SUPREME COURT COPY

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SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) S072316
	)
v.	) (San Diego County
	) Number SCD 114421)
VERONICA UTILIA GONZALES,	)
	) AUTOMATIC APPEAL
Defendant and Appellant.	)
	)

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

Honorable Michael D. Wellington, Trial Judge

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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WORD COUNT CERTIFICATION (Rule 8.630 (b)(2))

Pursuant to California Rules of Court, Rule 8.630 (b)(2), counsel for Veronica Gonzales hereby certifies that this opening brief contains 49,562 words. Because this somewhat exceeds the 47,600 word limit specified in Rule 8.630 (b)(1)(B), permission to file an oversize brief is being sought pursuant to Rule 8.630 (b)(5)

COMMENTS ON RESPONDENT'S STATEMENT OF THE FACTS

1. Introduction

Throughout Respondent's Statement of the Facts, Respondent has cherry-picked fragments of sentences, ignoring the rest of the sentence and important surrounding context, in order to present the facts in a highly

overstated manner that makes Veronica Gonzales appear to be as despicable as possible. Thus, Respondent continues to prosecute this case in the same manner as was done in the trial court. Nobody could or would dispute the fact that the victim in this case was treated badly during her months in the Gonzales household, and that her death was truly horrible. On the other hand, no person who fairly and honestly reviews all of the testimony in the trial record can conclude with any reasonable degree of confidence whether the treatment of Genny Rojas should be blamed on Veronica Gonzales or on Ivan Gonzales or on both. Respondent seeks instead to secure the execution of Veronica Gonzales by grasping at every possible means to destroy the character of this unfortunate young woman in an apparent attempt to leave reviewers comfortable in blaming her for this tragic crime despite an evidentiary record that leaves a large void where the truth should be found.

A number of examples of Respondent's repeated efforts to unfairly slant the evidence will be summarized in this section, before replying individually to the various arguments offered by Respondent.

2. Respondent Infers That Veronica Gonzales's Drug Use Was the Only Reason the Gonzales Residence Was Unclean, But the Evidence Clearly Demonstrates the True Reasons Were the Fact That She Was Overwhelmed by Being Responsible for the Care and Feeding of Seven Children Under the Age of Nine, With No Help from Her Unemployed Husband

Respondent begins by describing the dirty state of the small apartment in which Veronica Gonzales lived with her husband, their six children, and her niece, Genny Rojas. Placing the blame squarely on Veronica Gonzales in the worst possible way, Respondent states, "Gonzales claimed she could not clean the apartment because she was using drugs and was 'pretty out of it.'" (RB 3.) Respondent leaves the impression that Veronica Gonzales freely admitted to being in a permanent drug stupor that was the sole reason for the filthy condition of the apartment. Respondent ignores the context, in which Veronica Gonzales acknowledged drug use, while simultaneously offering a more complete picture of the hopeless circumstances in which she found herself.

At the first transcript page cited by Respondent, Veronica Gonzales was asked about the dirty state of her apartment and her actual response was:

> Things were really bad then. it -- everything was out of control. The drugs were more, the stress was more. I -- I -- I couldn't deal with it no more. Meaning I -- I was just -- I was tired. (RT 65:7455.)

The prosecutor asked her to elaborate and she explained further why she was unable to keep her home clean:

> Because I was on drugs. Because I -- I was – I couldn't really -- my mind wasn't there anymore. I was trying to deal with Ivan more and the things that were going on with him. (RT 65:7455-7456.)

The prosecutor soon asked why she was unable to keep the family's clothing and bedding clean and she explained:

> I wasn't allowed to go to the laundromat. Ivan would not allow me to go. The money wasn't there. And when it was, I still couldn't go. I had to wash clothes in the bathtub. I had to wash them by hand in the bathtub. And I couldn't -- I couldn't do it all. (RT 65:7457.)

The prosecutor returned to this theme later in his cross-examination, asking Veronica Gonzales again why she was unable to keep the apartment clean. Ms. Gonzales responded:

> At that time, I was pretty out of it. I mean, I was trying to deal with Ivan and trying to help Genny and put the kids and then, with the crystal, I was pretty much out of it. I mean, I wasn't thinking about those things; I was thinking about everything else. (RT 68:8091.)

The prosecutor pressed for more information and Veronica Gonzales responded:

> Well, I mean, through all the time that Genny was hurt, I was focusing more on that and keeping Ivan away and keeping him happy when the kids were out of school; so I was fo-

> cusing on those things more than -- ... -- more than cleaning. (RB 68:8092.)

In sum, a fair review of Veronica Gonzales' responses shows that she did not simply blame her inability to keep her home clean on her drug use. Instead, she presented a picture of being overwhelmed by trying to care for seven young children and an unemployed husband who was at home all the time, but did nothing to help, all while expecting her to be available at all times to tend to his needs.

Genny Rojas died in mid-1995. At that time, Veronica Gonzales was not yet 26, but was responsible for the care of seven children under the age of 8-1/2. (RT 65:7340-7342.) As explained in detail in the statement of the facts in the opening brief, Veronica's drug use began at a time when her husband Ivan was working long hours and used crystal meth to keep himself awake. He started using more and more of it and began bringing it home for Veronica to use with him. He wanted her to be able to keep up with him and to still be awake for sex when she was finished feeding and bathing the children and putting them to bed. (See AOB 41.)

Thus, it was no surprise that Veronica became increasingly tired and stressed, and could no longer deal with caring for all the children and keeping the home clean. (AOB 42-43.) Respondent may feel entitled to cherry-pick fragments of Veronica Gonzales' testimony.[1] However, after a fair

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[1] It is true that the rules of appellate review of sufficiency of the evidence allow for viewing the evidence in the light most favorable to

(Continued on next page.)

review of all of the evidence, all that can truly be said is that Veronica

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(Continued from last page.)

the verdict reached below. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 61 L.Ed.2d 560, 573.) However, this Court has recognized that this is not an absolute rule, but must instead be tempered by logic. Quoting with approval from former Chief Justice Roger Traynor's insightful volume, *The Riddle of Harmless Error*, this Court explained in *People v. Johnson* (1980) 26 Cal.3d 557, 577-578:

> A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment, however, risks misleading the court into abdicating its duty to appraise the whole record. As Chief Justice Traynor explained, the "seemingly sensible" substantial evidence rule may be distorted in this fashion, to take "some strange twists." "Occasionally," he observes, "an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law." (Traynor, *The Riddle of Harmless Error* (1969) p. 27.) (Fns. omitted.)

Gonzales was trapped in an impossible situation, and there is no evidence whatsoever to contradict her quite reasonable explanation of her inability to keep the family home clean. Respondent can speculate that Veronica Gonzales may not have been fully truthful in her description of her circumstances, but Respondent can point to no evidence to rebut her explanation.

Drug use was a part of the problem, but the stress and overwhelming responsibility of taking care of a small apartment filled with young children and an unemployed husband, who did nothing to help and refused to pay for basic cleaning materials, all contributed to a situation that would have remained deplorable even if she had not used drugs at all. Furthermore, it is not at all surprising that a young woman faced with such overwhelming stress would turn to drug use as the only available means of temporary escape.

3. Respondent Relies on a Phrase that Was Clearly Not Meant to Be Taken Literally to Conclude There Was No Food for the Seven Children on the Day Genny Rojas Died When Undisputed Evidence Established the Children Had Cereal for Breakfast, and Testimony from a Police Officer Establishes Conclusively that Chicken and Beans Was Being Prepared for Dinner

Next, Respondent states, "There was no food in the house for the children on the day Genny was murdered except bread that Ivan bought when he went to the store to buy beer after Genny was fatally burned." (RB 4; see also RB 34.) It is true that when the prosecutor asked what was hap-

pening the morning of the day that Genny died, Veronica Gonzales said it was stressful, and when asked what she meant, she said "there was no food for the kids," and added there were debts to pay and a lot of pressure. (RT 66:7641.) However, it is clear she meant that in the sense that there were limited options available for feeding the kids.

This meaning is clear because Veronica Gonzales also said that the children had cereal for breakfast that morning, as soon as they were awake. (RT 66:7650-7651.) Around noon, Ms. Gonzales told her husband they needed more food, but he was not yet ready to go to the store. (RT 66:7653.) However, sometime that afternoon Ivan Gonzales did go to the store; according to the owner of the store, he bought milk, more cereal, and cookies for the kids. (RT 59:6671-6672.) He may have also bought ramen noodle soup. (RT 66:7669.)

Also, Veronica Gonzales described the dinner she started to prepare for the family that night, which included a little pot of beans and a big pot of chicken. (RT 66:7678; 67:8022-8023.) Indeed, the prosecutor below even introduced a photo of the stove in the family kitchen, showing the pots of food on the burners. (RT 66:7678; People's Exhibit #30-B.) The chicken had been in the freezer since a shopping trip that had preceded the day Genny died. (RT 67:8022-8023.) One of the police officers that arrived at the scene soon after Genny's death verified that there was a pot of beans and another larger pot of food on the stove, and that it appeared the food had been cooked, but not yet served. (RT 57:6238.) Respondent simply ig-

nores these details, leaving an indisputably false picture of a home with drugs for the adults but no food for the children.

4. Respondent's Claim That Genny Rojas Lingered for at Least Six Hours Between Receiving Her Fatal Burns and Her Death is Contrary to Undisputed Evidence and the Only Fair Conclusion Is That the Actual Interval Is Simply Unknown, But Was Far More Likely Less Than an Hour Rather Than More Than Six Hours

Respondent also tries to paint an impossibly false picture of how much time passed between the time Genny was scalded in the tub and the time that Veronica Gonzales sought aid, once again cherry-picking isolated bits of testimony taken out of context. Respondent states that Genny went into shock 1-3 hours after she was immersed in hot water, that after she went into shock it took "**at least** three hours for Genny to die," and that she died about 6 hours after the immersion. (RB 9; emphasis added.) In fact, at the very pages cited by Respondent, Dr. Eisele, the medical examiner, stated that Genny probably started to go into shock immediately after the immersion, and she died "some hours later." (RT 56:5964.) He did not state that she died six hours after immersion; instead he it could possibly have been as long as six hours. (RT 56:6035.)

The **prosecution** below also presented the testimony of a very experienced pediatrician, Dr. Feldman, who explained that once a child goes into shock, s/he can deteriorate much faster than an adult would. He conceded it was possible that Genny died within one hour after she was

scalded. (RT 59:6652.) A defense expert witness (a very experienced pathologist) believed Genny probably died within an hour after she suffered the burns, since a longer period would have resulted in fluid in her lungs, which was not present, and tissue changes which had not occurred. (RT 62:6992-6993, 7006; see also 62:6980-6986.)

Aside from the medical testimony that was much less certain than Respondent indicates, there was ample other evidence to make it quite clear that the time between immersion and death was much shorter than six hours. When the first officers arrived at the scene at 9:20 PM, Genny was clearly dead and was "very cold" to the touch. (RT 56:6065, 6070.) Sometime close to 8:00 PM, neighbors heard a child's cry and the sound of something hitting a wall very hard. (RT 60:6724-6726, 6730; 72:8985-8986.) This was very likely the point when Genny received a head injury that occurred some significant time **prior** to her immersion in the scalding water. (RT 56:5924-5926; 59:6593.)

Thus, it is highly likely that death occurred well under an hour after the scalding, and perhaps very quickly after the scalding. Undisputed evidence about the events during the afternoon and early evening of that tragic day is simply not consistent with the possibility that Genny was fatally scalded before 3 PM and lingered for six hours before dying. (See AOB 59-63.) Also, as noted above, undisputed evidence, including a confirmation by the first officer to arrive at the scene, showed that Veronica Gonzales cooked dinner for her family that evening, but had not yet served it. That is

inconsistent with Respondent's claim that Genny was fatally scalded before 3:00 PM and lingered for six hours, but it is very consistent with Veronica Gonzales' testimony that the burns occurred during the evening hours.

5. Respondent's Implication That Veronica Gonzales Confessed to Causing Burns on Genny Rojas' Face By Pressing a Blow Dryer to Her Face Is Simply Unsupported By the Evidence

Respondent entitles a section of the statement of the facts, "Facial injuries caused by the blow dryer." (RB 12.) The first sentence of the section states, "Gonzales admitted she put the blow dryer on Genny's face but claimed she did so after her fatal bath to blow some air on her. (14 CT 3101, 3103.)" (RB 12.) The rest of that paragraph describes in considerable detail the burn injuries on Genny Rojas' cheeks that were apparently caused by the grid area of a hot blow dryer being pressed against her cheeks.

