responding. The jurors' inquiry was not about whether or not oral sex or sodomy occurred, but how to determine the relation of any oral copulation or

sodomy to the murder in the context of determining whether the special circumstance allegation applied. The jury's question was:

> Can you explain advancing the crime of oral copulation in the special circumstance portion of first degree murder? Does oral sex or sodomy have to be the primary objective or can it be part of the crime or is the continuous sequence of the crime enough to warrant special circumstances?

(XII RT 3159.)

The trial court's response, comparing the jurors' inquiry to asking "when did you stop beating your wife" was a response to the jurors' use of the term "primary objective," not to the question of whether or not oral sex or sodomy actually occurred.

> Now I'm going to go back and answer as directly as I can the middle paragraph. You've asked me to discuss this in the context of the special circumstances. "Does oral sex or sodomy have to be the primary objective or can it be part of the crime?" You asked me a question that I don't take. It's like: When did you stop beating your wife? "Does oral sex or sodomy have to be the primary objective?" [¶] You've heard me make no reference to a primary objective. I'm at a loss to see where you got that quotation. You might be concerned with it and thought there might be an easy answer, but there's no requirement that it be the primary objective.

(XII RT 3163.)

A plain reading of the jurors' question quoted above demonstrates that the jury posited, for the sake of the question, that either oral copulation or sodomy or both had occurred. The only point at issue in the jury's questions was how to determine whether murder was committed "while engaged in the commission of" oral copulation, sodomy or both. The suggestion that the trial court "was merely protecting appellant's interests by

taking issue with that presumption (that the oral copulation or sodomy had occurred)" is a wholly unreasonable interpretation of the record.

Respondent also contends that the trial court's response did not tell the jury that consideration of appellant's "primary objective" was erroneous or irrelevant, but "merely told them there was no requirement that the crime of oral sex or sodomy had to be the primary objective." (RB 253.) In support of such an interpretation, respondent cites *People v. Bolden, supra*, 29 Cal.4th 515 for the proposition that the jury is not required to assign a hierarchy to determine which of multiple concurrent intents was primary. (RB 253.) Respondent further cites *People v. Raley*, *supra*, 2 Cal.4th at p. 970, and *People v. Clark*, *supra*, 50 Cal.3d at pop. 608-609, for the proposition that special circumstances are appropriate where there are dual objectives, i.e., concurrent intents to kill and to commit an independent felony. (RB 253.)

However, the trial court did not merely tell the jury that "there was no requirement that the crime of oral sex or sodomy had to be the primary objective." The trial court's response was couched in terms of incredulity or derision that the jury had considered that whether or not the oral copulation was the primary objective was relevant. The trial court's response may not have directly instructed the jury not to consider "primary objective," but the negative and rather emphatic rejection of the jurors' question on the subject undoubtedly left the jurors with the understanding that "primary objective" was not a relevant consideration. Respondent's attempt to characterize the trial court's response as "meant to keep the jury on the right track" (RB 252) is unavailing, for the trial court's response left a very clear impression that "primary objective" was the wrong track, not that it was an available, but not necessary track.

The trial court took away from the jury a consideration which may have helped the jurors determine the applicability or non-applicability of the special circumstance. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 387 ["The evidence that defendant said he wanted to rape Hansen strongly suggests that his primary motivation was rape, not murder, or at least that the rape was an "independent purpose."].) Having taken away a legitimate consideration, the trial court failed to provide the jurors with any alternatives which they could understand and apply to this case.

Even assuming arguendo that the trial court's response could be interpreted as only an instruction that "primary objective" was not a consideration necessary to a determination of the special circumstance, respondent's reliance upon *Bolden*, *Raley* and *Clark* as support for such an instruction does not salvage the trial court's response. In the opening brief, appellant acknowledged the various phrasings this Court has employed in analysis of the evidence necessary to sustain a felony-murder special circumstance. (AOB 239-241.) Moreover, appellant argued in the opening brief there were concepts and descriptions relevant to the jury's determination of the applicability of the special circumstance other than those in CALJIC No. 8.81.17 which were available to the trial court in an attempt to clarify the issue for the jury when CALJIC No. 8.81.17 proved too confusing for the jury to apply. (AOB 239-241.)

Even if all the trial court did was inform the jury that a determinaton of "primary objective" was unnecessary, it failed to provide adequate guidance on how else to make the determination. The trial court did not provide the jury with any of those alternate concepts or descriptions this Court has employed, or upon which respondent now relies. The jury was never instructed that it could find the special circumstance based upon

concurrent independent intents. The instructions given to the jury regarding the second special circumstance, both initially (XI RT 3138-3139; 3 CT 703) and in response to questions from the jury (XII RT 3161-3167) did not include any instruction that the special circumstance could be found if appellant had concurrent, independent intents to commit the murder and the oral copulation.[36] Accordingly, there is no basis for a conclusion that the jury made such a determination, or based the finding of the special circumstance upon such a determination. Neither *People v. Raley* nor *People v. Clark*, therefore, supports the instructions the jury received, or the special circumstance finding based upon those instructions. Had the trial court instructed the jury according to the concepts of concurrent independent intents discussed in *Raley*, *Clark*, and numerous other cases, a jury finding of a special circumstance in this case might be more defensible. (But see, AOB Arg. VII; Arg. VII, *ante*.) However, had the jury received instructions which clarified the confusion about the special circumstance

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[36] In the opening brief, appellant noted that there were various terms and phrasings used in this Court's opinions concerning the relationship between a felony and a murder required to support a felony special circumstance, which were available to the trial court for use in trying to clarify the law for the jury. (AOB 241-242.) One such phrasing, the term "independent purpose" was used by this Court in *People v. Navarette* (2003) 30 Cal.4th 458. Respondent notes that *Navarette* was decided nine years after appellant's trial, so it's language regarding "independent purpose" was not available "from the case law" at the time of appellant's trial, as appellant claimed at. (RB 254.)

However, this Court had used the term "independent purpose" in this regard in *Clark*, supra, 50 Cal.3d at p. 608, and in *People v. Wright* (1990) 52 Cal.3d 367, 417, both of which were published well before appellant's trial.

determination, it is reasonably likely that the Second Special Circumstance allegation would not have been found true.

Respondent contends that, since the jury resumed its deliberations after the trial court's supplemental instructions without an audible (reported) response to the trial court's question, "Are you ready to resume your deliberations?" "impliedly indicates the jury's confusion was cleared and it was ready to resume deliberations." (RB at 247.) Respondent notes that the trial court then indicated its view that body language indicated 6 jurors appeared to understand the supplemental instructions. (RB 247-248; XII RT 3172.) However, as respondent acknowledges (RB 248) the prosecutor disagreed with the trial court, stating his belief that the jurors "did not appear to me to be fully satisfied with the court's answer. . . ." (XII RT 3170.) Thus, respondent's suggestion that the jury's confusion was cleared, while a possibility, is by no means apparent or compelled by necessary implication from the record.

Appellant argued in the opening brief that the trial court's response diverted the jury from consideration of, or further clarification of, the question of appellant's "primary objective," the consideration of which would likely have been favorable to appellant. (AOB 239, 243-245.) Respondent argues that juror L. A. was not dissuaded from seeking further clarification by the trial court's response, as evidenced by that juror's subsequent request for clarification. (XII RT 3166-3169; RB 253.) However, Juror L. A.'s question did not seek further clarification of the relevance of "primary objective," but requested further explanation of "advancing the crime of oral copulation." (XII RT 3167.)

After the trial court responded, inadequately, to juror L. A.'s question, the prosecutor noted that the jurors appeared confused and

unsatisfied with the trial court's response. (XII RT 3167.) The next day, the prosecutor repeated his concern that the jurors appeared confused, and that the instructions that had been given were erroneous. (XII RT 3173-3174, 3177.) Defense counsel Hart, who had misstated the applicable law during argument to the jury, agreed with the prosecutor that the instructions did not make sense, and noted that "[t]he more I read it the less it makes sense to me. Indeed, these analyses of the special circumstance say it doesn't make sense. So I agree that the law is complex and doesn't really make sense in this area." (XII RT 3180.)

If the instructions given to the jury did not make sense to the attorneys trying the case, it is extremely unlikely that those instructions made sense to the jurors. Given the trial court's response to the jury's question, the absence of further requests for clarification most likely evidences a conclusion that further inquiry would be futile, or met with further derision, rather than demonstrating that the jury's confusion had been cleared.

In the opening brief, appellant argued that the trial court could have clarified the law further for the jury by instructing them that the chronological sequence of the felony and the murder are not determinative. This could particularly have clarified any confusion engendered by the prosecution's argument (XI RT 2967), which set forth a certain chronological sequence as determinative. (AOB 242.) Respondent contends that "the prosecutor's argument (XI RT 2966-2967) needed no such amplification." (RB 255.) The jury, however, given its demonstrated confusion over the application of the instructions to the second special circumstance, would likely have been aided in their understanding of the applicable legal principles, and their evaluation of the prosecutor's

argument, by such an instruction. The point is that the jury demonstrated its confusion and sought clarification from the trial court. Rather than amplify the instructions with additional concepts relevant to the special circumstance determination, the trial court essentially repeated what had already confused the jury. The trial court then continued with further explanations of those instructions which were themselves confusing, deflected the jury from consideration of relevant matters, and included comments which were derisive and acted to dissuade the jurors from seeking further clarification.

Rather than clearing up the jurors' confusion "with concrete accuracy" (*Bollenbach v. United States*, *supra*, 326 U.S. at 613), the trial court made matters worse, leaving the jury with an inadequate and misleading understanding of the applicable law, and violating appellant's federal and state constitutional rights to be tried by a properly instructed jury. (See *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836 (en banc), overruled in part on other grounds, *Weeks v. Angelone* (2000) 528 U.S. 225 [jurors' uncorrected confusion on the law may lead to verdicts inconsistent with Eighth Amendment and due process]; *People v. Collins* (1976) 17 Cal.3d 687, 692-693.)

Finally, respondent argues that any error in the instructions was harmless, relying upon the description of the evidence supporting the special circumstance finding, set forth in respondent's Argument VII. (RB 256-258.) However, as demonstrated in Arguments VI and VII in the opening brief and in this reply brief, respondent's analysis of the evidence is flawed. Even the prosecutor acknowledged that, depending on the facts found by the jury, the special circumstance may not apply. (XII RT 3177.) Furthermore, the prosecutor was willing to strike the special circumstance

allegations due to his doubts about the instructions and the jury's understanding of them. (XII RT 3173-3174.)

Respondent argues that the prosecutor's willingness to drop the special circumstance when the jury's confusion became apparent "was a reflection of the complexity of the legal issues involved, not the closeness of the facts." (RB 257.) However, the prosecutor acknowledged that, as to the special circumstance finding, the evidence was not clear cut factually. His argument to the jury acknowledged as much, and his comments on the confusion of the jury acknowledged as much. (XI RT 2967; XII RT 3177.) Respondent's contention that the offer to drop the special circumstance did not reflect the closeness of the facts is belied by the acknowledgments to the contrary by the prosecutor.

Moreover, to the extent that the offer to dismiss the special circumstance reflected the complexity of the issues, it demonstrates the prosecutor's conclusion that a special circumstance finding returned by this jury, after having received the instructions given here, would be flawed due to the inadequacy and error of the instructions, which in turn were a result of the complexity of the issues. Appellant contends that the instructions given to the jury were inadequate and erroneous. The prosecutor apparently agreed, to the point of being willing to dismiss the special circumstance allegation. Respondent's argument that any error in the instructions regarding the Second Special Circumstance Finding are harmless are thus not consistent with the record or the perception of the prosecutor. As argued in the opening brief (AOB 247-250), review of the entire record compels the conclusion that the errors in instructing the jury concerning the Second Special Circumstance cannot be determined to be harmless under either the *Watson* or the *Chapman* standard.

Whether (1) the homicide had been committed to further or advance the oral copulation or (2) the oral copulation had been incidental to the homicide was a key issue in the finding of the oral copulation special circumstance. The evidence on that point was, at best, ambiguous, and at worst, insufficient. There was no direct evidence which addressed the question posed by the special circumstance allegation, nor any substantial circumstantial evidence which justifies anything more than speculation in this regard. As argued in the opening brief and above (see AOB Arg. VII, Arg. VII, *ante*), the evidence was insufficient to sustain the jury's finding of the special circumstance, which finding is reasonably likely the result of the erroneous instructions. Even if the evidence is arguably sufficient to sustain a finding of the special circumstance, such a finding is not compelled or even strongly suggested by the evidence.

Moreover, in arguing in support of the sufficiency of the evidence to sustain the special circumstance finding, respondent has argued that the evidence is sufficient to sustain a finding of concurrent independent intents. However, the jury was not given any instruction under which the special circumstance finding could have been based upon a jury determination of concurrent independent intents. If this Court determines that the evidence is sufficient on that basis alone, the special circumstance finding must still be reversed.

The questions from the jury demonstrating their difficulty with this issue, the time the jury required to reach a verdict even after the trial court's supplemental instructions, and the prosecution's willingness to drop the special circumstance allegation when the jury's confusion became apparent, all demonstrate that the evidence on this question was not strong or compelling.

For all the reasons stated above and in the opening brief, the Second Special Circumstance finding must be reversed.

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IX

REVERSAL IS REQUIRED DUE TO IMPROPER AND MISLEADING ARGUMENT TO THE JURY BY THE PROSECUTION

In the Opening Brief, appellant argued that the prosecution committed misconduct during argument to the jury, by referring to and misrepresenting evidence outside the record, by misstating evidence, and by improperly commenting upon appellant's decision not to testify. The misconduct consisted of argument to the jury by the prosecutor concerning waivers of Fifth Amendment rights to remain silent by Bond and Benjamin, which argument was misleading and contradicted by facts known to the prosecutor but not to the jury. As appellant demonstrated, this argument was an improper attempt to bolster the credibility and innocence of the prosecution's two main witnesses, Bond and Benjamin, in a manner which equated their testifying with innocence, and implicitly equated appellant's failure to testify with guilt. Appellant also demonstrated that the trial court erred in failing to take judicial notice of the Superior Court file in this case, which contained evidence that contradicted the prosecutor's argument. The trial court therefore erred in overruling appellant's objection to the prosecution's argument and in denying appellant's motion for a mistrial.

Respondent argues that the prosecutor's argument was fair comment on the evidence (RB 271-273), fair response to defense counsel's argument to the jury (RB 273-274) and contained no reference to appellant's silence. (RB 273-274.) Respondent also argues that the trial court did not err in failing to take judicial notice of the court file, suggesting that the defense didn't really mean it. (RB 270-271.) Finally, respondent argues that any error was harmless. (RB 274-278.)

A. The Argument Was Misleading, Referred to Facts Outside the Record, and Was False

The argument to which appellant objected was the prosecutor's argument to the jury that

> I'd like you to recall something with respect to the Bond and Benjamin conspiracy. Remember, right here in these United States, there's a Fifth Amendment right. You don't have to be interviewed by a police officer. You don't have to testify. [¶] At any time, anywhere along from the first morning, neither Bond nor Benjamin didn't have to say a thing, but they did. I want you to bear that in mind.

(XI RT 3080-3081.) Later in the argument, the prosecutor again emphasized that Bond and Benjamin allowed themselves to be cross-examined, and had not invoked their Fifth Amendment rights:

> Both men basically came and said, "'What I'm telling you here today after I've thought about it, I've read my statements, I've been cross-examined, I've given you my best effort." That was the final statement from these men.

(XI RT 3085)

> And you could convict this man based on simply the testimony of Benjamin and Bond. And when you look at their testimony, I submit to you that most of what they told you was the truth. They pretty much at this point in time had to. You could ignore that testimony completely. Say they didn't come forward. Say they decided to sit here and take the Fifth, and we provided to you the testimony instead of Anthony Williams, Brad Nelson, Albert Martinez, Eric Johnson.

(XI RT 3099-3100.)

The prosecutor's argument was clearly misleading. The prosecutor sought to bolster the credibility of Bond's and Benjamin's testimony by argument that they could have remained silent, invoking their Fifth Amendment rights, but consistently chose not to do so. In fact, the record

in this case demonstrates that Bond did invoke his Fifth Amendment rights and refused to testify as to various matters during appellant's preliminary examination. The prosecutor also knew that Bond had invoked his Fifth Amendment rights while testifying at a deposition in the parallel civil case, further undercutting his argument. Yet the prosecutor not only omitted those facts in his argument, but affirmatively represented to the jury that Bond had never invoked his Fifth Amendment rights in relation to this case.

Respondent characterizes appellant's argument as challenging "remarks that neither Bond nor Benjamin were required to give a statement to detectives nor to testify but that they opted to do so. (AOB 251-252.)" (RB 259.) This does not fairly characterize the objection made below or the arguments made in the opening brief. The defense objection was to the prosecution's focus on Bond's and Benjamin's testimony in the context of their Fifth Amendment rights, and the implicit, but compelling, contrast to appellant's failure to testify, while at the same time stating it in a manner which was known to be untrue by the prosecutor.

Appellant argued that the prosecution argument was misleading in that it contradicted facts known to the prosecution, i.e., that Bond had invoked his Fifth Amendment rights in the preliminary examination in this case as well as in other proceedings relating to the events of April 8-9, 1992, in F-Pod of the Fresno County Jail. Mr. Pedowitz, one of defense counsel, stated:

> I objected to the district attorney's reference to neither Mr. Benjamin or Mr. Bond having asserted their Fifth Amendment rights, and I have two theories as to why I believe this is impermissible prosecutorial misconduct, and I am moving now for mistrial. [¶] The [first] reason is Mr. Bond did in fact assert his Fifth Amendment rights at the preliminary examination in this case, and he did it at particular points in

> time, and to comment on his invoking the Fifth Amendment rights or not invoking the Fifth Amendment rights at that particular point in time is not proper. And, in fact, in this case it was a -- I believe it was a blatant lie because he did invoke his Fifth Amendment rights.

(XI RT 3104.) Mr. Pedowitz further argued that this misleading argument was made

> to further spotlight a fact that [appellant] has availed himself of the Fifth Amendment rights. I'm certainly aware that the Court's going to read the jury an instruction that says they're not supposed to consider the fact our client hasn't testified, but I don't believe that that instruction allows a prosecutor in this day and age to make mention of the fact, comment on the fact that the defendant has in fact asserted his Fifth Amendment rights, and I cannot for the life of me imagine any good-faith reason why Mr. Oppliger would have mentioned the fact that Mr. Bond and Mr. Benjamin did not in fact assert the Fifth Amendment rights.

(XI RT 3104-3105.)

Respondent cites instances of testimony referring to Benjamin's and Bond's invocation of Fifth Amendment rights during the initial interrogations, and based thereon, argues that "[t]he prosecutor's remarks were fair comments based on evidence elicited and alluded to by the defense." (RB 259-261.) Other than Bond's statement that he thought he had "pled the Fifth" at the preliminary examination, however, respondent cites no testimony regarding Benjamin or Bonds invocation or waiver of Fifth Amendment rights from the end of the initial interrogations through trial.

In the Opening Brief, appellant asserted that there was no evidence of either Benjamin or Bond invoking or not invoking the Fifth Amendment prior to their trial testimony, except that Bond admitted invoking at the

preliminary examination. (AOB 261, citing IX RT 2413, 1 CT 37.) In response, respondent quotes portions of the record which, it is argued, belie that assertion. (RB 259-262, 272.) Appellant acknowledges that there were references in the testimony to Benjamin and Bond having waived their right to remain silent at the initial interrogations conducted on the day of Andrews' death. However, there was no evidence, and respondent cites none, regarding invocation or waiver of Fifth Amendment rights after those initial interrogations and up until their testimony at trial, other than Bond's admission that he had invoked the Fifth Amendment at the preliminary examination in this case.

The testimony cited by respondent in which Bond or Benjamin either waived or invoked Fifth Amendment rights supports appellant's assertion that the prosecutor's argument was misleading and misstated the evidence. The prosecutor stated, "At any time, anywhere along from the first morning, neither Bond nor Benjamin didn't have to say a thing, but they did." Respondent cites no testimony of any waivers of Fifth Amendment rights after the end of the initial interrogations through to Bond's and Benjamin's testimony at trial. During that time frame, however, based upon the preliminary examination transcript (1CT 37), Bond's own testimony (IX RT 2413) and the prosecutor's acknowledgment that Bond had invoked his Fifth Amendment privilege at a deposition in the parallel civil case (XI RT 3106), the record indicates that Bond did invoke his Fifth Amendment rights, more than once. The record thus demonstrates that the prosecutor's argument was factually incorrect and misleading, and that the prosecutor knew it.

Respondent's argument appears to be that because there was evidence that Benjamin and Bond had waived their respective rights to

remain silent upon initial interrogation, and testified at trial, the prosecutor's argument is simply fair comment on that evidence. Such a characterization is unwarranted, for the prosecution's argument was misleading not only about the evidence before the jury, but amounted to unsworn testimony to "facts" outside the record, which "facts" were known to the prosecution to be false. The prosecutor effectively presented his own testimony by asserting that Benjamin and Bond had not relied on the Fifth Amendment "from the first morning" through trial. That assertion was not supported by evidence presented at trial, was in fact contradicted by what evidence there was, and was contradicted further by evidence of which the prosecution was aware, but which was not presented to the jury.