In this manner, Respondent unmistakably implies that Veronica Gonzales flatly admitted that she had caused these burn injuries, which apparently occurred close in time to the bathtub scalding incident. The truth is far different.

The pages cited by Respondent refer to portions of a police interview of Veronica Gonzales that occurred in the evening of the third day following Genny Rojas' death. (See CT 14:3039, ll. 6-7.) As explained in detail at AOB 101-115 (with full citation to the record), the officers sought every possible detail about what had occurred in the Gonzales household

from the time the family members awoke on the day Genny died, through the events following Genny's fatal injuries. As explained fully throughout the opening brief, this interview occurred at a time when Veronica Gonzales was still being protective of her husband, while denying that she was directly involved in inflicting any of the serious injuries that Genny Rojas had suffered. In later trial testimony, she acknowledged that much of what she told the officers was untrue, and she explained her reasons for the responses she gave during the interview.

At the pages cited by Respondent, after 95 minutes of interviewing (see CT 13:3101, l. 7), the officers asked what Ms. Gonzales did after taking Genny Rojas out of the bathtub. She responded incoherently, "Well, like I said I was in the bedroom, in the bedroom while he was standing there trying to you know I would turn it on, you know and then (making noise) you know. Try to blow some air. I did. I put the blow dryer on her. I'm sorry I didn't say. But yeah." (CT 14:3101, ll. 24-27.)

Understandably seeking clarification, the officer asked, "What part of the blow dryer did you put on her?" (CT 14:3101, l. 28.) Ms. Gonzales responded, "No. The blow (making noise)." (CT 14:3102, l.1.) In further responses, she made clear that the only aspect of the blow dryer that made contact with Genny Rojas' face was the air coming out of the dryer. The officer expressly asked if any other part of the dryer touched Genny and Ms. Gonzales responded, "No." (CT 14:3102, ll. 2-5.)

The officer continued, telling Ms. Gonzales flatly that her response was untrue. In further questioning, Ms. Gonzales repeatedly said she only blew the air on Genny, while Ivan Gonzales was supposedly looking for a fan. (CT 14:3102-3103.) It is quite clear that she was describing a misguided effort to help Genny Rojas by blowing air on her face, using the lowest setting of the blow dryer fan while waiting for Ivan to find a better fan. She explained, "Well, I thought I would give her some air." (CT 14:3103, l. 10.) As the officer continued to press the point, asking if the front of the dryer ever touched Genny's face, Ms. Gonzales responded, "What I'm saying maybe I did you know." (CT 14:3103, l. 19.)

The officer asked what she meant and she elaborated: "Maybe I did touch her. You know but I went (making noise). No. What I did was blow in her face. I was." (CT 14:3103, ll 21-22.) The officer again asked if it was possible the front of the blow dryer touched Genny's face and Ms. Gonzales responded, "Maybe it has, but I wouldn't do you know like, like that." (CT 14:3103, l. 25.)

Thus, while the transcript of the interview shows that Ms. Gonzales' responses contained many sentence fragments and some amount of ambiguity, it is clear that all she said was that she was trying to help Genny by blowing air on her face, that she never intentionally touched Genny's face with the surface of the blow dryer, that she was not even aware of accidentally causing contact between the metal surface and Genny's face, but that she could not rule out the possibility that some accidental contact occurred.

The evidence simply provides no support for Respondent's conclusory statement, devoid of context, that Veronica Gonzales "admitted" putting the blow dryer on Genny's face.

6. Respondent Greatly Overstates the Severity of the Injuries to Genny Rojas' Ears

In describing various facial injuries suffered by Genny by causes other than burn injuries, Respondent states flatly, "There was no skin on her ears. (56 RT 5919; 67 RT 7940, 7943.)" (RB 14.) In fact, the latter two pages cited refer to testimony by Ms. Gonzales about the bonnet she put on Genny in an attempt to keep medication on her head and to prevent her from scratching her head. She conceded that the bonnet may have been too tight and could have rubbed against Genny's skin, causing abrasions forming a ring that circled portions of Genny's ears and the bridge of her nose. (RT 67:7940, 7943.) Ms. Gonzales conceded that Genny was missing skin on both ears, but it is quite apparent that the discussion refers to **some** skin missing from the area of her ears, and not to any claim that there was "no skin on her ears." (RB 14.)

The first of the three pages cited by Respondent, RT 56:5919, provides no further help for Respondent's overstated claim. That is a portion of the testimony of Dr. John Eisele, the medical examiner who performed an autopsy on the body of Genny Rojas. He stated that skin had been worn away from **portions** of the **outer rim** of the ear, but he never said that there was "no skin on her ears."

Ms. Gonzales makes no claim that the injuries to Genny Rojas were minor. Indeed, they were serious. But this is one more example of Respondent's unsupported attempt to make these injuries appear significantly more serious and disturbing than they actually were.

7. There is No Evidence That Genny Rojas Was Ever Hung on a Hook in the Closet

Respondent states that Veronica Gonzales admitted that Genny Rojas "was hung in the closet by a hook." (RB 15.) On the next page, Respondent ups the ante, claiming that Ms. Gonzales "explained that Genny was hung in the closet from the hook by her neck, ..." (RB 16.) Respondent goes on to describe blood patterns indicating Genny had been "suspended from the hook ..." (RB 16.) Respondent adds that there were injuries to Genny's neck "consistent with being hung by her neck." (RB 16.)

These descriptions conjure up images of a child with some type of ligature around her neck, left suspended from a hook. Of course, this is absurd, as it would cause death very quickly. Indeed, even the People's own witness, the doctor who performed the autopsy, testified, "If she was being hung so that her weight was suspended, yes, I would expect her to die." (RT 56:5940.)

Respondent seizes a theme started by the police who interviewed Veronica Gonzales and continued by the prosecutor at trial, trying to evoke images of a hanging that simply never occurred. First, the police officer who interviewed Ms. Gonzales repeatedly asked her about Genny being

hung from a hook in the closet. Contrary to Respondent's claim that Ms. Gonzales admitted that such a hanging occurred, the record shows precisely the opposite.

During the police interview, the officer asked why Genny was regularly forced to spend time in the closet and Ms. Gonzales explained that Ivan Gonzales put her in the closet to prevent her from rubbing her sore-covered head on the hard surfaces of various items of furniture. (CT 13:2979.) The officer returned to the subject of the closet in a subsequent interview, and Ms. Gonzales said that the sessions in the closet went on for about a week. (CT 14:3117.) On some of the occasions, Genny's hands were tied, in another misguided effort to keep her from scratching her head. (CT 14:3118.)

Soon the officer asked about the makeshift hanger in the closet and Ms. Gonzales said that was generally used as a place to hang her underclothes. (CT 14:3120.) The officer asked what else the hanger was used for and Ms. Gonzales explained that on one occasion "somebody hanged her from there." However, Ms. Gonzales **immediately** added, "Not hang her literally you know ..." (CT 14:3120.) She explained further that Genny had once cut her head on a box in the closet. To prevent that from happening again, a shirt was used to restrain her arms and hold them up, looped around the hook above her head to keep her from falling. (CT 14:3121-3123.)

The officer couldn't fully understand Ms. Gonzales' inarticulate description, so he asked her to explain again. She again explained that the purpose was to keep her standing, so she would not fall. Out of the blue, the officer asked, "Was it for punishment?" Ms. Gonzales responded, "Oh, in a way." (CT 14: 3123.) She continued on, making it clear the real intent was to prevent her from falling. (CT 14:3123-3124.) She explained again, "It wasn't hanging her." Indeed, when Ms. Gonzales called Genny when it was time to eat, Genny could jump up and release herself from the hook, so she could go eat. (CT 14:3124.)

The officer next asked "How many times was she hung up on, was she hung up on that hook?" (CT 14:3124.) Veronica Gonzales immediately replied, "Not hung-hung, Not like that." (CT 14:3124.) Soon Ms. Gonzales explained that on one occasion after Genny had been required to stay in the closet for an extended period with her hands restrained, the adults discovered that the shirt used to restrain the girl had become twisted around her neck and had left marks on her neck. (CT 14:3126.) Both adults realized there was a danger Genny could choke and decided not to do that anymore. (CT 14:3128-3129.)

No claim is being made that the methods used to control Genny's behavior were in any way appropriate. Instead, the point being made is that, based on these responses during a police interview, it is a gross overstatement for Respondent to claim that Ms. Gonzales "admitted" Genny was hung in the closet by a hook. Every time the term "hang" or "hung" was

used, Ms. Gonzales immediately explained that was not an appropriate description of what had occurred. She never said that Genny was suspended from the hook in any way, only that the hook was used to help Genny remain in a standing position so she would not fall against the box in the closet.

Nonetheless, this time referring to Veronica Gonzales' trial testimony, Respondent claims again that Ms. Gonzales "explained that Genny was hung in the closet from the hook by her neck, ..." (RB 16.) Once again, the pages cited by Respondent fail to support this highly exaggerated claim. In her testimony, Ms. Gonzales explained that it was her husband who put Genny in the closet. Ms. Gonzales was not present when he put Genny there, but she acknowledged that she did see Genny standing on the box in the closet. (RT 66:7605-7607.) Genny was crying and said she was tired and wanted to get down. (RT 66:7612.)

Ms. Gonzales described seeing a shirt around Genny's stomach. (RT 66:7612-7613.) The shirt had strings hanging down, tied around Genny's waist. (RT 66:7614.) The shirt was also hooked to the pole overhead. (RT 66:7615.) The shirt was holding her in place, but her feet were still on the box. There was nothing around Genny's neck on that occasion. (RT 66:7616.)

On another occasion, Ms. Gonzales heard Genny crying and found her standing on the box saying she was in pain. This was the occasion when Genny's neck was red, possibly from the shirt pulling or pushing against

her. (RT 66:7624.) Ms. Gonzales' reaction was to start yelling at Ivan, cussing him out, asking him how he could do that to Genny. (RT 66:7625.) While yelling at Ivan, Ms. Gonzales released Genny from her bindings. (RT 66:7626.) After that, Genny was never again restrained with her arms bound to the hook. (RT 66:7626-7627.)

Once again, it is a gross overstatement to summarize this testimony with a statement that Veronica Gonzales explained that Genny was hung in the closet from the hook by her neck. Instead. Ms. Gonzales explained only that Genny was required by Ivan Gonzales to stand in the closet with a shirt that was looped over the hook in order to prevent her from falling and hurting herself. On one occasion the shirt became twisted and caused a serious red mark around Genny's neck, and as soon as that was discovered, Genny was released and was never again left in that position.

Nonetheless, the prosecutor returned to the hanging theme in later cross-examination. He referred to the time Genny "was hung by her neck," "hanging from this hook." (RT 68:8003.) Ms. Gonzales immediately corrected this description, saying that the cloth that was around the metal bar was also around her neck. (RT 68:8003.)

Respondent ignores all of this important context and goes on to state again that Genny was "suspended from the hook" and had "injuries to her neck consistent with being hung by her neck." (RB 16.) Just as on the prior occasions, the testimony at the cited pages does not support these conclusions in any way.

The first page cited by respondent refers to testimony by Brian Kennedy, a sergeant with the Sacramento County Sheriff's Office who moonlighted as a private consultant in crime scene reconstruction. (See RT 58:6382.) During Mr. Kennedy's examination, the prosecutor asked whether the observations he had made of the closet were consistent with a child of Genny's size "hanging from her neck..." (RT 58:6409.) The witness responded, "That's feasible." (RT 58:6409.) But the prosecutor immediately went on to clarify what he meant, asking if the observations of the closet were consistent with the victim's head being at the same level as the bottom of the hook. The officer said, "Yes, it is." (RT 58:6409.) It is apparent that if Genny's head was at the level of the bottom of the hook, she could not have been "hanging" from her neck.

Still determined to cast this sad event as a hanging, the prosecutor asked whether it appeared that there had been "more than one hang." (RT 58:6410.) The witness did not accept this description, but instead asked the prosecutor whether he meant to ask whether it appeared there had been "more than one incident of suspending the child in this location..." (RT 58:6410.) It is true the witness at one point used the phrase "suspended off of that hook," (RT 58:6410), but there is nothing whatsoever in the witness' description of his observations to support a conclusion that Genny was suspended with her feet in the air or was hung from the hook. Instead, what he described was evidence that the child had been bound around the hook, with her head at the same level as the hook.