Respondent also cites to testimony by Benjamin and Bond regarding a "code of silence" among prisoners (RB 259-260[37]), motivated by, according to respondent, a fear of "gaining a reputation [among fellow inmates] from cooperating with law enforcement." (RB 260.) Respondent also cites Detective Christian's testimony that he "has not had much success in getting statements from inmates regarding jail incidents on prior cases. (X RT 2675.)" (RB 260.)[36]

However, testimony regarding an inmate "code of silence" is not comparable, practically, or legally, to the constitutional right to remain silent. The "code of silence" is not based upon the Fifth Amendment, or any

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[37] Citing VI RT 1508-1509, IX RT 2560-2561, 2567 and X RT 2675.

[36] Respondent also quotes an excerpt of cross-examination of Anthony Williams (VI RT 1404-1405; RB 261-262), which is completely irrelevant to the issue of the prosecutor's improper argument. That excerpt contains no mention of Benjamin or Bond, nor is there any mention of the Fifth Amendment.

other constitutional provision. It is utterly irrelevant to the prosecutor's argument that the jury should believe that Bond and Benjamin were innocent because they did not invoke their Fifth Amendment rights. The argument to which appellant objected was not about whether Benjamin and Bond broke some inmate "code of silence." The defense objection was that the prosecutor's argument regarding the Fifth Amendment was false and misleading, and that it unconstitutionally focused the jury upon appellant's reliance upon the Fifth Amendment in not testifying.

Respondent has been unable to demonstrate that the prosecutor's argument that Benjamin and Bond never invoked the Fifth Amendment "anywhere along from the first morning" through trial was based on evidence of that fact which had been presented at trial. The only conclusion to be drawn is that the prosecutor represented as fact something which was not supported by record evidence, and was contradicted by evidence both in the record and outside it. Moreover, the prosecutor knew his statement was false.

Appellant sought to put forward evidence in support of the objection, including the reporter's transcript of the preliminary examination, showing that Bond had invoked his Fifth Amendment rights during his testimony at that proceeding. Respondent contends that the trial court did not deny the defense request for judicial notice of the preliminary examination transcript. Rather, respondent contends, the defense did not pursue the request, arguing that the request for judicial notice stemmed from defense counsel's misperception of what information the trial court was asking for. (RB 271.) Respondent's contention that the trial court did not deny the request for judicial notice is belied by the record. Upon the defense request for judicial notice, the trial court replied simply, "Evidence is closed." (XI RT 3104.)

Respondent does not explain how that statement was anything but a denial of the request. That defense counsel did not pursue the request is thus explained: the trial court plainly refused the request. Pursuing it would have been futile.

Without further explanation, respondent concludes that there was no error in the trial court's failure to grant judicial notice. The only support for this contention is a general cite to *People v. Brown* (2003) 31 Cal.4th 518, 563, for the proposition that a court is not required to take judicial notice of irrelevant matters. (RB 271.) While appellant has no quarrel with that proposition, respondent does not explain how the preliminary examination transcript or the court file could be irrelevant to appellant's objection. The preliminary examination transcript, in the court file, constituted evidence of the prosecutor's misconduct, i.e., that he had knowingly misrepresented the facts.

Additional evidence of Bond's invocation of Fifth Amendment rights during testimony at a deposition was acknowledged by the prosecution. Yet the trial court apparently refused to consider this evidence because it was not in front of the jury, stating, "If there may have been some information known to the district attorney that's not in our file, that would constitute prosecutorial misconduct. I need to leave that to some other Court, as you may report it." (XI RT 3107.)

Respondent claims that "trial court was well aware that Bond had asserted [the Fifth Amendment] privilege at times," noting discussions outside the jury's presence in which the prosecution stated that "when Mr. Bond is in custody, because of concerns for his safety, he has exercised a very . . .specific area or intermittent Fifth Amendment privilege." (VIII RT 2183, 2185-2186, 2269; RB 270.) While these discussions further

demonstrate that the prosecutor knew his argument was based on a falsehood, respondent does not explain the trial court's failure, or refusal, to acknowledge the falsity of the prosecution's argument, or to take steps to remedy the prosecutor's misconduct. As argued in the opening brief (AOB 263-265), the trial court's ruling failed to consider available evidence of material facts relevant to its ruling denying appellant's motion for mistrial. The trial court's denial of a mistrial was therefore an abuse of discretion, and error.

Respondent also contends, as did the prosecutor at trial, that the objectionable argument was a fair response to defense arguments that Benjamin and Bond were the actual killers and had plotted to throw the weight of suspicion on appellant. (RB 273-274.) In support of this contention, respondent cites portions of closing arguments by both sides. The first consists of a prosecution reference to the code of silence. (XI RT 2950-2951; RB 262.) The second again refers to the code of silence and the various motivations the various in-custody informers may have had for making statements or testifying, from threats to "a theme . . .of civic duty . . . ." (XI RT 2986-2989; RB 262-263.) Respondent further cites to defense arguments that the code of silence among inmates was counterbalanced by the code of "look out for myself," including looking for a deal (XI RT 3004-3005); that Benjamin and Bond plotted and discussed how to respond to the authorities so as to throw the weight of suspicion onto appellant rather than themselves (XI RT 3007-3008, 3047); concerning Bond's motivation to cooperate with law enforcement when they told him that they wanted appellant, not Bond (XI RT 3021); and that Benjamin and Bond framed appellant with the murder. (XI RT 3037; RB 263-265.)

Nothing in the arguments made by the defense and cited by respondent can reasonably be considered as having opened the door to the argument made by the prosecutor. To be sure, the defense argued that Benjamin and Bond were guilty, and lying. Such argument could reasonably have been countered by argument that Benjamin and Bond were innocent. However, the prosecution did not merely argue that they were innocent. Rather, he based the argument that they were innocent upon the fact that they gave statements to the police and testified in court. This was done by referring to the right to remain silent in a manner which contrasted Benjamin's and Bond's ["innocent"] testimony with appellant's ["guilty"] silence. That argument, whether made explicitly or implicitly was misconduct, and substantially prejudicial, as demonstrated in the opening brief.

In response to the defense objection, the prosecutor represented to the trial court that he had made the argument because the defense had accused Benjamin and Bond of having committed the murder. (XI RT 3105-3106.) It is clear that his argument was intended to bolster the juror's belief in both the credibility and the innocence of Bond and Benjamin. The prosecution argued to the jury that Benjamin and Bond should be believed by the jury, that their innocence of the murders should be presumed, because they testified despite their Fifth Amendment rights to not do so, and had, from the initial interrogation through their testimony at trial been forthcoming, never invoking their right to silence. This argument was factually misleading. The prosecution knew the true facts which contradicted the "facts" presented by his argument. It was also intended to equate testifying with innocence, which by necessary implication equated

appellant's silence with guilt. The argument thus violated appellant's rights under *Griffin*.

None of the cases cited by respondent (RB 273) in support of the argument that this was "fair comment" on the evidence lends any support for that characterization. *People v. Morris* (1988) 46 Cal.3d 1, 35, *People v. Johnson* (1992) 3 Cal.4th 1183, 1228-1229, and *People v. Clair* (1992) 2 Cal.4th 629, 663, all involve a prosecutor's argument that evidence was "uncontradicted." The prosecutor's argument here went well beyond that.

United States v. Robinson (1988) 485 U.S. 25, cited by the prosecutor in the trial court as justification for his argument, is again cited by respondent. However, as explained in the Opening Brief (AOB 262), the facts in *Robinson* – substantial and repeated misstatements by defense counsel in argument, the prosecutor's objections to the defense argument, the prosecution's request to the trial court to be allowed to respond with argument that would otherwise be *Griffin* error, and the argument made only after the trial court had allowed it as a remedy for the misconduct of the defense (485 U.S. at pp. 27-29) – bear no resemblance to the facts in this case. The prosecutor here made no objection to the defense argument to which he said he was responding, never identified any misconduct or demonstrable falsity in that argument, never asked the trial court to allow the argument he proposed in response, and represented to the jury as fact that which there was no testimony to support and which he knew was untrue.

Respondent does not address any of these distinguishing characteristics of *Robinson*. Respondent does not identify any misconduct in the defense argument to which the prosecutor claimed he was responding. Nor does respondent explain why, having reviewed *Robinson*

and relying on it for his argument, the prosecutor did not follow the steps taken by the *Robinson* prosecutor to address the matter to the trial court *before* making an argument characterizing waiver of Fifth Amendment rights as evidence of innocence. Simply put, *Robinson* provides no support for the prosecutor's misconduct in appellant's case.

Respondent finally contends that any error was harmless. (RB 274-278.) Respondent relies upon the standard court instructions that the jury not draw any inferences from appellant not testifying (RB 277), as well as various comments made by the trial court and counsel during voir dire (RB 375-276), and the contention that the evidence against appellant was strong and the case was not a close one. (RB 277-278.)

However, as demonstrated in the opening brief and throughout this brief, the prosecution's case against appellant had substantial weaknesses, not the least of which was that it relied heavily upon Benjamin and Bond. As to the "oral copulation," the prosecution's case relied entirely upon Benjamin and Bond. Yet, as the trial court had noted, Benjamin and Bond were possible suspects, possible accomplices, and had been impeached "from wall to wall." (X RT 2796.)

Respondent's improper argument was thus aimed at bolstering a significant weakness in the prosecution's case against appellant, i.e., the credibility of Benjamin and Bond, and their possible guilt of the crime for which appellant was on trial. At the same time, the prosecutor's argument sought to bolster its case by improper argument implying that appellant's failure to testify was an indication of guilt.

The offending statements here were made during the prosecution's closing argument, with no opportunity for the defense to rebut or correct the misleading statement before the jury began its deliberations. The trial court

gave no admonition to the jury specifically addressing and attempting to remedy the misconduct. It is reasonably likely that the jury was misled by the prosecutor's argument into believing "facts" which had not been established by the evidence, but only by the prosecution argument, and which were, in fact, not true. It is reasonable likely that the jury was misled by the argument into contrasting Bond's and Benjamin's decisions to testify with appellant's reliance upon his Fifth Amendment right not to testify on his own behalf. As a result, appellant's rights to confront and cross-examine witnesses, to a fair jury trial, to due process and to reliable determinations of guilt, death eligibility and penalty were violated, and reversal is required unless the violation of those rights was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; U.S. Const., Amends. V, VI, VIII, XIV.)

For the reasons stated in the opening brief and above, the prosecutor's improper argument cannot be found harmless beyond a reasonable doubt. (*Ibid.*) Whether considered alone or in conjunction with the other errors from appellant's trial, reversal of the judgment is required.

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X

THE TRIAL COURT ERRED IN RESTRICTING CROSS-EXAMINATION OF BENJAMIN REGARDING PRIOR PERJURY

In the Opening Brief, appellant argued that his rights to confrontation and cross-examination, to a fair trial, to due process of law, to present a defense, and to a reliable determination of both guilt and penalty were violated by the trial court's preclusion of cross-examination of Benjamin concerning his commission of perjury at his prior murder trial. (U.S. Const. Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 7, 15; *Davis v. Alaska* (1974) 415 U.S. 308, 316; *Delaware v. Van Arsdall* (1986) 475 U.S. 673.)

Respondent contends that the trial court's ruling was a valid exercise of discretion because it regarded a collateral matter and would have involved an undue consumption of time. (RB 283-286.) Respondent argues in the alternative that any error was harmless. (RB 286-293.)

Respondent relies on *People v. Jennings* (1991) 53 Cal.3d 334 and *People v. Gurule* (2002) 28 Cal.4th 557 as supporting the trial court's ruling. Both are substantially distinguishable from the facts presented here, and provide no support for respondent's position.

Jennings involved a request by the defense to impeach prosecution witnesses with acts of perjury allegedly committed in submitting applications for county welfare benefits. (53 Cal.3d at p. 371.) The prosecution represented to the trial court that one of the witnesses disputed that the act of perjury occurred, and another intended to invoke her Fifth Amendment rights if so examined. (*Ibid.*) Faced with a factual dispute as to one witness, and the probability that any act of perjury by the other would

require proof by extraneous evidence, the trial court in *Jennings* "weighed the probative value of the evidence with the possibility that the various witnesses would invoke their Fifth Amendment rights, resulting in the undue consumption of time taken up on this collateral matter, the trial court properly excluded the evidence." (*Id.*, at p. 372.)

In contrast, as appellant demonstrated in the Opening Brief, there was no indication before the trial court in appellant's trial that Benjamin would either invoke any Fifth Amendment rights or deny his perjury. (AOB 275-276.) Appellant cited *People v. Quartermain* (1997) 16 Cal.4th 600, a case more factually similar to appellant's case on this issue, in which this Court found error in the denial of cross-examination of a witness regarding acts of bribes of judges on the ground that it would consume undue amount of time, where it was unlikely the witness would deny it. (16 Cal.4th at p. 624.) Respondent does not address *Quartermain* or demonstrate how *Jennings* might be more applicable here.

Respondent also relies upon this Court's holding in *Jennings* that the evidence in question "would impeach the witnesses on collateral matters and was only slightly probative of their veracity." (RB 283.) As demonstrated in the Opening Brief, Benjamin's commission of perjury in a prior trial is not a collateral matter, but is relevant evidence. Under California law, evidence of misconduct involving dishonesty or moral turpitude is relevant and admissible, even in the absence of a conviction, to impeach the credibility of a witness in a criminal case. (*People v. Wheeler* (1992) 4 Cal.4th 284 [impeachment with misdemeanor]; *People v. Mickle* (1991) 54 Cal.3d 140, 168 [impeachment of jailhouse informant with evidence he'd threatened witnesses in his own case]; *People v. Harris* (1987) 47 Cal.3d 1047 [prior reliability of a police informant admissible to

attack or support witness's credibility].) (AOB 273; see Evid. Code §210 ["'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness ...."] and §351 ["Except as otherwise provided by statute, all relevant evidence is admissible.") Moreover, rather than being slightly probative of Benjamin's veracity, his commission of perjury in his testimony in a prior murder trial is highly relevant to his credibility at appellant's trial. (See, e.g., *People v. Rollo* (1977) 20 Cal. 3d 109, 118.) Respondent does not explain how such commission of perjury by Benjamin could be considered only "slightly probative" as was evidence of omission of information from applications for welfare benefits in *Jennings*.

Gurule, the other case upon which respondent's primarily relies, involved the denial of cross-examination about the beating of a 15 month old baby by a witness and exclusion of evidence that the witness had minimized his responsibility in previous crimes. (28 Cal.4th at p. 618.) The defense sought to elicit the information about the beating of the baby as impeachment of the witness's testimony that he was not a violent man and would not use violence against another except in self-defense. The trial court had noted that the testimony regarding violence had been elicited by the defense on cross-examination, and that a party cannot ask a witness a question in order to later impeach him. (*Id.*, at p. 619, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 748 and *People v. Lavergne* (1971) 4 Cal.3d 735, 744.) In that context, this Court described the beating as a collateral matter, and within the trial court's discretion to disallow it as impeachment. (*Id.*, at p. 619.)

As explained in the Opening Brief, Benjamin's commission of perjury was separately relevant and admissible as impeachment, not in contradiction of some testimony elicited on cross-examination, but as

evidence of conduct "from which the jury could reasonably infer a readiness to lie." (*People v. Mickle* (1991) 54 Cal.3d 140, 168; Evid. Code §§210, 351.)

The defense in *Gurule* was also precluded from "introducing evidence of other crimes whose circumstances indicated that Garrison employed a habit of admitting some blame but then shifting the bulk of the blame elsewhere." (28 Cal.4th at p. 620.) This Court expressed doubt about the probative value of the evidence sought to be introduced by the defense, stating, "defendant merely 'was precluded from proving [his point] with time-consuming hearsay and character evidence that was not particularly probative on the question.' " (*Ibid.* [citations omitted].) The evidence appellant wished to elicit from Benjamin, on the other hand, was not "time consuming hearsay." Instead, there is no basis in the record, other than Benjamin's history as a perjurer, for assuming that he would not have admitted the perjury when confronted with it on cross-examination. (See *People v. Quartermain*, *supra*, 16 Cal.4th at p. 624.)

Nor was Benjamin's perjury at his prior murder trial simply some amorphous evidence of a habit of shifting blame as in *Gurule*. Rather, it was a specific instance which demonstrated that in a trial for murder, as here, Benjamin lied on the witness stand by arguing that someone else, not he, was the guilty party. Rather than "character evidence that was not particularly probative on the question," appellant sought specific impeaching evidence which was highly relevant on the question of Benjamin's credibility in a situation in which he was personally at risk legally, as he was in this case and at his prior murder trial.

Respondent contends that any error was harmless, arguing that Benjamin had already been impeached with various felonies, and various

aspects of his testimony were corroborated, primarily by Bond. (RB 286-293.) Respondent's reliance upon the physical evidence corroborating Benjamin and Bond (RB 288-289) is overstated. While the physical evidence, such as appellant's physical injuries, corroborated that appellant had been in a fight in the cell, it did not establish that appellant was the one who choked Andrews with a towel, or the one who tied the towel around Andrews' neck. Nor did any physical evidence corroborate Benjamin and Bond on the description of a fleeting kiss on the tip of appellant's penis by Andrews. Furthermore, while other evidence presented supported the conclusion that appellant had been the one who killed Andrews, none of it was determinative of that point. None of the evidence explains how appellant could have tied the towel around Andrews' neck as tightly as it was without Benjamin and Bond having seen it happen. As argued in the opening brief, the prosecution's case relied heavily upon the testimony and the credibility of Benjamin and Bond, yet they were the most obvious alternate suspects, with substantial incentive to lie and to shift blame to appellant. The impeachment sought by appellant to demonstrate that Benjamin had perjured himself to a jury on another occasion would likely have had a substantial impact upon this jury's evaluation of his credibility. Evidence of perjury is substantially more probative of Benjamin's willingness to lie to this jury than other impeaching evidence presented by the defense, such as prior inconsistent statements and prior felony convictions.

Moreover, in argument to the jury, the prosecutor used Benjamin's past conduct in dealing with charges against him to bolster Benjamin's credibility:

> I want to ask you about -- I want to talk to you about what Mr. Pedowitz said about Mr. Benjamin. [¶] He is saying well, you know, he's looking for a miracle. He claims that Mr. Benjamin, as he's sitting there, a guy who had sat in front of the FBI and admitted what he did, unfortunately admitted what Mr. Anderson did, caused him a little bit of problem, and then he went and pled guilty. *Two examples of Benjamin telling the truth to the authorities.*

(XI RT 3091 [emphasis added].) This argument was made by the prosecutor despite his knowledge that he had prevented appellant from introducing evidence that Benjamin had previously committed perjury when tried on a charge of murder, and blamed someone else for the murder he himself had committed.[37/] Thus, in the absence of the excluded cross-examination, the prosecutor was able to present to the jury a false picture of Benjamin as honest in dealing with his own crimes.

The denial of cross-examination and impeachment of Benjamin thus prevented appellant from presenting relevant evidence which cast substantial doubt on the prosecution's case against him, and upon the credibility and reliability of one of the prosecution's primary witnesses, and allowed the prosecution to present a distorted impression of Benjamin's credibility. The violation of his right to confrontation also denied him the right to present a defense and the right to a fair trial. It simultaneously undercut the reliability of the jury's determination of the evidence, and of the ultimate determinations of both guilt and penalty. (U.S. Const. Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 7, 15.) Respondent has not established that the jury's verdict was surely unattributable to the trial court's concealment of Benjamin's prior perjury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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[37] No objection to the argument was made by defense counsel.

Based upon the arguments above and set forth in the opening brief, the judgment must therefore be reversed.

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XI

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

In the opening brief, appellant demonstrated that the consciousness of guilt instruction, CALJIC No. 2.06, given in this case was unnecessary, improperly argumentative and permitted the jury to draw irrational inferences against appellant, thereby depriving appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., VI, VIII, & XIV Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Reversal is therefore required.

Respondent contends that this claim is not cognizable on appeal because it was not raised below. (RB 295.) Respondent also contends that the evidence supported the instruction, and relies upon this Court's past opinions upholding the instruction against challenge. (RB 296-302.) Finally, respondent contends that if there was error, it was harmless. (RB 302-303.)

Respondent asserts that "[n]othing in the record indicates the defense objected to the trial court's giving of CALJIC No. 2.06 below." (RB 295.) As demonstrated below, the lack of an objection to this instruction does not bar appellate review. In any case, the available record is not adequate to establish whether or not an objection or any requests for modification of the instruction were made by the defense.