Continuing in this effort to avoid all context that gives meaning to words or phrases, and choosing instead to grasp at words or phrases that convey the most disturbing impressions with no regard for what was actually said, Respondent sums up testimony by the doctor who performed the autopsy by stating, "Genny had extensive injuries to her neck consistent with being hung by her neck." (RB 16.)

However, the doctor's actual testimony was that he saw marks around her neck that could have resulted from something tied around her neck, rubbing against the skin. (RT 56:5940.) It was the prosecutor who introduced "hanging" terminology, asking if the doctor had ever seen injuries resulting from hanging. The doctor responded that he had seen such injuries on many occasions, since hanging was a common method of suicide. (RT 56:5938.) The prosecutor asked if the injuries on Genny's neck were consistent with being hung by the neck, and the doctor did respond affirmatively. (RT 56:5938-5939.) However, he immediately explained that, while there were some consistent aspects in the injuries the doctor had seen on people who had committed suicide by hanging and some of the markings on Genny's neck, there were also some **inconsistent aspects**, including markings that were more consistent with a long-term pressure around the neck. (RT 56:5939-5940.)

Indeed soon afterward, the prosecutor asked whether the witness would expect a four-year old who was hung by the neck to die. The doctor initially said, "not necessarily," but then **immediately** added that if she was

hung so her weight was suspended, he would expect her to die. But if she had a ligature around her neck and was still able to support herself with her feet, that would be consistent with the injuries around her neck. (RT 56:5940.)

In sum, it was the prosecutor who introduced "hanging" terminology. While the doctor sometimes fell into using words such as "hung" or "suspended," it is abundantly clear that he was using such terms loosely, and that what he meant was far from what is commonly understood as being hung or suspended. Instead, what he unquestionably meant was that a ligature that ended up around Genny' neck had resulted in rubbing injuries.

Once again, this is not an appropriate way to discipline a child, but it is by no means evidence that Genny was hung or suspended from a hook or by her neck. Instead, it is clear that could not have occurred, as it would have resulted in death. Also, of course, none of this overstated description helps determine whether this treatment of Genny Rojas was the fault of Ivan Gonzales or Veronica Gonzales or both of them.

8. Ivan Gonzales, Jr. Had No Personal Knowledge Regarding Any Loss of Genny Rojas' Hair Caused by Burning

The many difficulties pertaining to the various interviews of Ivan Gonzales, Jr., and the many inconsistencies in the statements made by this boy who was 8 years old when Genny Rojas died, were set forth in detail in Appellant's Opening Brief, at pp. 125-155. Respondent chooses to ignore

all of this and instead feels free to grab any isolated fragment of a sentence uttered by this boy and offer it to this Court as established fact. For all the reasons set forth in the opening brief, this is disingenuous at best.

But even putting aside all of the problems with Ivan, Jr.'s many conflicting statements, discussed in the opening brief, Respondent's reliance on fragments of what Ivan, Jr. said is still unfair. For example, Respondent states, "Ivan Jr. explained that Genny lost her hair when Gonzales burned her and pulled her hair out. (15 CT 3399.)" (RB 18.) What actually appears at the page cited by Respondent does not support that statement.

During the preliminary examination, Ivan, Jr. was asked by the prosecutor if he had ever seen Genny without a lot of hair. He said he had, and he was then asked if he knew how Genny lost some hair. It is true he initially responded, "When my mom had burned her, it would come off, and our mom would pull her hair." (CT 15:3399.) However, the very next question asked if he had actually seen his parents burn Genny's head and he responded, "No." (CT 15:3399.) Further responses were limited to claims that his parents had pulled out some of Genny's hair on a number of occasions. (CT 15:3399.)

On cross-examination by defense counsel during this same testimony, Ivan, Jr. radically changed his story. He said the Genny lost her hair "from the hot water and from our mom and dad pulling her hair." (CT 15:3461.) He was asked how many times he had seen his parents pull Genny's hair and he replied, "a couple of times." (CT 15:3461-3462.) But

when asked how many times he had seen his mother pull Genny's hair, he said he did not know. He was asked how many times he had seen his father pull Genny's hair and he responded, "A couple of times." (CT 15:3462.) He was next asked if he remembered ever seeing his mother pull Genny's hair and he responded, "No." (CT 15:3462.)

Thus, this testimony demonstrated a lack of personal knowledge of any burning by Ivan or Veronica Gonzales. Furthermore, even in regard to pulling hair out, the questions and answers were too superficial to allow any determination whether young Ivan, Jr. had truly witnessed such events, or whether he had merely seen his mother comb Genny's lice-infested hair, and was alarmed to see significant amounts of hair come off in the comb. Also, when finally pinned down in regard to what he had seen his mother do and what he had seen his father do, he conceded that he **never** saw his mother pull Genny's hair out, only his father.

The isolated statement relied on by Respondent becomes even less significant when viewed in the context of Ivan, Jr.'s other statements in regard to Genny's hair loss. In an early police interview, Ivan, Jr. said that Genny scratched her own head when she had sores, and her hair came out. He also said she rubbed her head on the wall. He was asked if she ever got burned on her head and he said "No." (CT 15:3307-3308.) In another interview, Ivan, Jr. again said that both of his parents pulled Genny's hair out, but he also said that they cut all her skin off with a knife, which was clearly false. (See detailed description at AOB 139-140.)

All of this is typical for reportage by an 8-year-old. Cherry-picking isolated aspects and presenting them as established fact is misleading at best, and deceptive at worst.

9. Ivan, Jr.'s Claim That His Parents Tortured Genny Rojas Was Immediately Followed By a More Detailed Explanation Which Was Patently Untrue

Respondent states that Ivan, Jr. "explained that his parents were torturing Genny..." (RB 40.) It is true that at the page cited by Respondent the boy said that his parents were torturing Genny. (CT 15:3277.) However, in the very next question, he was asked to describe what he meant when he said his parents were torturing Genny. He responded, "They were hitting her, getting her skin and cutting it off." (CT 15:3277.) The very next question sought more detail about what he meant by getting her skin and cutting it off. The boy replied, "They would get it, like that, then just get a knife and cut it off, and then they would put a big mark right here, and you could see her meat and her blood." (CT 15:3277-3278.) He added they did this on her face and everywhere. (CT 15:3278.)

The autopsy doctor and other medical witnesses described a great number of cuts, bruises, and burn injuries observed on Genny Rojas' body. However, not one of the described injuries were remotely consistent with Ivan, Jr.'s description of his parents cutting off Genny's skin. This description by Ivan, Jr. was patently untrue, and it was his only description of what

he meant when he said his parents tortured Genny Rojas. Thus, there is no factual support left for Respondent's bare statement that Ivan, Jr. explained that his parents tortured Genny.

Reply to Respondent's Legal Arguments

I. THERE WAS NO LEGITIMATE SUPPORT FOR ANY CLAIM THAT VERONICA GONZALES SHARED ANY DESIRE THAT HER HUSBAND MAY HAVE HAD FOR EACH TO BLAME THE OTHER FOR GENNY'S DEATH, AND MANY ERRORS WERE COMMITTED BY THE TRIAL COURT AND THE PROSECUTOR IN THE EFFORT TO FALSELY IMPLY A CONSPIRACY THAT EXISTED ONLY IN THE MIND OF THE PROSECUTOR; COMPOUNDING THE IMPACT OF THESE ERRORS, THE ERRONEOUS ORDER THAT VERONICA GONZALES BE EXAMINED BY A SPECIFIC PROSECUTION PSYCHIATRIST, AND THE COMMENT ON HER FAILURE TO COOPERATE, VIOLATED HER CONSTITUTIONAL RIGHTS AND CANNOT BE DEEMED HARMLESS

A. INTRODUCTION

Argument I covers a number of distinct, but closely related, errors that struck at the heart of the defense and allowed the prosecutor convey a speculative theory that never supported by the evidence. It will first be shown that the prosecutor was began asking improper questions with no initial defense objection, but continued with his improper line even after defense objections were made and sustained. This allowed the prosecutor to successfully imply that Veronica and Ivan Gonzales had conspired to blame each other for Genny Rojas' death, in a callous effort to both escape punishment. As will be shown, no evidence supported this theory, but the jury was surely left with the opposite impression. The error was compounded when the prosecutor asked an admittedly unsupported hypothetical question of an expert witness, again implying the devastating theory that was never

actually proved. The damage escalated when the prosecutor asked a defense expert about inadmissible hearsay that seemed to support the prosecutor's unproven theory, but was once again based on assumed facts that were not in evidence.

Over vehement defense objection, the prosecutor was erroneously permitted to hire an expert whose sole purpose was to debunk whatever the defense experts might have to say. While the prosecutor may have had the right to hire such an expert, he had no right to force Veronica Gonzales to submit to an examination by that expert, or by a second more objective expert, but the trial court made such an order anyway. When Veronica Gonzales properly refused to cooperate with the first expert, the court compounded the errors by instructing the jury that the lack of cooperation could be considered against her. All of these erroneous rulings allowed the prosecutor to fortify his implied, but factually unsupported, theory that the defendant and her separately tried husband had conspired to hide the truth from the jury. Compounding these errors even more, the trial court erroneously disallowed defense evidence offered to demonstrate the falsity of the prosecutor's implied facts.

B. The Prosecutor Presented Highly Prejudicial Inadmissible Evidence By Implying Unproved Facts That Sought to Fill the Evidentiary Gap In His Speculative Theory of the Case

In the Opening Brief, it was shown that the prosecutor had a theory that Veronica Gonzales and her husband, Ivan, had conspired to each blame the other for Genny Rojas' death, in the hope that each could gain an acquittal in their separate trials, leaving nobody to be held responsible. The only problem with the prosecutor's theory was that he had no evidence whatsoever to support it. He relied on ambiguous notations in a letter that Ivan Gonzales wrote to his wife, which could be interpreted as meaning Ivan might have believed they should blame each other. However, there was no evidence whatsoever that Veronica Gonzales responded to Ivan's suggestion in any way, and there was no evidence that she shared whatever intent he may have had.

In an obvious effort to fill the gap, the prosecutor first asked Veronica Gonzales a series of questions regarding what she thought Ivan Gonzales' notations meant. Unsatisfied with her responses, he then filled the gap by phrasing questions in a manner that told the jurors what he wanted them to hear without regard to how or whether they were answered. The prosecutor first asked, "Well, you knew that Ivan Gonzales claimed he was a battered man, didn't you?" (RT 67:7866-7867.) Ms. Gonzales correctly responded that he had never testified to that; indeed he had never testified at all. The prosecutor then continued his effort to tell the jury what he could

not prove through the testimony of any witness, asking, "He didn't testify to it, but he claimed that, didn't he?" (RT 67:7866-7867.) At this point the defense objected, and the objection was sustained, with the judge telling the prosecutor "... we shouldn't go through with that line." (RT 67:7867.)

Ignoring the trial court's direct statement, the prosecutor made sure the jury understood his point, asking, "Well, were you aware that was his defense?" (RT 67:7867; see also AOB 229-230.) Another defense objection was sustained, with the court explaining that Ivan Gonzales had said nothing in his own trial, and that any knowledge Veronica Gonzales might have about what Ivan's attorneys decided to do did not have any evident relevance in the present trial. (RT 67:7867.)

Respondent sets forth one possible interpretation of Ivan Gonzales' letter, finding it "clear" that he was telling his wife that she could shift the blame to him. (RB 52.) Respondent ignores the fact that Ivan Gonzales may well have been acknowledging that he was responsible for the injuries to Genny Rojas, and telling his wife that he would understand if she **truthfully** placed the blame on him at her own trial. Furthermore, even if Ivan Gonzales' letter meant precisely what Respondent believes it meant, Respondent has still failed to show how Ivan's state of mind, long after he and his wife were arrested and charged in this case, provides any probative evidence regarding Veronica Gonzales' state of mind. Ivan's possible beliefs about trial strategy were simply irrelevant in Veronica Gonzales' trial.

Respondent highlights the fact that it was Veronica Gonzales' defense team that initially offered the letters in evidence. (RB 52.) But the purpose for which the defense team offered the letters was to demonstrate Ivan's continuing efforts to control his wife, even to the point of telling her to fire her attorney because Ivan did not like what he believed her defense team was planning. This was proper corroboration of the defense claim that Ivan Gonzales had always controlled the behavior of his wife. But Respondent has pointed to no evidence that Veronica Gonzales ever agreed with, or abided by, Ivan's possible suggestion that they should each blame the other. The trial prosecutor's speculative theory remains unproved.