In support of the assertion that no objection was made, respondent cites to the Settled Statement Regarding Jury Instruction Conferences. (SCT4 147-183 ["Settled Statement"].) The Settled Statement exists in the record because the trial court conducted conferences with counsel regarding

the instructions to be given in appellant's case off the record, in violation of section 190.9.[38] It was determined at these conferences which instructions would be given. Some of these determinations were by agreement of the parties, and some were by the trial court's ruling when the parties disagreed. (SCT4:148.) Whether the defense objected to CALJIC No. 2.06 or sought its modification, and whether the trial court ruled that the instruction would be given despite objection and without modification is unknown, although defense counsel did not put any objection on the record concerning CALJIC No. 2.06 when the conferences were discussed on the record. (XI RT 2941-2947.) To the extent that this Court were to determine that an objection must have been made to preserve appellate review of this instruction, appellant has been denied an adequate record on appeal as a result of the trial court's violation of section 190.9. Denying appellant review of his challenge to the instruction based upon an inadequate record, the inadequacy of which is not attributable to him, would deny him due process and the full, fair, meaningful and reliable appellate review of the trial proceedings to which he is entitled. (U.S. Const., Amends. V, VI, VII, XIV; Cal. Const. Art. 1 §§ 1, 7 & 15; *In re Steven B* (1979) 25 Cal.3d 1, 7-9; *People v. Barton* (1978) 21 Cal.3d 513, 517-520; *March v. Municipal*

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[38] Section 190.9, at the time of appellant's trial, stated in relevant part:

> In any case in which a death sentence may be imposed, all proceedings in the justice, municipal and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

Court (1972) 7 Cal.3d 422, 427-429; see, e.g., *Griffin v. Illinois* (1956) 351 U.S. 12; *Mayer v. City of Chicago* (1971) 404 U.S. 189, 195.)

In support of the argument that appellant's claims are not cognizable on appeal, respondent also relies on authority that is inapposite. The cases which respondent cites concern claims of error regarding the admissibility of evidence. (RB 295.) In *People v. Raley* (1992) 2 Cal.4th 870, cited by respondent, this Court cited "the general rule that *questions relating to the admissibility of evidence* will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (2 Cal.4th at p. 892 (quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548) (emphasis added); see also *People v. Williams* (1997) 16 Cal.4th 153, 259 [gang evidence - relevance objection did not preserve Evid. Code, § 352 or constitutional issues]; *People v. Rodrigues* (1994) 8 Cal.4th 1060 [constitutional objections not raised at trial re: admission of videotape]; *People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13 [argument that coercive ploy was used to obtain confession was not raised in trial court, may not be raised on appeal].)

Because the instructions were legally erroneous and unconstitutional, and because they undeniably affected appellant's substantial rights, appellant need not have objected to preserve this claim for appellate review. (Pen. Code §1259; see *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn.7; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) Respondent makes no claim that the instructions did not affect appellant's substantial rights.

Respondent's contention of waiver should also be rejected because appellant's constitutional claims raise "pure questions of law" that can be resolved without the necessity of developing any further record in the trial court. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, 133; *People*

v. Hines (1997) 15 Cal.4th 997, 1061.) Finally, this Court should exercise its discretion to consider constitutional questions raised for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; see, e.g., *People v. Ramirez* (1987) 189 Cal.App.3d 603, 618, fn. 29.)

Respondent contends that there was evidence to support the instruction. (RB 296-297.) However, appellant did not argue that there was no evidence to support the instruction. Rather, appellant argued that the instruction was unnecessary, that it duplicated the circumstantial evidence instructions, but was partisan and impermissibly argumentative, and that it embodied improper permissive inferences, allowing the jury to draw irrational inferences from the evidence to which it properly applied.

However, respondent raises one theory in support of the instruction which was never raised at trial, and which is entirely speculative and an unreasonable characterization of the evidence at trial. Respondent repeats the argument that appellant action's in killing Andrews constituted an effort to suppress evidence of the oral copulation by silencing Andrews to avoid detection of the sexual assault. (RB 302.) In another case, with different facts, perhaps such reasoning might make some sense. In this case, as demonstrated above (Arg. VII, *ante*), it is an unreasonable characterization of the evidence, and amounts to pure speculation. According to the descriptions of Bond and Benjamin, the "oral copulation" was a relatively minor detail of a longer, violent assault.

In the context of this case, killing Andrews so that no one would find out that he was made to kiss the tip of appellant's penis, an action resulting in no physical evidence corroborating its occurrence), would be so absurdly counterproductive that it is not a reasonable inference from the record in this case.

Respondent's theory is based purely upon speculation, not upon evidence that "reasonably inspires confidence" (*People v. Morris* (1988) 46 Cal.3d 1, 19; *People v. Marshall* (1997) 15 Cal.4th 1, 35) or reasonable inferences therefrom. (*People v. Morris, supra*, 46 Cal.3d at p. 21.)

In the opening brief, appellant demonstrated that CALJIC No. 2.06 amounted to an improper, argumentative, pinpoint instruction inviting improper permissive inferences. Appellant pointed out that much of the activity relevant to the instruction applied equally to others, especially Benjamin and Bond. Yet the instruction improperly focused on appellant's activity, and inferences therefrom which were beneficial to the prosecution case, but without mentioning parallel inferences which would apply to Benjamin's and Bond's consciousness of their own guilt in a manner which would undercut the prosecution case.

Respondent contends that to remedy that problem, appellant should have requested instructions on permissive inferences of reasonable doubt about guilt or permissive inferences of guilt of prosecution witnesses. (RB 298.) Appellant is not arguing for a proliferation of argumentative pinpoint instructions embodying permissive inferences. Rather, the partisan nature of CALJIC No. 2.06 and the permissive inferences it highlights in a manner which is advantageous to the prosecution renders it fatally flawed, and it should not have been given.

Respondent argues that focusing the instruction on appellant rather than on Benjamin and Bond or other prosecution witnesses is justified because appellant was not similarly situated to prosecution witnesses, "because the jury was merely required to assess their credibility as opposed to whether they were guilty of the offenses." (RB 298-299.) However, Bond and Benjamin were not merely prosecution witnesses. They were

alternate suspects. In argument to the jury, defense counsel argued that Benjamin and Bond were in fact the guilty parties in this case. ((XI RT 3007-3008, 3037, 3047.); see Arg. IX, *ante* [regarding prosecution argument responding to defense argument accusing Benjamin and Bond].) The jury thus had a responsibility to consider whether Benjamin and Bond were guilty of the offenses in the determination of whether or not there was a reasonable doubt about appellant's guilt. The evidence was the same as to each of the three regarding cleaning up the cell. The issues were the same for all three regarding that evidence, i.e., did their actions demonstrate a consciousness of guilt? Yet the instruction addressed only appellant's actions and inferences to be drawn therefrom. The instruction was, therefore improperly partisan and argumentative, as demonstrated in the opening brief.

Respondent further argues that focusing the instruction on inferences of appellant's guilt rather than anyone else's was justified because appellant was not similarly situated to the prosecution, because the prosecution had the burden of proof. (RB 299.)

If respondent is seriously arguing that the prosecution is entitled to the partisan, argumentative instructions because the prosecution has the burden of proof, such an argument flies in the face of settled law that instructions are to be neutral, and conflicts with the state's burden to prove defendant's guilt beyond a reasonable doubt, and with due process. (See e.g., *Cool v. United States* (1972) 409 US 100, 103 n. 4; *People v. Moore* (1954) 43 Cal.2d 517, 526-27 ["There should be absolute impartiality as between the People and the defendant in the matter of instructions"].)

Respondent relies on this Court's decisions in prior cases rejecting the claim that CALJIC No. 2.06 is an argumentative pinpoint instruction.

(RB 299-300.) Respondent further dismisses, without analysis, the substantial out-of-state authority rejecting consciousness of guilt instructions, as not binding. (RB 300.)

Appellant acknowledged this Court's prior decisions rejecting these claims in the opening brief. Appellant also demonstrated that those decisions are wrongly decided, and argued that this Court should revisit the issue. Given the absence of analysis beyond citation of past decisions in respondents brief, no additional analysis on this point is necessary in this reply.

In the opening brief, appellant demonstrated that CALJIC No. 2.06 allows irrational impermissible inferences regarding appellant's mental state at the time of the crime and that he engaged in or attempted to engage in an act of oral copulation with Andrews and thereafter killed him in order to carry out or advance the commission of the oral copulation. (AOB 294-295.)

Concerning inferences regarding appellant's mental state, respondent relies solely on *People v. Crandall* (1988) 46 Cal.3d 833, 871, which rejected the argument that CALJIC 2.06 allows impermissible inferences in regard to a defendant's mental state at the time of the crime. (RB 301.) Appellant acknowledged and addressed *Crandall* in the opening brief. (AOB 292-294.) Respondent fails to respond to, or even acknowledge, the argument and authorities in the opening brief demonstrating the flaws in *Crandall's* reasoning, and presents no additional analysis beyond citation to *Crandall*. (RB 301.)

Concerning inferences of guilt of the oral "copulation," respondent reasserts the argument that the evidence supports an inference that appellant killed Andrews to avoid detection for that act. (RB 302.) Appellant has

demonstrated above that respondent's theory is not supported by any evidence that "reasonably inspires confidence." (*People v. Morri*, *supra*, 46 Cal.3d at p. 19; *People v. Marshall*, *supra*, 15 Cal.4th at p. 35; see Arg. VII, *ante*.) Rather, it is supported only by speculation, which does not justify the inference invited by CALJIC No. 2.06.

For the reasons stated above and in the opening brief the error in giving this instruction requires reversal of the judgment.

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XII

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

In the opening brief, appellant demonstrated that the trial court gave a series of standard CALJIC instructions which violated appellant's right to be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) These instructions (CALJIC Nos. 1.00, 1.02 Supp.,[39] 2.01, 2.02, 2.21.2, 2.22, 2.27, 2.50, 2.51, 2.90, 8.20 and 8.67[40]) enabled the jury to convict appellant on a lesser standard than is constitutionally required, and in a manner which cannot be deemed harmless. Reversal of the entire judgment is therefore required.

Respondent contends that because defense counsel requested certain of the instructions and failed to object to the others, appellant's claims are not cognizable on appeal. Respondent is wrong. Respondent otherwise relies primarily upon this Court's previous rejections of similar claims,

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[39] Respondent is correct that the heading in Argument XII.B. in the opening brief referred to CALJIC No. 1.02, while the challenge intended is as stated in the text of that section, to the instruction CALJIC No. 1.02 Supp., as it is designated in the Clerk's Transcript. (3CT:642.)

[40] Respondent notes that, while the opening brief includes CALJIC No. 2.21 among the instructions at issue here, the brief contains no citation to the record where that instruction was given in this case. (Resp. Br. at 304, fn. 84.) That instruction was not given in this case, and the references to it in the opening brief (AOB at 305, 309-310) were included by error. Similarly, a reference to CALJIC No. 2.21.1 (AOB at 311) was included by error.

adding only that the errors, if any, are harmless (RB 308-309, 312), and arguing that a portion of the prosecution closing argument cited by appellant was proper.

Appellant acknowledged in the opening brief that this Court has previously rejected similar claims of error, and argued that the Court's position should be reconsidered. (AOB at 312-313.) Accordingly, no further reply is necessary in that area. Appellant asks this Court to reconsider its prior rulings for the reasons set forth in his opening brief.

Because the instructions were legally erroneous and unconstitutional, and because they undeniably affected appellant's substantial rights, appellant need not have objected to preserve this claim for appellate review. (Pen. Code §1259; see *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn.7; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) Respondent makes no claim that the instructions did not affect appellant's substantial rights.

Respondent's contention of waiver should also be rejected because appellant's constitutional claims raise "pure questions of law" that can be resolved without the necessity of developing any further record in the trial court. (see *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, 133; *People v. Hines* (1997) 15 Cal.4th 997, 1061.) Finally, this Court should exercise its discretion to consider constitutional questions raised for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; see, e.g., *People v. Ramirez* (1987) 189 Cal.App.3d 603, 618, fn. 29.)

Respondent instead contends that because the defense requested CALJIC Nos. 1.00, 1.02 Supp., 2.01, 2.02, 2.21.2, 2.22 and 2.27, any challenge to those instructions is not cognizable on appeal, due to invited error. (RB 307-308.)

Invited error applies where "defense counsel intentionally caused the court to err." (*People v.Wickersham* (1982) 32 Cal.3d 307, 330 disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1031.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham, supra*, 32 Cal.3d at pp. 332-335,; *People v. Moon* (2005) 37 Cal.4th 1, 28; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3; compare *People v. Hernandez* (1988) 47 Cal.3d 315, 353 [counsel's argument indicated a tactical purpose for requesting the instruction].) Here, neither condition for invited error has been met.

Respondent cites nothing in the record which would support such findings regarding the defense request for the instructions at issue here. Review of the record demonstrates, at most, routine requests for standard CALJIC instructions on subject matter which this Court has held must be given sua sponte. The conferences on jury instructions in this case were not conducted on the record. (SCT4 147.) Rather than a transcript of the discussions about the instructions, reflecting the basis for defense counsel's requests for the instructions, the record is limited to a settled statement which does not reflect defense counsel's reasoning. (SCT4 147-154.)

CALJIC Nos. 1.00, 1.02, 2.01, 2.21.2, 2.22 and 2.27 must be given sua sponte. (See CJER Mandatory Criminal Jury Instructions Handbook (CJER 2007) Sua Sponte Instructions, sections 2.4, 2.136.) The trial court's sua sponte duty, combined with the prosecution's requests for CALJIC Nos. 1.00, 1.02, 2.21.2, 2.22 and 2.27 (2CT 550), make it manifest that

appellant's apparent request for the instructions at issue did not cause the errors of which appellant now complains. This Court's decisional law caused the errors, and as urged in the opening brief, should be reconsidered.

In the opening brief, appellant noted a portion of the prosecutor's argument to the jury (XI RT 3097-3098), to which appellant had objected at trial, as attempting to place a burden of proof on the defendant, especially as to interpretations of circumstantial evidence. (AOB 304.) The prosecutor argued, essentially, that the lack of defense evidence on any point meant that any interpretation not consistent with the prosecution's interpretation was speculation. (XI RT 3098.)

Respondent defends the argument as proper, arguing that the prosecutor is allowed to comment on the state of the evidence or the failure of the defense to introduce material evidence or to call logical witnesses. (RB 311.) Appellant does not contest the propriety, generally, of comments on the state of the evidence or the failure of the defense to introduce material evidence or to call logical witnesses. However, the prosecutor's argument demonstrated the danger to the proper implementation of the prosecution's burden of proof beyond a reasonable doubt which the challenged instructions raise. The prosecutor attempted to transform the principles respondent cites and the direction of the instructions to reject the unreasonable and accept the reasonable into a conclusion that the failure of the defense to present evidence on a point made any inference other than one pointing to guilt unreasonable.

Not only does the prosecutor's argument demonstrate the danger of misapplication of the instructions generally, but the prosecutor exploited the defects in the instructions in this case. The prosecutor's argument made it likely that the instructions affected the jury's deliberations, as explained in

the opening brief. (AOB 304-305.) As shown in the opening brief, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

Respondent argues that any error was harmless, based upon the strength of the prosecution case. Appellant has demonstrated in the opening brief and throughout this brief that respondent overstates the strength of the evidence. The prosecution's case relied heavily on circumstantial evidence and had substantial weaknesses, which would have been disguised by misapplication of the relevant law due to the defects in the challenged instructions. The prosecutor's argument which exploited the erroneous instructions also makes it reasonably likely that the jury applied the instruction in a manner inconsistent with appellant's constitutional rights. The instructions cannot be considered harmless on this record.

For the reasons stated in the opening brief, and above, the judgement must be reversed.

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XIII

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

In his opening brief, appellant argued that the California death penalty statute and the instructions implementing its application are unconstitutional because they fail in several respects to set out the appropriate burden of proof. Specifically, the statute and jury instructions fail to: assign a burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death; delineate a burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision; and, require jury unanimity as to the existence of aggravating factors. As appellant has demonstrated, these critical omissions in the California capital sentencing scheme run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 316-348.)

Respondent contends that these issues have been resolved by this Court, and that no further discussion is required. (RB 317.) However, additional authority supporting appellant's claims has arisen since respondent's brief was filed.

As respondent points out, this Court has declared that *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered its conclusions regarding the burden of proof at the penalty phase. (RB 318; *People v. Huggins* (2006) 38 Cal.4th 175, 250-251) and a requirement of jury unanimity on aggravating factors. (RB 319; *People v. Danks* (2004) 32 Cal.4th 269, 316.) This Court has justified its position on the theory that "the penalty phase determination in California is normative,

not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto* (2003) 30 Cal.4th 226, 275.)

This Court's analogy, however, is unavailing. The discretion afforded under California law to sentencing judges in noncapital cases recently came under scrutiny in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 868]. In *People v. Black* (2005) 35 Cal.4th 1238, 1254, 1258, this Court had held that California's Determinate Sentencing Law (DSL) did not run afoul of the bright line rule set forth in *Blakely* and *Apprendi* because "[t]he judicial factfinding that occurs during [the selection of an upper term sentence] is the same type of judicial factfinding that traditionally has been a part of the sentencing process." The United States Supreme Court rejected that analysis, finding that circumstances in aggravation under the DSL (1) were factual in nature, and (2) were required for a defendant to receive the upper term. (*Cunningham v. California*, *supra*, 127 S.Ct. at pp. 860-863.) The United States Supreme Court held that "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 871, fn. omitted.) The high court further remarked as follows:

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29

Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Id.* at p. 869.)

Although this Court has concluded that "[t]he *Cunningham* decision involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to the state's capital sentencing scheme" (*People v. Prince* (2007) 40 Cal.4th 1179, 1297; see also *People v. Stevens* (2007) 41 Cal.4th 182[41]), the *Cunningham* decision itself suggests otherwise.

This Court has rejected prior *Apprendi-Ring-Blakely* challenges to California's death penalty law, describing the jury's penalty determination a "normative judgment" that aggravation outweighs mitigation, and not fact-finding within the scope of the Supreme Court's *Apprendi, Ring,* and *Blakely* cases. This Court has concluded that even if this "normative judgment" requires that the jurors make findings, those findings are simply "discretionary sentencing choice[s] within a statutory range of punishment that remains allowable under *Apprendi-Ring-Blakely*." (See e.g., *People v. Ramirez* (2006) 39 Cal.4th 398, 475; *People v. Morrison* (2005) 34 Cal.4th 698, 730; *People v. Prieto, supra*, 30 Cal.4th at p. 263; *People v. Snow*

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[41] It appears that *People v. Prince, supra*, 40 Cal.4th 1179 and *People v. Stevens, supra*, 41 Cal.4th 182 both address *Cunningham* only in relation to argument regarding failure to require the jury to make written findings concerning the aggravating circumstances it relied upon, and the failure to require juror unanimity as to aggravating circumstances relied upon. (40 Cal.4th at p. 1297; 41 Cal.4th at p. 212.) Appellant has also relied upon *Apprendi, Ring* and *Blakely* in Arguments XII and XV in the opening brief. Appellant incorporates this discussion of the effect of *Cunningham* into each of those arguments in this reply brief.

(2003) 30 Cal.4th 43, 126; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590.) According to the Court:

> The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt.

(*People v. Snow* (2003) 30 Cal.4th at p. 126, fn. 32.)

This rationale, employed by the Court to uphold California's death penalty law, can not survive *Cunningham,* which made clear that a sentencing scheme that allows the sentencer discretion to select the appropriate sentencing term within a statutory range by balancing aggravating and mitigating facts, regardless of whether those facts have been found beyond a reasonable doubt, violates the federal Constitution. As stated by the Supreme Court:

> [A sentencer's] broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the [sentencer] must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

(*Cunningham v. California, supra,* 127 S.Ct. at p. 869, citing *Blakely v. Washington* (2004) 542 U.S. 296, 305 & fn. 8.)

Thus, under the *Apprendi, Ring,* and *Blakely* line of cases, it matters not that the juror's penalty decision is labeled a "normative" or "moral judgment," or is equated with a sentencing court's traditional discretion to impose one sentence within a statutory range of punishment. What matters

instead is whether the jury must determine additional facts before a death sentence can be imposed. (*Cunningham v. California, supra,* 127 S.Ct. at p. 869.)

Under California law, if the jury finds the defendant guilty of first degree murder and also finds a special circumstances to be true, the offense carries a maximum sentence of life without the possibility of parole, *unless* the jury makes additional determinations at the penalty trial that at least one aggravating factor exists and that the aggravating factor or factors outweigh any mitigating factors. (Pen. Code, §§ 190.2, 190.3; see also CALJIC No. 8.88; CALCRIM No. 766.) Hence, in order to sentence a defendant to death, California law does not require only that the jury find murder and the existence of a special circumstance making the defendant eligible for death. The jurors must additionally find that at least one aggravating factor exists (and thus, for instance, make an additional determination that the special circumstance constitutes aggravation making the defendant deserving, and not just eligible, for the death penalty), and that the factors in aggravation outweigh those in mitigation. (Pen. Code, § 190.3.) In this respect, California's death penalty statute is no different than the Arizona statute the Supreme Court struck down in *Ring:*

> A defendant convicted of first-degree murder in [California] cannot receive a death sentence unless [the sentencer] makes the factual determination that [] statutory aggravating factors exists [and outweigh any mitigating factors]. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.