Nonetheless, Respondent concludes that Ivan's letter supports a reasonable inference that Ivan and Veronica Gonzales decided to blame each other for the murder of Genny Rojas. (RB 57.) Again, Respondent offers no explanation of how this letter supports any inference that **Veronica** Gonzales decided anything at all. At most, the letter could indicate that Ivan decided the best course was to blame each other. However, anything Ivan decided has no relevance in Veronica's trial.

It is true that Veronica Gonzales "decided" to defend herself at trial by blaming Ivan for Genny's death. She also "decided" to offer evidence that she suffered the effects of battered spouse's syndrome, in order to provide the jury with an explanation of why she failed to protect Genny, and why she initially lied to the police and gave statements that appeared designed to protect Ivan Gonzales as well as herself. The issue for the present

jury was whether the defense offered by Veronica Gonzales should be accepted or not. Whatever Ivan may have meant in his letter to Veronica gives the jury no information whatsoever to help decide whether Veronica "decided" to offer the defense that she offered because it was true, or whether she "decided" to offer it because she agreed with Ivan that the best course was to blame each other.

If there had been a letter from Veronica to Ivan saying that his suggestions were great ideas, then the prosecutor might have had a basis to argue that the evidence showed that the defense was contrived. But there was no such letter. Lacking any affirmative proof that the defense was contrived, the prosecutor simply decided to use questions to imply what he wanted the jury to believe.

Despite Respondent's claim of a lack of clarity (see RB 57-58, esp. fn. 22 at p. 58), Veronica Gonzales' first claim of error is stated clearly in he argument subheading at AOB 229: "The Prosecutor Committed Intentional Misconduct in Questioning Veronica Gonzales about Any Hearsay Knowledge She Might Have of Ivan Gonzales' Defense, and in Strongly Insinuating Facts He Knew Were Untrue, Continuing After the Trial Court Repeatedly Sustained Defense Objections, and the Trial Court Then Erred in Failing to Grant a Mistrial or Any Other Meaningful Relief, All Resulting in Irreparable Prejudice to Veronica Gonzales." (AOB 229.)

Reaching the merits, Respondent recognizes, "a prosecutor 'may not examine a witness solely to imply or insinuate the truth of the facts about

which questions are posed.' (*People v. Young*, *supra*, 34 Cal.4th at pp. 1149, 1186; *People v. Visciotti*, *supra*, 2 Cal.4th at pp. 1, 52.)" (RB 59.) Nonetheless, Respondent fails to recognize that is **precisely** what the prosecutor did in this trial. When he asked, "Well, you knew that Ivan Gonzales claimed he was a battered man, didn't you?" (RT 67:7866), he unmistakably insinuated that Ivan had, indeed, claimed he was a battered man. The jury would certainly believe that the prosecutor knew what Ivan had claimed, and the prosecutor's point was driven home no matter how the question might be answered. When the prosecutor followed with, "He didn't testify to it, but he claimed that, didn't he?" (RT 67:7866-7867), the prosecutor unmistakably insinuated that Ivan had made such a claim, even if he did not give such testimony. Again, it made no difference how the question might be answered, or even whether it was answered at all. When he then blatantly ignored the trial court's direction to not go any further with that line of questioning, and asked "Well, were you aware that was his defense?" (RT 67:7867), once again he unmistakably insinuated that was, in fact, Ivan's defense.

Thus, the prosecutor repeatedly examined Veronica Gonzales in a manner clearly designed to imply or insinuate the truth of the facts set forth in the questions. It is true there was no objection to the first of these three insinuating questions, but this very experienced and skillful trial prosecutor must have realized his question was improper. When the defense objected to the second question, a claim of error was preserved. Although the objec-

tion was sustained, the harm was done and could not be undone. Not satisfied with his successful implications, and not deterred by the judge's clear direction to move to a new line of questioning, the prosecutor asked the third question, which can only be seen as an intentional disregard of the court's directions, and an intentional effort to drive home his point despite his inability to prove that Ivan had claimed he was a battered man, or that Veronica was aware that was Ivan's defense.

This went directly to the heart of the defense. Veronica Gonzales made a strong presentation, corroborated by numerous witnesses, that she was a battered spouse and that it was understandable for her to have failed to protect Genny and to have initially lied to the police. The prosecutor desperately wanted the jury to believe that Veronica Gonzales and her husband had callously conspired to contrive a defense. Lacking any evidence to support that theory, the prosecutor filled the gap by asking questions no attorney could have believed, in good faith, were proper. Certainly lack of good faith is shown by the fact that the prosecutor persisted even after the court sustained one objection and told him to move to a new line of questioning.

This jury started with the list of suspects narrowed down to two people. Thus, the jury was narrowly focused on making a determination whether Veronica Gonzales or Ivan Gonzales or both were responsible for the fatal injuries to Genny Rojas. Veronica Gonzales' only hope was to persuade the jury that her well-supported claim that she suffered from Bat-

tered Spouse Syndrome was sincere and that it provided a reasonable explanation for her failure to protect Genny Rojas and her false statements during police interviews. The prosecutor was clearly determined to undermine Veronica Gonzales' only hope, even if he had to resort to blatantly unfair methods to achieve that goal.

Thus, to put it in Respondent's own terms, this **was** "'a pattern of conduct "so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process."' (Citations omitted.)" (RB 59.) Similarly, this must be considered a deceptive and reprehensible method to put before the jury the prosecutor's theory of the case despite the lack of admissible evidence to support it, in an effort to undermine the heart of the defense. (*People v. Gray* (2005) 37 Cal.4th 168, 215; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431]; RB 59.)

Noting that the letter was properly admitted in evidence, Respondent concludes the prosecutor was entitled to ask Veronica Gonzales "if Ivan carried out **their** plan, as written in the letter, to blame each other for Genny's murder." (RB 60; emphasis added.) But Respondent does not identify any evidence that this was **their** plan, or that there was any plan, joined by Veronica, to blame each other. At most, the letter supports an in-

ference that this was Ivan's plan.[2] The mere fact that Veronica received the letter does nothing whatsoever to support an inference that she agreed with anything Ivan conveyed in the letter, just as the fact that we all receive unsolicited invitations to various credit cards does nothing to indicate that we all want to apply for those credit cards.

Nonetheless, if the prosecutor could convey to the jury that Ivan Gonzales had also utilized a battered spouse defense in his own trial, that could cause cynical jurors to be more skeptical of Veronica Gonzales' defense.[3] But there were serious problems the prosecutor had to overcome. The most serious problem was that the premise was simply untrue. What we know about Ivan Gonzales' defense, from the present record, was that he did **not** claim that Veronica Gonzales inflicted the injuries on Genny Rojas and that he took no part in it, but failed to protect Genny and lied to

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2 Even that is a stretch. Ivan's letter simply implied it was okay for Veronica to point the finger at Ivan. It did not say that he planned to reciprocate. This is why it remains totally unclear whether Ivan meant that it was okay for Veronica to **falsely** blame him, or whether he meant that they both knew he was the one responsible for what happened to Genny, and that it was okay with Ivan for Veronica to **truthfully** place the blame on him, if that was necessary to protect herself.

Furthermore, anything Ivan wrote in his letter was clearly inadmissible hearsay, if offered for the truth of the matter.

3 That is not to suggest that even that inference would be legitimate; it is merely a comment on the reality of human nature. This prosecutor simply counted on such realities of human nature to overcome the evidentiary gaps.

the police simply because he suffered the impact of Battered Spouse's Syndrome.

Instead, we know that he offered **no testimony of his own** at all, and he presented **no expert testimony**. All he did was explore the possibility of a battered spouse defense, and be examined by an expert who concluded he was a battered spouse. However, that expert never testified at Ivan's trial. The only reasonable assumption is that Ivan realized any battered spouse defense he might try to present was simply too weak, and/or would open the door to other evidence he did not want his jury to hear. Under the facts of this case, he must have simply let his attorney argue to his jury that the prosecution evidence left a reasonable doubt whether he was to blame for Genny Rojas' death, rather than Veronica Gonzales.

But the jury never knew many of these facts that we know. The jury did not know whether he testified or not, or what he might have said if he had testified. The jury did know that an expert examined him and concluded he was a battered spouse, but the jury did not know whether that expert testified. The jury knew that a few of Ivan's close friends and relatives testified in Veronica's trial that there had been occasions when Veronica was verbally or physically aggressive toward Ivan. The jury did know that he was convicted and sentenced to death.

Based on what this jury knew, the stage was set for the prosecutor's ploy. Hearing insinuating questions that unmistakably conveyed the prosecutor's misguided claim that Ivan Gonzales had relied on a battered spouse

defense, this jury could only conclude what the prosecutor wanted them to conclude – that Ivan Gonzales presented the very same battered spouse defense that Veronica had presented, that his jury rejected that defense, that any defendant could find an expert who would support such a defense, and that Veronica Gonzales' battered spouse claim was merely part of a mutual plan to blame each other, and should be rejected just as Ivan's defense was rejected.

Furthermore, as was shown in subsequent arguments in the opening brief, and will be discussed further in subsequent sections of this brief, the defense was unfairly left helpless. The defense was not permitted to present evidence that Ivan did **not** present such a defense. The defense was not permitted to present evidence that the expert who concluded Ivan was a battered spouse relied on faulty assumptions to support his conclusion, and that even Ivan decided it was better not to present that witness at his trial.

Respondent contends that Ivan Gonzales did rely on a battered spouse defense, but supports that with facts that fall far short of supporting the contention. (RB 60-61.) Respondent points to various statements made by Ivan Gonzales' attorney in the very early stages of the case, before the charges against the two co-defendants were severed, and more than a year before Veronica Gonzales' trial began. The first reference cited by Respondent occurred during an argument in favor of the severance that was later granted. It should come as no surprise to this Court that claims made during such arguments at such early stages of the proceeding are not necessarily

accurate predictions of what will actually be presented at trial. More importantly, all that Ivan's attorney said at that time was that Ivan would claim that he was not responsible for Genny Rojas' death and that Veronica was responsible. That falls far short of a claim that Ivan suffered from Battered Spouse's Syndrome. Also, this statement by Ivan Gonzales' trial counsel was not in evidence before the present jury, so the prosecutor's implied facts were not supported by any evidence.

The second reference was to a statement by one of Veronica Gonzales' trial attorneys, outside the presence of the jury, in which she agreed that Ivan Gonzales' whole defense was based on blaming Veronica Gonzales. (RB 60.) Again, this falls far short of supporting an inference that Ivan Gonzales suffered from Battered Spouse's Syndrome. Furthermore, Respondent neglects to mention that this statement was **immediately** followed by a statement from Veronica Gonzales' other trial counsel: "But he never actually said anything." (RT 67:7912.) The trial judge agreed with that statement. The prosecutor countered that Ivan had blamed Veronica Gonzales in his statements to the police, but the trial court disagreed: "... my memory was that neither of them ever directly said that the other had done it. And then we got to court, and we had attorneys, and defenses got crafted. And the position from Ivan's team was that Veronica did it; but I don't remember Ivan ever saying that." (RT 67:7913.) Thus, this reference fails for all the same reasons noted above for the first reference.

The next reference is similar to the first one and fails for the same reasons. The remaining references (RB 60-61) deal with early statements by Ivan Gonzales' counsel, prior to the severance, which did, at least, refer to an intent to present evidence that Ivan Gonzales was a battered spouse. However, as we know, and as the prosecutor who served at both Ivan' and Veronica's cases clearly knew, Ivan never actually presented that defense. Respondent argues that Veronica Gonzales was present during these statements and therefore "had knowledge of Ivan's **intended** defense." (RB61, emphasis added.) But the questions at issue in this claim did not refer to any intended defense. What the prosecutor told the jury through his inferential questions was "... you knew that Ivan Gonzales claimed he was a battered man..." "... he claimed that, didn't he?" "... were you aware that was his defense?" (RT 67:7866-7867.) While **we** know that was an intended defense that was rejected by Ivan's defense team, Veronica Gonzales' jury did not know that and the trial court precluded the defense from presenting any evidence to that effect.

Thus, Respondent has not in any way rebutted the actual issue. The prosecutor, in essence, told the jury that Ivan Gonzales had relied on the same battered spouse defense as Veronica Gonzales. Based on the overall knowledge that these jurors had, they would have certainly taken that to mean that such a defense was presented at Ivan Gonzales' trial, backed by expert testimony, and was rejected by Ivan's jury. This was completely false and the prosecutor knew it. The defense wanted to counter that dam-

aging false information and the trial judge forbade it. The judge reiterated that he did not want to get into what had occurred at Ivan's trial, even though the prosecutor had already opened that door and the defense merely wanted to show what did not occur at Ivan's trial, contrary to the prosecutor's claim.