(*Ring v. Arizona, supra,* 536 U.S. at p. 596, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 538 (dis. opn. of O'Connor, J.).)

California's statute authorizing imposition of the death penalty requires that having found a defendant guilty of murder and a special circumstance, the jury must make additional determinations that aggravating circumstances exist and outweighs any facts in mitigation. (Pen. Code, § 190.3.)[42] Under United States Supreme Court precedent, it does not matter how those determinations are labeled (*Ring v. Arizona, supra,* 536 U.S. at p. 602 ["The dispositive question . . .'is not one of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt."]), or that the jurors have broad discretion in making those determinations. (*Cunningham v. California, supra,* 127 S.Ct. at p. 869.) What matters is that these determinations are not included in the jury's guilt and special circumstance verdicts, and they must subsequently be made in order to impose the death penalty. Under *Apprendi, Ring, Blakely,* and now *Cunningham,* these determinations must be found by the jury beyond a reasonable doubt. To the extent the Court's prior cases, relied upon here by respondent, have held otherwise, those cases must be overruled.

For the reasons set forth in the opening brief and in the paragraphs above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity

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[42] Under the terms of Penal Code section 190.3, "the trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole."

requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XIV

THE INSTRUCTIONS DEFINING THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argued in the opening brief that CALJIC No. 8.88, as it was read to appellant's jury, did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects, requiring reversal of the penalty judgment in this case. (AOB 349-360.) Respondent contends that no error occurred relying solely on prior case law of this Court, without any additional analysis. (RB 322-326.) Appellant has already addressed in the opening brief why that case law should be reconsidered, so no further reply is necessary.

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XV

THE INSTRUCTIONS REGARDING THE MEANING OF MITIGATING AND AGGRAVATING FACTORS AND THEIR APPLICATION IN APPELLANT'S CASE RESULTED IN AN UNCONSTITUTIONAL DEATH SENTENCE

Appellant argued in his opening brief that the versions of CALJIC Nos. 8.85 and 8.88 with which appellant's jury was instructed, together with the application of the statutory sentencing factors under Penal Code section 190.3, rendered appellant's death sentence unconstitutional. Respondent, in opposition, relies primarily upon this Court's prior decisions without further analysis, and no reply is therefore required as to these points.

However, respondent also contends that, because appellant filed a motion to preclude the death penalty in this case, challenging Penal Code section 190.3 solely on the basis of the Eighth Amendment, appellant's challenge under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the California Constitution are waived, citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1242. (RB 330.)

Appellant's Motion to Preclude Prosecutor From Seeking Death Penalty, filed in the trial court (2CT:314-317), relied upon the Eighth Amendment, and cited *Stringer v. Black* (1992) 503 U.S. 222, *Furman v. Georgia* (1972) 408 U.S. 238, *People v. Tuilaepa* (1992) 4 Cal.4th 569 and *People v. Proctor* (1992) 4 Cal.4th 499, noting that the United States Supreme Court had granted certiorari in both *Tuilaepa* and *Proctor*. (2CT 315-317.) It specifically argued that

> [w]ithout clarifying language, submission to the penalty jury of factors (a) (Circumstances of the capital crime); (b) (other violent criminal activity); and (i) (defendant's age at time of crime) precludes a meaningful and guided distinction between those murders which require or warrant the death penalty and

> those that do not. Because of this lack of guidance on the part of the death sentencing statute, the prosecution in this case should be restrained from seeking the death penalty against the defendant.

(2CT:316-317.) In argument on the motion, defense counsel argued, inter alia, that Penal Code section 190.3 is constitutionally flawed because

> the jury is not told exactly how they are to weigh the age of the defendant of how they are to weigh the circumstances of the crime.
>
> Now, "the circumstances of the crime" can mean virtually anything about the particular crime and there is nothing in the statute that spells out to the jury how it is that they are to apply such a general and amorphous a term as "circumstances of the crime."

(1RT:82-83.) Defense counsel further argued that

> asking the jury to determine from the circumstances of the crime whether death or life should be imposed without any specific factors as to whether that's aggravating, mitigating or how they are to weigh that invites speculation, invites capriciousness of thought that should not be involved in as important a decision as life without parole or the death penalty.

(1RT:83-84.)

While the Motion cited only the Eighth Amendment, appellant did not thereby waive appellate review of the statutes under which he was sentenced. Appellant "may raise for the first time on appeal a pure question of law which is presented by undisputed facts." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *People v. Hines* (1997) 15 Cal.4th 997, 1060 -1061.)

> "The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a

> factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]"

(*People v. Yeoman* (2003) 31 Cal.4th 93, 118, fn. 3, [quoting *Ward v. Taggart*, *supra*, 51 Cal.2d at p. 742].) Respondent has identified nothing about the claims made in this argument which contemplate a "factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial." There being no detriment to respondent in being required to defend against these claims for the first time on appeal,[43] and the claims being pure questions of law presented by undisputed facts, appellant's arguments are properly before this Court for appellate review.

Respondent also claims, again citing *People v. Jackson*, *supra*, 13 Cal.4th 1164, that because appellant requested CALJIC No. 8.85 below, "'any objection to it is waived on appeal.' (*Jackson*, *supra*, at p. 1225.)" (RB 330.)

The trial court conducted conferences with counsel regarding the instructions to be given in appellant's case off the record, in violation of

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[43] Respondent states that "this Court repeatedly has considered and rejected [appellant's] claim and assertions in prior capital cases. Thus an extensive exploration and discussion of these matters is unnecessary." (Resp. Br. at 330.) Respondent thus demonstrates the belief that it is not required to defend against claims that this Court has regularly considered, and against which respondent has regularly defended in other capital cases. Having identified no factual dispute in appellant's case which affects the claims made in this argument, and relying solely upon this Court's prior decisions as deciding the merits of the claims, respondent suffers no undue burden or detriment from appellate review of these claims. There is, therefore, no basis for respondent's claim of waiver.

section 190.9.[44] The only basis in the record supporting respondent's assertion that defense counsel requested CALJIC No. 8.85 is that the trial court marked the instruction as having been requested by both the prosecution and the defense. (3CT 732-733.) No written request for the instruction was submitted by the defense. In the Settled Statement Regarding Jury Instruction Conferences, a number of instructions requested by the defense during the conference on penalty phase instructions are identified. (4SCT 155-156.) CALJIC No. 8.85 is not one of them.

Appellant did submit proposed instructions which attempted to rectify flaws in CALJIC No. 8.85. (3CT:832-843; see *People v. Dunkle* (2005) 36 Cal.4th 861, 895.) The trial court refused Defendant's Requested Instructions B (Scope and Proof of Mitigation: General), C (Scope and Proof of Mitigation: Sympathy Alone is Sufficient to Reject Death), D (Scope of Mitigation: No Mitigation Necessary to Reject Death) and E (Individual Juror Determination of Aggravation and Mitigation). (3CT:833-836; RT 3720-3722.) Defense counsel additionally requested a modification of CALJIC No. 8.85, expanding the description of mitigation under paragraph (k) of that instruction.[45] The trial court refused the requested modification. (3CT:837-839, 842-843; 4SCT:155; 14RT 3721-3722.) Appellant submitted additional instructions further addressing the

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[44] Section 190.9, at the time of appellant's trial, stated in relevant part:

> In any case in which a death sentence may be imposed, all proceedings in the justice, municipal and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present.

[45] The details of the requested modification are unknown at this time. (See 4SCT:156.)

scope and meaning of section 190.3 factors. Defense counsel requested, but eventually withdrew Requested Instructions F (Disregard Inapplicable Factors: Absence of Mitigation is not Aggravation), G (Aggravation Limited to Enumerated Factors), H (No Double Counting of Aggravating Factors Which Are Specials), K (Mental Impairment Not Limited to Excuse or Negation of An Element), and L (Jury Must Determine Whether Unadjudicated Acts were "Violent" and "Criminal"). (CT 837-839, 842-843; 4SCT:155; 14RT: 3722.) However, the basis for withdrawing the requested instructions is unknown, other than counsel's withdrawal of Requested Instruction H on the basis of the prosecutor's representation that he would not argue that aggravating factors which are also special circumstances should be considered twice. (14RT:3720.)

Respondent cites no authority which could justify depriving appellant of appellate review of the validity of CALJIC No. 8.85 on the basis that appellant *may* have requested it as a routine request for the standard CALJIC instruction on mitigating and aggravating factors at a capital penalty phase trial. No objection in the trial court is necessary to allow appellate review of an instruction which affects an appellant's substantial rights. (Pen. Code § 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247.) Respondent makes no assertion that CALJIC No. 8.85 does *not* affect defendant's substantial rights; such an assertion would be frivolous. Nor does respondent cite any authority which directly holds that CALJIC No. 8.85 does not affect substantial rights.

Respondent instead contends that because the trial court marked the box indicating that the defense requested CALJIC No. 8.85, any objection to the instruction is waived. (RB 330.) Such a request could be considered a forfeiture of appellate review of the instruction only if the result

constituted invited error. Here, appellant's challenges to the statute and requests for further instruction demonstrate that the errors contained in CALJIC No. 8.85 were not caused by appellant. (Cf. *People v. Dunkle*, *supra*, 36 Cal.4th at p. 895.)

For the doctrine of invited error to apply, it must be clear from the record that defense counsel made an express request for the instruction at issue. "In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons...." (*People v. Wickersham* (82) 32 Cal.3d 307, 332 (*Wickersham*); *People v. Valdez* (2004) 32 Cal.4th 73, 115; compare *People v. Hernandez* (1988) 47 Cal.3d 315, 353 [counsel's argument indicated a tactical purpose for requesting the instruction].) Invited error applies where "defense counsel intentionally caused the court to err." (*Wickersham*, 32 Cal.3d at p. 330; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1031.)

Respondent cites nothing in the record which would support such a finding regarding any defense "request" for CALJIC No. 8.85. Review of the record demonstrates only that the trial court marked the instruction as having been requested by both the prosecution and the defense. (3CT 732-733.) At most, this was not a request for a specific instruction for tactical reasons, but a routine request for a standard CALJIC instruction on subject matter which this Court has held must be given sua sponte. (*People v. Benson* (1990) 52 Cal.3d 754, 799; *People v. Marshall* (1990) 50 Cal.3d 907, 932.) No written request for the instruction was submitted by the defense. The conference on jury instructions in this case were not conducted on the record. (4SCT: 147-148.) Rather than a transcript documenting the discussions about the instructions, and reflecting the basis for defense counsel's request, if any, for the instruction, the record is

limited to a settled statement which does not reflect defense counsel's reasoning. (4SCT: 154-156.)

At the time of appellant's trial, this Court had held that the trial court must instruct, sua sponte, on all factors under section 190.3 which are applicable in the record of the individual case[46] (*People v. Marshall* (1990) 50 Cal.3d 907, 932-933), and that, while it is not error to delete factors not applicable on the facts of the case (*People v. Miranda* (1987) 44 Cal.3d 57, 104-105), the better practice is to instruct on all the section 190.3 factors. (*People v. Marshall, supra*, 50 Cal.3d at p. 932.) In light of that state of the decisional law at the time of appellant's trial, combined with the prosecution's request for the instruction, and defense counsel's requests for supplemental instructions, it is manifest that appellant's apparent request for CALJIC No. 8.85 did not cause the errors of which appellant now complains. Thus, any defense "request" for CALJIC No. 8.85 was not invited error. Appellant's claims of error are fully preserved for appellate review.

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[46] In CJER Mandatory Criminal Jury Instructions Handbook (CJER 2007) Sua Sponte Instructions, section 2.5, CALJIC No. 8.85 is listed as being required sua sponte. The 1994 edition which would have been available at the time of appellant's trial, similarly lists No. 8.85 as being required sua sponte. (CJER Mandatory Criminal Jury Instructions Handbook (CJER 1994) Sua Sponte Instructions, section 2.5.)

XVI

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Appellant argued in his opening brief that California's failure to provide intercase proportionality violated the Eighth and Fourteenth Amendments. (AOB 387-394.) Appellant acknowledged that this Court has previously rejected similar claims of error. Respondent relies on this Court's previous rejections of this issue without additional analysis. (RB 337.) Accordingly, no reply to respondent's argument is necessary. Appellant asks this Court to reconsider its prior rulings for the reasons set forth in his opening brief.

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XVII

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

In his opening brief, appellant argued California's sentencing procedures violate international law and fundamental precepts of international human rights. Appellant requested that this Court reconsider its decisions rejecting similar claims (see e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 511). (AOB 395-399.) Respondent claims that appellant does not provide sufficient reasoning for this Court to reconsider its prior rulings that the use of the death penalty does not violate international law, and otherwise relies solely upon those prior rulings without additional analysis. (RB 338-339.) Appellant disagrees, and asks this Court to reconsider those rulings for the reasons set forth in his opening brief. (AOB 395-399.)

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XVIII

IF THE SECOND SPECIAL CIRCUMSTANCE FINDING IS REVERSED, THE DEATH JUDGMENT MUST ALSO BE REVERSED

In the opening brief, appellant argued that if this Court reverses the Second Special Circumstance finding, the death judgment must likewise be reversed. Respondent, relying solely on *Brown v. Sanders* (2006) 546 U.S 212 (*Sanders*), argues that, assuming arguendo that the Second Special Circumstance finding is invalidated, "it did not an [sic] add an improper element to the aggravation scale because another sentencing factor enabled the jury to give aggravating weight to the same facts and circumstances." (RB 340.)

In *Sanders*, the United States Supreme Court determined that:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process [fn. omitted] *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(546 U.S. at p. 220.) The Supreme Court recognized, however, that an invalidated factor may cause "other distortions . . . beyond the mere additional of an improper aggravating element." (*Ibid.*, fn. 6) The issue which the Supreme Court addressed in *Sanders* was "the skewing that could result from the jury's considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty. As we have explained, such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Id.*, at p. 221.)

In analyzing the error in *Sanders*, the Supreme Court noted that two of four special circumstances in that case had been found invalid. A burglary-murder special circumstance was held to be invalid based on the merger doctrine (*People v. Wilson* (1969) 1 Cal.3d 431, 439-40) and a "heinous, atrocious or cruel" special circumstance because that special circumstance had been previously found to be unconstitutionally vague. (546 U.S. at p. 223.)

> . . . [T]he jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.

(*Id.*, at p. 224.)

The burglary-murder special circumstance was not invalidated because there was no burglary,[47] or because the murder was not committed during the commission of a burglary, but because the jury was instructed on a theory of felony murder, and of the special circumstance, of a burglary committed with intent to commit assault. Under the merger doctrine (*People v. Wilson*, *supra*, 1 Cal.3d at pp. 439-440; *People v. Ireland* (1969) 70 Cal.2d 522), such a burglary will not support a conviction of felony murder nor of a felony murder special circumstance. (See *People v. Sanders* (1990) 51 Cal.3d 471, 509-510, 517.)

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[47] The defendant in Sanders was convicted of a separate count of burglary, which was not affected by the ruling setting aside the burglary-murder special circumstance. (See 51 Cal.3d at p. 485.)

The reasoning was explained by this Court as follows:

> "In [*People v.*] *Ireland* [(1969) 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580], we rejected the bootstrap reasoning involved in taking an element of a homicide and using it as the underlying felony in a second degree felony-murder instruction. We conclude that the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation." (*People v. Wilson* (1969) 1 Cal.3d 431, 441, 82 Cal.Rptr. 494, 462 P.2d 22.) We thus concluded that "a burglary based on intent to assault ... cannot support a felony-murder instruction." (*Ibid.*; see also *People v. Smith* (1984) 35 Cal.3d 798, 804, 201 Cal.Rptr. 311, 678 P.2d 886.)

(51 Cal.3d at p. 509.) Thus, *Sanders* involved a question solely of the applicability of a legal theory to the facts determined by the trial court, not to the facts themselves, which were then available to the jury during penalty as bearing upon the "circumstances of the crime" under Penal Code section 190.3, subd. (a). (See 546 U.S. at p. 224.)

Sanders thus involved a situation different from that presented here. If the second special circumstance is invalidated because there is insufficient evidence to sustain a conviction of violation of Penal Code section 288a, subdivision (e), or because the instructions on Count Two erroneously stated the elements of that crime (see Argument VI, *ante*), of course the penalty verdict must be overturned because the jury was allowed to consider an invalid conviction as aggravation. Reliance by the jury on an aggravating factor which "has been revealed to be materially inaccurate" is a violation of the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment and reversible per se. (*Johnson v. Mississippi, supra*, 486 U.S. at p. 590.)

If the second special circumstance is found invalid because of flawed instructions as to the elements of the special circumstance itself, the situation is no different. A special circumstance finding based upon flawed instructions leaves no valid special circumstance finding but also leaves no findings of the elements of that special circumstance. Consideration of a special circumstance which "has been revealed to be materially inaccurate" rather than legally inaccurate as in *Sanders*, is a violation of the Eighth and Fourteenth Amendment and reversible per se. (*Ibid.*)

Thus, while *Sanders* was based upon a situation where special circumstances were invalidated on purely legal bases which did not affect the actual findings upon which the guilt and special circumstance findings were based, in appellant's case, the Second Special Circumstance is invalid due either to an invalid conviction of oral copulation or upon flawed instructions which leave the jury's factual findings on the special circumstance unknown and unknowable. Rather than an invalid special circumstance based upon reliable fact-finding as in *Sanders*, the jury's consideration of the Second Special Circumstance in appellant's case raises an unacceptable and unconstitutional risk that the jury considered evidence and factual "findings" which were not valid factors in the jury's weighing of an appropriate penalty.

Therefore, as stated in the opening brief, the judgment of death must be reversed.

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XIX

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

In response to appellant's argument that reversal is required based on the cumulative effect of the errors in this case (AOB 396-401), respondent simply contends that no errors occurred, or, to the extent that error was committed, appellant has failed to demonstrate prejudice. (RB 343-344.) No reply is therefore necessary to those contentions.

However, respondent also contends that cumulative error should be assessed only by determining "whether it is reasonably probable the jury would have reached a result more favorable to the defendant in [the] absence" of errors found. (RB 343.) The standard respondent relies upon is that set forth in *People v. Watson* (1956) 46 Cal.2d 818 for assessment of state law errors. (46 Cal.2d at pp. 834-837.)

As appellant established in the opening brief, and as argued throughout this brief, taken separately, or in combination, the errors and violations of appellant's constitutional rights deprived appellant of a fair trial, due process and a reliable determination both of guilt, and ultimately, of penalty. (AOB 398; U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Gardner v. Florida* (1977) 430 U.S. 349; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Therefore, while appellant contends that reversal is required even under the *Watson* standard, the standard

applicable here is the federal *Chapman*[48] standard, that reversal is required unless it can be said that the combined effect of all of the errors, of federal constitutional magnitude and otherwise, was harmless beyond a reasonable doubt. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; AOB at 396, 398.) Furthermore, even for state law errors, reversal is required when there is a reasonable possibility the error affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) That standard is "the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705." (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Rogers* (2006) 39 Cal.4th 826, 901.)

It is true that this Court employed the *Watson* standard in *People v. Bunyard* (1988) 45 Cal.3d 1189, which respondent cites (RB 343) but *Bunyard* found reversible error under that standard (45 Cal.3d at p. 1236.) A fortiori, reversal would have been mandated under the stricter federal constitutional *Chapman* standard. *Bunyard* does not, and cannot, stand for the proposition that federal constitutional errors are to be assessed by California's state constitutional standard. Should this Court find errors which it deems non-prejudicial when considered individually, still it must reverse the judgment based on the cumulative effect of those errors, which cumulative effect respondent has not established was harmless beyond a reasonable doubt.

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[48] *Chapman v. California, supra,* 386 U.S. 18

CONCLUSION

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

DATED: March 3, 2008

Respectfully submitted,

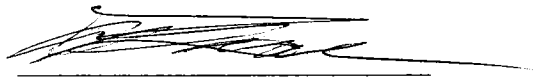
MICHAEL J. HERSEK
State Public Defender

WILLIAM T. LOWE
Deputy State Public Defender

Attorneys for Appellant

Certificate of Counsel
(Cal. Rules of Court, rule 8.630(b)(2)

I, William T. Lowe, am the Deputy State Public Defender assigned to represent appellant Ronnie Dement in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 55,404 words in length.



WILLIAM T. LOWE
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Dement* No. S042660

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; 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:

JEFFREY D. FIRESTONE
Deputy Attorney General
Department of Justice
Office of the Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2250

FRESNO COUNTY SUPERIOR COURT
ATTN: Clerk of the Court
1100 Van Ness
Fresno, CA 93724

RONNIE DALE DEMENT
P.O. Box C-63925
San Quentin, CA 94974

Each said envelope was then, on March 3, 2008, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty that the foregoing is true and correct.

Executed on March 3, 2008, at San Francisco, California.

Glenice Fuller
DECLARANT