Next, Respondent discusses a portion of the argument in the opening brief in which Veronica Gonzales relied on *People v. Shipe* (1975) 49 Cal.App.3d 343, and *Douglas v. Alabama* (1965) 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074. (RB 62-63; see AOB 241-243.) Initially, Respondent correctly summarizes those cases: "In each of these cases, the prosecutor, knowing the witness would not answer the question, was able to place statements in front of the jury that were not subject to cross-examination. Thus, in both cases, the defendant's Sixth Amendment right to cross-examination was violated." (RB 62.) Respondent then dismisses each of these cases, **falsely** stating that Veronica Gonzales was not raising a claim that her Sixth Amendment right to cross-examination was violated, and pointing to distinctions that make no difference – that Veronica Gonzales did not refuse to answer questions or invoke a privilege. (RB 63.)

In fact, after discussing *Shipe* and *Douglas* in the opening brief, it was noted, "Since Ivan Gonzales was not a witness, these inferences could not be tested by cross-examination." (AOB 243.) Reliance on these cases and the statement that Veronica Gonzales was unable to cross-examine Ivan Gonzales to demonstrate the falsity of the prosecutor's insinuations

clearly did amount to a claim that the prosecutor's misconduct resulted in a denial of cross-examination. In other words, the use of insinuating questions to convey new factual information **is** misconduct for multiple reasons, one of which is that it results in a denial of the Sixth Amendment right to confrontation, as recognized in *Douglas*. Furthermore, Veronica Gonzales was also unable to cross-examine the prosecutor who made the statements in front of the jury, nor was she allowed to present any other evidence to disprove what the prosecutor had falsely implied.

More importantly, the rationale of these two cases clearly applies to the present circumstance even though Veronica Gonzales did not refuse to answer questions or invoke a privilege. Here, the prosecutor knew that it did not matter whether Veronica Gonzales answered the questions or not. She answered one question, but did **not** answer the next two because her objections were sustained. By these reprehensible means, the prosecutor placed before the jury false statements that Ivan Gonzales had, indeed, utilized a battered spouse's defense in his trial. The prosecutor's statements were not subject to cross-examination. This all demonstrates that the prosecutor's questions were seriously improper and did amount to misconduct.

Respondent's dismissal of *People v. Blackington* (1985) 167 Cal.App.3d 1216 is another attempt to redefine reality. (RB 63.) Respondent points to the letter that was in evidence as proof that "the Gonzaleses discussed blaming each other for Genny's murder." (RB 63.) But the letter shows only that Ivan made a suggestion, not that Veronica discussed it or

agreed with it or even considered it. Respondent tries vainly to recast the issue by stating, "the questions did not suggest facts of the murder that were never sought to be proved." (RB 63.) True, the questions did not directly suggest facts about the murder, but that is not the issue raised in the opening brief. The questions insinuated untrue facts about a Battered Spouse's Syndrome defense allegedly (but not actually) utilized by Ivan.

Respondent's attempted application of *People v. Earp* (1999) 20 Cal.4th 826 is similarly flawed. (RB 63-64.) Respondent again describes the letter as establishing the fact that Veronica and Ivan discussed blaming each other and decided to do so. (RB 64.) As noted above, the letter demonstrates only the views expressed by Ivan (which were irrelevant in Veronica's trial), and supported no inference whatsoever about Veronica's state of mind. Like the prosecutor below, Respondent desperately wants this Court to believe there was evidence that Veronica discussed a callous plan with Ivan and agreed to it, but that evidence simply does not exist.

Respondent also incorrectly states that "the only insinuation that could possibly be drawn was that Gonzales and Ivan decided to blame each other ...", which was proved by the letter. (RB 64.) As discussed above, that was **not** proved by the letter. Furthermore, that was not the only insinuation that could be drawn. The prosecutor's questions, taken in context, unmistakably implied that Ivan had utilized the same battered spouse defense at his trial that Veronica was utilizing at her trial. That is the key fact that was

not proved by any other evidence, and could not be proved, since it was not true.

Respondent next goes on to argue that if there was any misconduct, it was harmless. (RB 64-72.) This contention has already been fully rebutted at AOB 246-252. Specifically, Respondent contends that Veronica Gonzales' answer to the prosecutor's first improper question, and the sustaining of objections to the other two improper questions, plus the tepid admonition, all served to cure the harm. (RB 65.) As explained at AOB 249:

> "And if the district attorney knows when he asks the question that an objection to the question should or will be sustained, the error is not corrected because the objection is sustained." (*People v. Grider* (1910) 13 Cal.App.703, 712.)

Here, the harm was complete when the questions were uttered, and a negative answer or the lack of an answer does nothing to undo the harm caused by insinuating facts as if everybody knows they are true.[4] No simple ad-

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4 Indeed, even if Veronica Gonzales' answer to the prosecutor's first question could have negated the initial harm, that answer was in turn negated by the subsequent two questions which insinuated facts contrary to the initial answer. Furthermore, the jury may well have interpreted the objections to the next two questions as showing that the defense had something to hide. To the contrary, it was the prosecutor's improper questions and the court's inadequate response that hid the truth from the jury.

monition could overcome the harm.[5] The only possible ways to overcome the harm would have been to allow the defense to present evidence that the prosecutor's insinuations were untrue, or to give an admonition that informed the jury that the insinuations were not true. The trial court here precluded the first means and rejected the second, all while conceding that the court saw no possible way to set the record straight. (RT 67:7872-7873.)

Respondent maintains that nothing in the prosecutor's questions insinuated facts that were inculpatory to Veronica Gonzales. (RB 66.) But the prosecutor essentially told the jury that Ivan had utilized a battered spouse defense. That could only mean that Ivan presented evidence that Veronica Gonzales was the responsible person, rather than Ivan. Such facts would be clearly inculpatory to Veronica, but were inadmissible hearsay that Veronica could not fairly rebut.

Respondent suggests that Veronica Gonzales could have easily overcome the false insinuations by testifying about her knowledge of Ivan's trial and his defense. (RB 66.) The first flaw in this contention is that any such testimony would have been inadmissible hearsay. Veronica Gonzales

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5 Respondent notes that the admonition was given at the request of the defense. (RB 65.) However, Respondent leaves out the fact that the defense made this request only after the trial court foreclosed every other form of relief that was requested. The fact that the defense may have concluded that this admonition was better than nothing in no way demonstrates any defense conclusion that this admonition was an adequate answer to the problem caused by the prosecutor.

was not present at Ivan's trial, and any information she had about his trial defense was necessarily second-hand. The second flaw in Respondent's position is that it unreasonably assumes the jury would have accepted her word over the word of the prosecutor, as unmistakably voiced in his insinuating questions. *People v. Valencia* (2008) 43 Cal.4th 268, 283, relied on by Respondent (RB 66) is inapposite. There, the alleged false impression occurred during the direct examination of a witness who could have corrected the false impression by proper questions on redirect examination. Here, in contrast, the false impression was left by the prosecutor's insinuating questions, but Veronica Gonzales' defense team had no opportunity to cross-examine the prosecutor to mitigate the harm in his insinuations. Respondent contends that the prosecutor's improper questions were brief and fleeting. (RB 67-68.) While they may have consumed a small amount of time, they were nonetheless devastating in falsely and improperly ridiculing the entire thrust of the defense. Furthermore, they had a synergetic impact with other errors, discussed in the opening brief and later in this brief, that repeatedly and improperly put before the jury the false impression that Ivan Gonzales did rely on a battered spouse defense.

Finally, Respondent argues that the misconduct was harmless because the evidence against Veronica Gonzales was compelling. (RB 68-72.) Respondent unabashedly conflates sufficiency of the evidence with harmless error. Respondent sets forth the evidence as favorably as possible on every point and then concludes the case was so strong that the prosecutor's

monition could overcome the harm.[5] The only possible ways to overcome the harm would have been to allow the defense to present evidence that the prosecutor's insinuations were untrue, or to give an admonition that informed the jury that the insinuations were not true. The trial court here precluded the first means and rejected the second, all while conceding that the court saw no possible way to set the record straight. (RT 67:7872-7873.)

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Respondent suggests that Veronica Gonzales could have easily overcome the false insinuations by testifying about her knowledge of Ivan's trial and his defense. (RB 66.) The first flaw in this contention is that any such testimony would have been inadmissible hearsay. Veronica Gonzales

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5 Respondent notes that the admonition was given at the request of the defense. (RB 65.) However, Respondent leaves out the fact that the defense made this request only after the trial court foreclosed every other form of relief that was requested. The fact that the defense may have concluded that this admonition was better than nothing in no way demonstrates any defense conclusion that this admonition was an adequate answer to the problem caused by the prosecutor.

was not present at Ivan's trial, and any information she had about his trial defense was necessarily second-hand. The second flaw in Respondent's position is that it unreasonably assumes the jury would have accepted her word over the word of the prosecutor, as unmistakably voiced in his insinuating questions. *People v. Valencia* (2008) 43 Cal.4th 268, 283, relied on by Respondent (RB 66) is inapposite. There, the alleged false impression occurred during the direct examination of a witness who could have corrected the false impression by proper questions on redirect examination. Here, in contrast, the false impression was left by the prosecutor's insinuating questions, but Veronica Gonzales' defense team had no opportunity to cross-examine the prosecutor to mitigate the harm in his insinuations.

Respondent contends that the prosecutor's improper questions were brief and fleeting. (RB 67-68.) While they may have consumed a small amount of time, they were nonetheless devastating in falsely and improperly ridiculing the entire thrust of the defense. Furthermore, they had a synergetic impact with other errors, discussed in the opening brief and later in this brief, that repeatedly and improperly put before the jury the false impression that Ivan Gonzales did rely on a battered spouse defense.

Finally, Respondent argues that the misconduct was harmless because the evidence against Veronica Gonzales was compelling. (RB 68-72.) Respondent unabashedly conflates sufficiency of the evidence with harmless error. Respondent sets forth the evidence as favorably as possible on every point and then concludes the case was so strong that the prosecutor's

misconduct must be deemed harmless. This is how an advocate would summarize the evidence when the issue is sufficiency of the evidence, but neither the federal constitutional standard for harmless error, nor the more conservative California standard operates that way.

It has been shown in the opening brief and in this argument that the prosecutor's misconduct deprived Veronica Gonzales of various federal constitutional rights, including the right to due process of law, to confrontation and cross-examination, to present a defense, and to a reliable determination of the facts underlying a guilt verdict that supports a death sentence. Thus, the erroneous rulings must be deemed prejudicial unless they can be declared harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) But whether that standard is applied, or if no constitutional error is found, and the standard of *People v. Watson* (1956) 46 Cal.2d 818 is utilized, the misconduct here cannot be deemed harmless.

Under *Chapman*, the reviewing Court does not disregard all evidence supporting the defense and focus only on the bits and pieces of the evidence that support the prosecution. "To say that an error did not 'contribute' to the ensuing verdict" is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403 [111 S.Ct. at pp. 1893]; accord, *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 278-280 [113 S.Ct. at p. 2080-2082].) In *People v. Haley* (2004) 34 Cal.4th 310, after finding error, this Court expressly noted that the evidence was sufficient to

sustain the verdict, but was also consistent with the defendant's claims. That meant the evidence was not overwhelming and the error could not be considered harmless.

In arguing that the present evidence is overwhelming, Respondent looks only to the bits and pieces of Veronica Gonzales' initial statements to the officers and ignores everything else, including the fact that she disavowed those statements at trial. But the very error we are considering went to the heart of whether the jury should or should not accept the impact of Battered Spouse's Syndrome, which was strongly supported by defense experts who were ridiculed by the prosecution based largely on what is attacked here as improper. Also, as shown in the first section of this brief, many of the snippets of testimony relied on by Respondent were shown to be highly deceptive or outright false.

Instead of Respondent's unsupported approach, the question this Court should be asking is whether a reasonable jury could have accepted the testimony of the defense experts and thus concluded that the statements Veronica Gonzales made in the first days after her arrest were not reliable evidence of guilt. If a reasonable jury could have so found, then the next question is whether the error could have had an impact on the jury's decision not to accept the defense. That question must be answered affirmatively, since the error went to the heart of the defense.

Similarly, Respondent relies on snippets from the statements of Ivan Gonzales, Jr., ignoring his many contrary statements and ignoring the fact

that many of his statements were patently untrue.[6] (RB 68-69.) Even assuming for the sake of argument that reasonable jurors could have relied on the isolated portions of Ivan, Jr.'s statements, it surely cannot be argued that reasonable jurors would **necessarily** have accepted those fragments. Instead, as shown in the opening brief and earlier in this argument, there were many reasons for jurors to disregard all of Ivan, Jr.s' statements as unreliable. There is simply no basis for a reviewing court, performing harmless error analysis, to assume that the juror's relied on anything that Ivan, Jr. had to say.

Respondent belittles the compelling expert testimony offered by the defense since the expert opinions were based on statements from Veronica Gonzales. (RB 71.) But that is usually the case with expert opinions supporting a battered spouse claim, and is no reason to conclude such opinions were necessarily wrong.[7] Indeed, here there was ample corroborating evi-

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6 A reasonable juror may be entitled to believe some parts of a witness' testimony and disregard other parts. But that does not mean a reasonable juror can choose to accept one answer and disregard the fact that the very next answer explained what was meant by the first answer, or that a reasonable juror can accept one answer that supports the prosecution theory and disregard the fact that the one answer occurred in the midst of a fuller discussion that everybody agrees was contradicted by known facts.

7 Respondent's position would mean that whenever a person claims they are suffering from Battered Spouse's Syndrome, and that claim is disputed, it should necessarily be rejected. That, of course, runs counter to the strongly stated view of this Court, recognizing the legitimacy and importance of Battered Spouse's Syndrome. (See *People v. Riggs* (2008) 44 Cal.4TH 248, 293-294.)

dence that Veronica Gonzales was a battered spouse. Respondent ignores the considerable corroborating evidence and argues that Veronica Gonzales' claims of being abused were contradicted by Ivan's close friends and relatives who testified they had seen Veronica acting aggressively toward Ivan. (RB 71-72.) But even if the testimony of those witnesses was believed, that does not in any way contradict Veronica Gonzales' claims that she was abused. The present defense experts reasonably explained that such conduct is not necessarily inconsistent with Veronica Gonzales' claims that she was abused.

Here, the jury heard strong evidence that Veronica Gonzales suffered from the impact of Battered Spouse's Syndrome, and that those impacts provided a reasonable explanation for her failure to protect Genny Rojas from Ivan Gonzales, and for her false statements in her interviews by law enforcement officers. The prosecutor was not content to present experts that disagreed with defense experts. The prosecution apparently believed that ridiculing the defense would help assure a guilty verdict. The present misconduct, coupled with erroneous court rulings, gave the prosecutor some phony support for his contention that both spouses conspired to pull the wool over the eyes of the jurors. This was clearly important to the prosecutor and was used precisely to undermine the defense. This misconduct, and the related erroneous court rulings, cannot be seen as unimportant in relation to the otherwise strong defense that was presented.

Even if the *Watson* standard is utilized, the question is whether it is reasonably probable that a result more favorable to the defendant would have occurred absent the misconduct and related erroneous court rulings. In answering this, the reviewing Court does not view the evidence as much in Respondent's favor as possible; instead it must examine the entire cause. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) For example, in *People v. Pantoja* (2004) 122 Cal.App.4th 1, 14-15, the reviewing court utilized the *Watson* standard and expressly noted that even if one could reasonably be skeptical of the defense version of the events, it was not so fantastic and incredible that it would necessarily have been rejected. The court noted that there was unquestionably evidence to support the prosecution version of the events, but it was nonetheless reasonably probable that a jury could have reached a different result absent the error.

Similarly here, even assuming the evidence is sufficient to sustain the verdicts, the defense was not so weak or incredible that it would necessarily been rejected in an error-free trial. Veronica Gonzales' experts were well-qualified and gave very reasonable testimony that could have been accepted by a reasonable jury. Had that expert testimony been accepted by the jury, it was very likely that the jury would have also concluded there was at least a reasonable doubt whether Veronica Gonzales was guilty. There is no way to know exactly what impact the prosecutor's misconduct had on the present jury, but it is reasonably probable that, based on the prosecutor's improper insinuations, the jurors concluded that Ivan Gonzales had, in fact,

offered a battered spouse claim at his own trial, and that Ivan and Veronica had decided together to blame each other in the hope they would both escape punishment.[8] That was a highly inflammatory suggestion that was unsupported by any evidence and should not have been heard by the jury. The fact that it was heard, and that the defense was not permitted to rebut it, could well have tipped the balance against Veronica Gonzales, in the eyes of the present jury. Thus, the misconduct and related errors cannot be deemed harmless.

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[8] Notably, in a recent case where this Court had to give meaning to language equivalent to "reasonably probable," in a different context, this Court concluded a **possibility** that was reasonably foreseeable was the real meaning of "...'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable'..." (*People v. Medina* (2009) 46 Cal.4th 913, 920. Under the *Medina* formulation, the error here was prejudicial if it was possible that the jury would have given more credit to the testimony of Veronica Gonzales' experts absent the prosecutor's misconduct.

Indeed, the end result in *Medina* was to permit a jury to turn a reasonable possibility into proof beyond a reasonable doubt. Whatever the *Watson* standard means, it is certainly less than proof beyond a reasonable doubt, so a reasonable possibility that the jury would have reached a different verdict absent the misconduct should satisfy the test.

C. Evidence of What a Non-Testifying Doctor Had Written About Ivan Gonzales, Who Was Not Involved in the Present Trial Carried a Great Potential for Confusion of the Issues and an Obvious Prejudicial Impact, Far Outweighing the Minimal or Non-existent Probative Value of Such Evidence, Rendering Its Admission Indefensible

As shown in the opening brief, one key aspect of the prosecutor's non-stop improper efforts to convince the jury that Ivan and Veronica Gonzales had conspired to present phony defenses was to put before the jury the fact that two different experts had examined Ivan and reached conflicting conclusions about whether he was a battered spouse. (See AOB 252-275.) Notably, Ivan Gonzales himself ultimately decided not to present such a defense at his own trial. He was not a party to the present trial. Thus, it seems quite irrelevant what a non-testifying expert concluded about a non-party. The prosecutor relied on an obviously transparent claim that he needed the evidence to show that different experts can reach different conclusions about the same person. This so-called need was downright silly. Everybody agreed this point would be obvious to any juror, and the prosecutor already had ample evidence that experts had disagreed about Veronica Gonzales in this very trial. The trial court openly recognized that any probative value was negligible at best, and that there was a very real potential for a prejudicial impact on the defense and for confusion of the issues, since there was no relevance in the opinions experts had reached about Ivan. Nonetheless, the trial court allowed the admission of this evidence for no apparent reason other than to satisfy the prosecutor who wanted to ex-

pose the jury to this nonsense.[9] This error was compounded by further rulings that precluded the defense from presenting any effective evidence to counter the prejudicial impact of the evidence that should not have been admitted.

Respondent argues there was no error and no prejudice even if there was an error. Once again, Respondent reaches these conclusions only by creating an alternative reality that is quite different from the actual trial. (RB 72-88.)

1. The Prosecutor's Insinuating Hypothetical Question to an Expert Witness Was Misconduct Because it Was Not Based on Any Evidence in This Case, As the Prosecutor Readily Admitted Below

First, Respondent finds no misconduct occurred when the prosecutor asked a defense expert an insinuating hypothetical question which the prosecutor readily conceded was not supported by any evidence that had been or would be produced. (RB 77-79.) Respondent does agree that a hy-

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[9] Indeed, even Respondent's own description of the factors weighed by the trial court in it's Evidence Code section 352 analysis (RB 74-75) clearly should have resulted in a decision to preclude the evidence. That is, the court found a modest amount of relevance, a substantial danger of confusing the jurors, an undue consumption of time, prejudice to the defendant with a limited opportunity to rebut it, and the need for a limiting instruction that would be difficult for the jury to follow.

pothetical question posed to an expert must be based on facts proved by the evidence. (RB 77.) Respondent then summarily dismisses the statement by the prosecutor below conceding that the hypothetical was not based on evidence in the present trial; the prosecutor argued instead the clearly erroneous proposition that it was permissible to ask an expert any hypothetical, no matter how unconnected it might be to the evidence adduced. (RB 78.) Ignoring the position taken below, Respondent seeks instead to invent an evidentiary basis that did not exist.

Specifically, the hypothetical question at issue stated that a husband and wife were both involved in a crime, each claimed they were a battered spouse, defense experts concluded that both were battered spouses, and prosecution experts concluded that neither was a battered spouse. After setting this irrelevant and unproved scene, the actual question posed to the expert was even more obviously improper: "What's a jury supposed to do?"[10] (RT 64:7288-7289.) As shown at AOB 254-256, controlling law clearly requires a factual basis for a hypothetical to an expert, but the prosecutor's erroneous position was as clear as it could be:

> ... the questions that I was posing to the doctor[,] as to what Mr. Popkins [defense counsel] thinks[,] had to do with Dr. Weinstein [and] were **completely hypothetical and never had**

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10 Indeed, to ask an expert witness what a jury should do is obviously improper, even if the rest of the hypothetical question had been entirely proper.

> **any factual basis**. I wasn't talking about actual facts that existed in this case. And the jury's free to accept any hypothetical. RT 64:7319-7320.)

Respondent abandons this clear position taken below and instead claims that there was a factual basis for the hypothetical:

> The prosecutor's hypothetical assumed facts that could be deduced from the evidence– that a husband and wife are both involved in the crime, they blamed one another, and expert witnesses disagreed on which, if any, spouse suffered from BWS. (RB 78.)

It is true that the evidence the jury heard established that a husband and wife were involved in the crime and that Veronica Gonzales blamed Ivan Gonzales. Respondent points to no properly admitted evidence that Ivan Gonzales blamed Veronica Gonzales, and none exists. Indeed, as shown in the preceding section of this argument, the trial court expressly recognized that the truth was simply that Ivan himself never testified at his own trial. Instead, Ivan Gonzales' attorneys merely argued at Ivan's trial that there was a reasonable doubt whether he was responsible rather than Veronica. Not even that much was ever established by any proper evidence at the present trial; it was merely something the trial court knew from presiding over Ivan's trial.

Even looking at the content of the letter that Ivan sent Veronica, nothing supports a conclusion that Ivan was blaming Veronica for what happened to Genny. Additionally, Respondent points to no properly admitted evidence that "expert witnesses disagreed on which, if any, spouse suf-

fered from BWS." (RB 78.) The admissibility of subsequent evidence about experts disagreeing on whether Ivan Gonzales suffered from Battered Spouse Syndrome is the underlying point of contention in this argument. Respondent engages in blatant bootstrapping by assuming the admissibility of the very evidence that is at issue.

Respondent even seems to be trying to defend the ultimate question the prosecutor asked after posing his unsupported hypothetical: "Given the conflicting expert opinions, the prosecutor asked what a jury is suppose to do, and how a jury to ought to evaluate such a situation. (64 RT 7289.)" (RB 78.) This was clearly an improper argumentative question to ask an expert witness. What a jury is supposed to do is follow the instructions to be given by the court regarding the assessment of the credibility of witnesses and the manner in which to resolve conflicts between various expert witnesses. This is not an area within the expertise of the various mental state experts. This question was clearly a cynical pretense to make an argumentative point and to "support" the hypothetical facts that the prosecutor was determined to put before the jurors by any means, fair or foul.

Once again, Respondent simply states that the objection to the improper question was sustained, as if that alone automatically cures any harm. (RB 78.) But as shown in the preceding section of this argument, controlling law makes clear that when the damage comes from the insinuations contained in an improper question, the fact that an objection was sustained does not necessarily cure the harm. Rather, we must look at the in-

admissible information contained in the improper question and determine the impact that might have had. (See *People v. Price* (1991) 1 Cal.4th 324, 481.) Here, as shown in the opening brief, that impact again went to the heart of the defense and had a synergetic impact when combined with the other errors committed below.

Finally, Respondent again claims any harm was negated by the admonition that questions are not evidence. (RB 78.) If life was that simple, then attorneys would be free to put any information they desired in front of juries in improper questions, safe in the knowledge that the worst penalty would be the standard admonition that questions are not evidence. Here, the trial judge himself, openly acknowledged:

> It's difficult for me to imagine in this scenario, that is, the D.A. cross-examining this expert with the substance of what Dr. Weinstein said in the context of this case, I'm having some real difficulty imagining the jury is going to really be able to follow the limiting instruction to comply with it. (RT 72:8925-8926.)

Thus, the admonition could not offset the harm from the improper question. The misconduct was complete when the question was uttered in front of the jury and cannot be deemed harmless.

2. The Preceding Error Was Compounded When the Trial Court Erroneously Permitted the Prosecutor to Ask a Defense Expert Witness if He Was Aware of the Fact That a Non-Testifying Expert Had Concluded That a Non-Party (Ivan Gonzales) Was a Battered Man

In the opening brief, it was shown that the prosecutor was erroneously allowed to seek and obtain a defense expert witness' acknowledgement that the expert was aware of the report by Ivan Gonzales' expert witness, concluding that Ivan was a battered spouse. The prosecutor insisted this was essential so the jury would know that different experts had reached different opinions. Of course, Ivan Gonzales was not a party to the present action, and the expert in question was never even called as a witness by Ivan in his own trial; that expert had nothing at all to do with the present case. The trial court expressly recognized that the evidence the prosecutor wanted to elicit had extremely limited probative value at best, and carried great potential for confusing the jury and otherwise prejudicing the defense. Even so, the trial court let the prosecutor have his way yet again. That ruling was erroneous for many reasons, and was made even worse by other rulings that, once again, precluded the defense from rebutting the evidence in any meaningful way. (See AOB 252-275.) Respondent again sees no error and no harm if there was any error. (RB 79-88.)

Respondent defends this childish effort to promote sound bites over the search for truth, claiming the cross-examination of the defense expert

was a proper means of "exposing weaknesses in psychology, and particularly in diagnosing BWS." (RB 79.) Respondent adds that the evidence "showed the inherent weakness in evaluating someone for BWS–that expert witnesses could come to different conclusions in evaluating the same person, in this case, Ivan Gonzales." (RB 80.) This rational stretches logic well beyond the breaking point.

The jury **properly** learned that experts can disagree in diagnosing Battered Spouses' Syndrome from the conflicting defense and prosecution experts who testified about Veronica Gonzales. These experts testified in front of the present jury, allowing the jurors to assess their credibility and come to a conclusion about which expert was more persuasive. Respondent points to **nothing** about the fact that different experts reached different conclusions about Ivan Gonzales that adds anything helpful to the jurors in their task of sorting out the conflicts in the expert and other testimony.

Furthermore, as shown in the opening brief, once the jury was exposed to the fact that different experts reached different conclusions about Ivan Gonzales, they could not possibly assign any rational weight to one side or the other in that particular conflict without any understanding of the basis for the conclusions reached by the expert who thought Ivan was a battered spouse – an expert who was never called by either side in the present

trial.[11] The defense wanted to counter the prosecutor's point by adducing evidence of the very weak basis for that expert's opinion, but the trial court refused to allow any such showing. The jury was given information that, to lay jurors, might have sounded important, but then they were left with no means of rationally deciding what to do with the evidence.

All they could do was throw up their hands and conclude that none of the expert testimony should be credited – exactly what the prosecutor wanted. Even this might have been arguably acceptable if the disputed evidence really showed the inherent weaknesses in psychological testimony, as Respondent argues. But it did no such thing; the fact that some unseen expert reached a conclusion about a non-party told the jury nothing whatsoever about the validity, or lack of validity, of the conclusions reached by Veronica Gonzales' expert opinions. All this evidence did was add more improper fuel to the fire the prosecutor so desperately wanted to build, to burn away the impact of the solid defense evidence by making the jurors believe that Ivan and Veronica callously conspired to fool them, even though no proper evidence supported that conclusion in any legitimate way.

Respondent goes so far as to accuse Appellant of missing the point, in the same sentence in which Respondent tries once again to invent a point that is detached from reality:

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[11] Indeed, in order to rationally assign any appropriate weight, the jury would have needed to know the bases for the conclusions of *both* experts who evaluated Ivan Gonzales.

> Gonzales misses the point for which the court admitted the evidence, and for which the jury was admonished: that the information was only for the purpose of considering the reliability of such expert testimony in this area, not whether Ivan Gonzales was a battered man. (73 RT 9306-9307.) (RB 81.)

As just explained, the disputed evidence did nothing at all to help the present jurors understand the reliability of the expert opinion presented in this case. If the prosecutor below, and Respondent now, are truly unconcerned with whether Ivan Gonzales was a battered man, then why was this testimony needed at all? Respondent fails to offer any explanation of how this testimony could have helped the jury below. Respondent also fails to offer any rebuttal of the specific reasons set forth in the opening brief why this testimony was harmful and served only to water the improper seeds the prosecutor had already planted.[12]

Respondent again distorts reality by repeatedly noting that there was no misconduct because the prosecutor sought and won advance approval from the trial court before asking the defense expert whether he knew about

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12 By this point the reader might legitimately wonder why this brief contains so much argument and so little law. The simple answer is that Respondent cites the same cases that were cited in the opening brief, and usually quotes the same law from those cases that was relied on in the opening brief. Then Respondent goes on in a seemingly simple sentence or two, stating a conclusion without ever explaining how the controlling law and the present facts supports that conclusion. All that can be done in rebuttal is to point out exactly how far-fetched Respondent's unsupported conclusions are.

conflicting reports pertaining to Ivan Gonzales. (See RB 80, 81.) However, by this point in the argument, we have gone past the misconduct that occurred earlier, when the prosecutor posed the improper hypothetical question. This portion of the argument focuses instead on the trial court error in ruling that the prosecutor could elicit evidence about conflicting reports about non-party Ivan Gonzales. True, some of the cases cited in the opening brief refer to prosecutorial misconduct, but those cases are still informative because they simultaneously discuss what type of evidence should be admitted and what should not be admitted. Thus, the distinction between misconduct and trial court error is immaterial to the discussion in those cases, because the focus of those cases is the prejudicial and unfair effect of the error, not the allocation of blame.

Respondent next stresses the trial court's lengthy analysis of the applicable Evidence Code section 352 factors, and the court's attempt to seek a "middle-ground solution." (RB 82-83.) But it has already been shown that the trial court's consideration of the factors was seriously flawed, and its so-called middle ground solution gave the prosecutor everything he wanted while leaving the defense unable to present a legitimate rebuttal. (See AOB 261-274.) Respondent simply ignores the many different specific flaws in the trial court analysis set forth in the opening brief.

Respondent then accuses Appellant of failing to recognize that the trial court alleviated any prejudice by admonishing the jury that the evi-

dence was not admitted for the truth of whether Ivan was battered or not. (RB 83.) Of course, what was noted in the opening brief, and is ignored by Respondent, is that this same trial court openly admitted that such a limiting instruction would be useless in this particular situation:

> It's difficult for me to imagine in this scenario, that is, the D.A. cross-examining this expert with the substance of what Dr. Weinstein said in the context of this case, I'm having some real difficulty imagining the jury is going to really be able to follow the limiting instruction to comply with it. (RT 72:8925-8926; see AOB 261.)

In any event, Respondent is wrong in stating that Appellant failed to recognize the impact of this useless admonition. That admonition was quoted in its entirety at AOB 274-275. After setting it forth verbatim, the opening brief explained why the admonition did not alleviate any harm. Instead, it told the jurors that the purpose of the evidence was to assist in the determination of the reliability of expert testimony in this area in general. (RT 73:9306-9307.) But, as shown above and in the opening brief, the jury was not given any information about the basis of the conclusions of the non-testifying expert; defense efforts to produce such information were completely shut down by the trial court. The jury was left with **nothing** that would allow any juror to assign weight to this evidence in making a determination of the reliability of the expert witnesses who did testify. This admonition could only have increased the jury's confusion, playing directly

into the hands of the prosecutor who wanted sound-bites for his argument, not reliable proof of any disputed fact. (See AOB 275.)

Respondent claims the disputed evidence "showed BWS evidence was not scientific and was subjective, therefore not reliable...." (RB 84.) As usual, after stating this conclusion, Respondent offers no clue as to how this evidence accomplished this supposedly lofty purpose. This evidence showed only that one unseen expert reached a particular conclusion about a non-party, while another expert reached a contrary conclusion. Perhaps one or both of those experts was not scientific or reliable, but that says nothing about whether Veronica Gonzales' experts offered scientifically sound and reliable evidence. Indeed, nobody disputed the fact that in some relationships **both** spouses can be battered spouses. Thus, even if there was any basis to conclude that Ivan Gonzales' own expert reached a scientifically sound and reliable opinion, that still would not contradict the conclusions reached by Veronica Gonzales' experts.

Respondent also either misses, or purposely seeks to obscure, another key point. The questions and answers under dispute in this argument pertained only to conflicting reports about whether Ivan was a battered spouse. They made no reference to Battered Spouses' Syndrome. Nobody has ever contended that every battered spouse suffers from Battered Spouses' Syndrome. Instead, the evidence was that some battered spouses, under some circumstances, suffer from Battered Spouses' Syndrome, and that Veronica Gonzales so suffered in the present case. But Respondent is

again flat wrong in stating that the evidence "showed BWS evidence was not scientific, therefore not reliable...." (RB 84. The evidence showed no such thing. It showed nothing at all about BWS evidence. It showed only that some unseen expert, for unknown reasons, concluded Ivan was a battered man.

Respondent also loses track of the actual argument made in the opening brief in regard to the prosecutor's misuse of the improperly admitted evidence for the truth of the matter, rather than for the limited purpose of assessing the credibility of the defense expert. The prosecutor didn't argue that the defense expert should not be believed because he failed to properly consider the report of the non-testifying Ivan Gonzales expert.[13] Instead, the prosecutor argued that "two experts evaluated Ivan Gonzales and one thought he was a battered man and another didn't." (RT 83:10979.) That argument uses evidence of the conflicting reports for the truth of the fact that experts in this very case disagreed about whether Ivan was a battered man.

In what may be the furthest reach into a non-reality, Respondent accuses Appellant of misconstruing the limited nature for which the evidence

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13 Any such argument would have been futile, since the unexplained conclusion reached by Ivan's expert had little or nothing to do with the accuracy of the conclusion that Veronica Gonzales suffered from Battered Spouses' Syndrome. Furthermore, any such argument would have exacerbated the error in not allowing the defense to show that Ivan Gonzales' expert himself had failed to consider critical evidence.

of conflicting reports about Ivan was admitted. (RB 87.) In so doing, Respondent completely misconstrues the point that was being made. Respondent contends the evidence was admitted to show weakness in expert testimony, rather than to show that Ivan was a battered man. But the point made at AOB 268 was that the prosecutor had argued to the court that he needed this evidence to show that Veronica Gonzales' expert was not credible because he failed to consider the report that said Ivan was a battered man. The point in the AOB was that the prosecutor was less than forthcoming in claiming Veronica's expert reached a flawed conclusion because he failed to consider evidence that the prosecutor himself agreed was not worth considering.

Next, Respondent sees no error in the trial court ruling that precluded the defense from presenting evidence to rebut the improperly admitted evidence about the conflicting reports. Respondent contends it is unclear what evidence the defense wanted to present, and that no offer of proof was made. (RB 87-88.) Respondent, once again, is wrong. The procedural history of the debate over what would and would not be admitted was set forth in considerable detail, with full citations to the record, in the opening section of the argument in the opening brief. (See AOB 208-220.) Pertinent excerpts from that summary include the following: "If the prosecutor elicited the evidence he had outlined, the defense would want to respond by showing that the expert who had concluded Ivan Gonzales was a battered man had reached a flawed conclusion." (AOB 209.) "Defense

counsel also reiterated his belief that if the prosecutor was allowed to get in the existence of conflicting reports about Ivan Gonzales, that would necessarily open the door to the defense producing evidence regarding the basis of the report that concluded Ivan Gonzales was a battered man. For example, defense counsel noted that in his report, Dr. Weinstein described the events in a manner unsupported by the statements Ivan Gonzales had made. Counsel concluded that the evidence the prosecutor sought to elicit was not relevant to Veronica Gonzales' guilt or innocence and did not impeach the defense experts, since Dr. Weinstein's conclusions were based on completely different material. (RT 72:9151-9152.)" (AOB 215.) "Defense counsel noted she might want to ask her own experts about Dr. Weinstein's report on redirect examination." (AOB 219.) "Defense counsel explained her experts would want to say that you have to look at the content of a report in order to decide it was appropriate to ignore it, but the judge responded he would not allow that. There would be no litigation at all of the merits of Dr. Weinstein's report." (AOB 219.) "Defense counsel noted that she also continued to request to be allowed to examine witnesses regarding the details of Dr. Weinstein's report, including statements by Ivan Gonzales that formed the basis of Dr. Weinstein's opinions. The court again denied that request. (RT 73:9308.)" (AOB 221-222.)

Thus, trial counsel clearly described categories and specific examples of the type of evidence they would want to present in rebuttal. The trial court emphatically precluded every effort by trial counsel, repeatedly de-

claring that no mini-trial would be permitted in regard to the validity of the report that concluded Ivan was a battered spouse. The trial court simply refused to concede that it would be an issue once the prosecutor sought to show that the particular report demonstrated that no BWS evidence should be believed. The trial court never criticized the defense offer of proof for any lack of specificity.

It was not unreasonable for the trial court to desire to avoid a mini-trial about the report of an expert who had nothing to do with the present trial. However, the only fair way to avoid such a mini-trial was to preclude any evidence at all about the report by Ivan Gonzales' expert. Federal 5th, 6th, 8th, and 14th Amendment rights to due process of law, to a fundamentally fair jury trial, to present a defense, and to reliability in factual determinations that support a death sentence all lead to only two reasonable choices – the evidence regarding the report by Ivan's expert should not have been permitted at all, or, if it was admitted, the defense should have been entitled to fairly rebut it.[14]

Respondent closes with a final puzzling claim. Respondent states that:

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[14] Appellant is in no way retreating from the position that it was clear error to admit the evidence of the Ivan Gonzales report in the first place. Rather, the point here is that once that evidence was erroneously admitted, or even if this Court concludes it was properly admitted, then the defense had a right to present a fair response to it.

> Even if Gonzales had requested the court admit evidence to show Weinstein based his conclusion on incomplete and/or invalid information (AOB 273), it would not have been error to exclude such because it would not have been "relevant and logical rebuttal" because the evidence that was admitted was not for the purpose of showing Ivan was or was not a battered man. (RB 88.)

But, while the evidence at issue was ostensibly not admitted to prove that Ivan was a battered man, it was supposedly admitted to impeach the testimony of Veronica Gonzales' expert witnesses. That is, it supposedly showed that Battered Spouse Syndrome evidence should always be viewed with skepticism because one non-testifying expert reached a conclusion the prosecutor considered laughable, about a non-party. If it was in any way true that the evidence elicited by the prosecutor tended to prove *either* that Ivan was battered, *or* that Battered Spouse Syndrome evidence should always be distrusted, then the defense should certainly have been allowed to respond by exposing the weaknesses in the conclusions reached by Ivan Gonzales' expert.

Such evidence would have shown that it was perfectly reasonable for Veronica Gonzales' experts to base their conclusions on their examination of Veronica Gonzales, even if done without consideration of the conclusion reached by Ivan's expert. Put differently, such evidence would have shown that the report about Ivan was not the sort of material on which legitimate experts would base an opinion about a different person. Similarly, such evidence would have shown that the report about Ivan was not evi-

dence that Battered Spouse Syndrome experts should never be believed. Instead, it was an anomaly by one expert whose work was incomplete, and whose conclusion in no way discredits the conclusions expressed by Veronica Gonzales' experts.

Respondent's pro forma claim that any error was harmless (RB 88) has already been addressed fully in the opening brief and in this brief. Specifically, the inadequacy of the admonition was discussed at AOB 275. The evidence did **not** merely show that different experts reached different results; it showed that a specific expert reached a specific result in regard to the only other suspect, and was spuriously used to undermine Battered Spouse Syndrome testimony. The defense was not allowed to rebut this evidence as to either claim. This was one more improper brick in the prosecutor's phony wall of evidence that Veronica Gonzales conspired with her husband to blame each other in order to both escape punishment, and make a mockery of the criminal justice system. This all went unfairly to the heart of a well-supported defense. Prejudice is manifest and it was the prosecutor below and Respondent now who seek to mock the criminal justice system with false arguments.

D. *Verdin* Has Already Been Applied Retroactively, in Accordance with Controlling Law, and the Conceded Violation of *Verdin* Deprived Veronica Gonzales of a Number of Federal Constitutional Rights and Cannot Be Deemed Harmless Under Any Arguably Applicable Standard

In the opening brief, it was argued that the trial court had no authority to order Veronica Gonzales to submit to an interview by prosecution mental health experts.[15] Since the filing of the opening brief, this Court held exactly that, in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096. Respondent concedes the order was error if *Verdin* applies, but Respondent argues *Verdin* should not be applied retroactively, even to cases not yet final on appeal. (RB 93-96.) As will be shown, controlling legal principles mandate retroactive application of *Verdin*. Indeed, this Court has already applied *Verdin* retroactively, in *People v. Wallace* (2008) 44 Cal.4th 1032, with no need for discussion of any retroactivity issue. Respondent argues in the alternative that even if *Verdin* applies to this case, the error was harmless. As will be shown, Respondent distorts the analysis of the facts that should occur in a harmless error review, and reaches a conclusion that would exemplify meaningless appellate review, if accepted by this Court. To the contrary, this error struck deeply to the core of a strong defense and cannot be considered harmless under any standard of review.

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15 As will be seen, there are several additional sub-arguments based on the series of related errors that followed this main error.

1. Pursuant to Controlling Law, the Holding in *Verdin* Applies to Cases Still Pending on Appeal

In *Verdin, supra*, at pp. 1102-1105, this Court concluded that a court-ordered psychiatric examination constituted discovery. At pp. 1105-1109, this Court went on to conclude:

> "... that (1) any rule that existed before 1990 suggesting or holding a criminal defendant who places his mental state in issue may thereby be required to grant the prosecution access for purposes of a mental examination by a prosecution expert was superseded by the enactment of the criminal discovery statutes in 1990, and (2) nothing in the criminal discovery statutes (§ 1054 et seq.) authorizes a trial court to issue an order granting such access."

Next, this Court concluded that court-ordered psychiatric examinations were not authorized by any other express statutory provision, with the *possible* exception of Evidence Code section 730, which had not been utilized in the trial court, and therefore was not at issue in *Verdin*. (*Id*, at pp. 1106-1114.)

Respondent neglects to mention that *Verdin* has already been applied retroactively by this Court, in *People v. Wallace, supra,* 44 Cal. 4th at pp. 1087. The *Wallace* opinion contains no discussion of retroactivity, and instead appears to have simply accepted the fact that *Verdin* was controlling. That is not surprising, in view of the language quoted in the preceding paragraph, wherein *Verdin* expressly stated that any pre-1990 rule allowing court-ordered examinations by prosecution experts was **superseded** by the

enactment of Proposition 115. Thus, *Verdin* itself should be enough to settle the question of what rules control the present case.

Having overlooked *Wallace*, Respondent looks to *Donaldson v. Superior Court* (1983) 35 Cal.3d 24 for a test of retroactivity. The question in *Donaldson* was whether to give retroactive application to *De Lancie v. Superior Court* (1982) 31 Cal.3d 865, which had held that "secret monitoring and recording of unprivileged conversations in prisons, jails, and police stations ... was unlawful unless done to protect institutional security." (*Donaldson. Supra,* at p. 27.) *Donaldson* initially set forth a proposition that should be enough to resolve the present case, though not to Respondent's liking:

> In determining whether a decision should be given retroactive effect, the California courts undertake first a threshold inquiry, inquiring whether the decision established new standards or a new rule of law. If it does not establish a new rule or standards, but only elucidates and enforces prior law, no question of retroactivity arises. (See *United States v. Bowen* (9th Cir. 1974) 500 F.2d 960, 975; *People v. Jones* (1980) 108 Cal.App.3d 9, 16 [166 Cal.Rptr. 131] and cases there cited.) Neither is there any issue of retroactivity when we resolve a conflict between lower court decisions, or address an issue not previously presented to the courts. In all such cases the ordinary assumption of retrospective operation (*County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 680-681 [312 P.2d 680]; *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 953-954 [148

> Cal.Rptr. 379, 582 P.2d 970]) takes full effect. (*Donaldson, supra*, at pp. 36-37.)

Here, as will be shown, *Verdin* did not establish new standards or a new rule; instead, it was the People of the State of California themselves who established new rules and procedures, when Proposition 115 was adopted in 1990, long before the present trial. Indeed, this Court expressly recognized in *Verdin*, as noted above:

> ... any rule that existed before 1990 suggesting or holding a criminal defendant who places his mental state in issue may thereby be required to grant the prosecution access for purposes of a mental examination by a prosecution expert was **superseded by the enactment of the criminal discovery statutes in 1990**.... (*Verdin, supra*, at p. 1109, emphasis added.)

In an effort to avoid the fact that the rule changed in 1990, rather than in 2008 when *Verdin* acknowledged the fact that the rule had changed, Respondent points to two cases, decided by this Court after Proposition 115 went into effect, that applied the pre-1990 rules regarding court-ordered mental health exams by prosecution experts - *People v. McPeters* (1992) 2 Cal.4th 1148, 1148, 1190, and *People v. Carpenter* (1997) 15 Cal.4th 312, 412. (RB 94.) However, neither *McPeters* nor *Carpenter* contained any claim that Proposition 115 changed the prior rules regarding prosecution mental health exams. Instead, both decision simply rejected only Fifth and Sixth Amendment claims that had been resolved in earlier cases. "It is axiomatic,' of course, 'that cases are not authority for propositions not considered.'" (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *Peo-*

ple v. Gilbert (1969) 1 Cal.3d 475, 482, fn. 7.) Thus, there was no pre-existing court-applied rule that was changed in *Verdin*. Instead, *Verdin* merely recognized that a pre-1990 court-applied rule had ceased to exist when Proposition 115 took effect in 1990. Therefore, pursuant to *Donaldson*, as quoted above, *Verdin* "does not establish a new rule or standard[], but only elucidates and enforces prior law, [so] no question of retroactivity arises." (*Donaldson, supra*, at pp. 36-37.)

It is true that *Donaldson* determined whether to give retroactive effect to *DeLancie*, and *DeLancie* was based on the interpretation of Penal Code sections 2600 and 2601. However, *Donaldson* expressly noted that Penal Code sections 2600 and 2601 had nothing to do with the situation presented in *Donaldson*; instead, the issue in *Donaldson* was impacted by another portion of the *DeLancie* discussion, in which a previous decision by this Court was overruled for three separate reasons, only one of which involved the policy set forth in Penal Code sections 2600 and 2601. (*Donaldson, supra,* at pp. 35-36.) *Verdin*, on the other hand, simply holds that pre-1990 cases lost their validity when Proposition 115 took effect. That conclusion was based on Proposition 115 and nothing else. Thus, while *DeLancie* was "... not a simple application of the statutory language" (*Donaldson v. Superior Court, supra*, 35 Cal.3d at p. 37), *Verdin* was a simple application of statutory language and nothing more. Thus, Respondent's contrary claim is mistaken. (See RB 94.)

Another case strongly supporting the conclusion that no doubt of retroactivity should arise here is *People v. Guerra* (1984) 37 Cal.3d 385. *Guerra* gave retroactive application, at least for cases not yet final, to *People v. Shirley* (1982) 31 Cal.3d 18, which barred testimony by witnesses who had undergone hypnosis that covered the subject-matter about which their testimony was offered. *Guerra* made clear that retroactivity was the norm:

> To determine whether a decision should be given retroactive effect, the California courts first undertake a threshold inquiry: does the decision establish a new rule of law? If it does, the new rule may or may not be retroactive, as we discuss below; but if it does not, "no question of retroactivity arises," because there is no material change in the law. (*Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36 [plur. opn.]; *People v. Garcia* (1984) 36 Cal.3d 539, 547-548; *United States v. Johnson* (1982) 457 U.S. 537, 549.) In that event the decision simply becomes part of the body of case law of this state, and under ordinary principles of stare decisis applies in all cases not yet final. "As a rule, judicial decisions apply 'retroactively.' [Citation.] Indeed, a legal system based on precedent has a **built-in presumption of retroactivity**." (*Solem v. Stumes* (1984) 465 U.S. 638.) (*People v. Guerra, supra*, at p. 399; emphasis added; see also *People v. Webb* (1993) 6 Cal.4th 494, 523: "...judicial decisions are generally retroactive absent constitutional or equitable reasons compelling a contrary result. (Citations.)".)

People v. Guerra, supra, also expressly noted, at p. 399, fn. 13, that an example of a judicial decision that would not be considered a new rule, and

would therefore be applied retroactively at least to cases not yet final, was "...a decision in which we gave effect to a statutory rule that the courts had theretofore misconstrued (*People v. Mutch* (1971) 4 Cal.3d 389, 394 [93 Cal.Rptr. 721, 482 P.2d 633]) or had not definitively addressed (*People v. Garcia* (1984) *supra*, 36 Cal.3d at p. 549)...." Here, *Verdin* was clearly such a decision, giving a statutory rule the effect that was intended from the time Proposition 115 was passed in 1990. (See also *People v. Crowe* (2001) 87 Cal.App.4th 86, 95.)

Even if a question as to retroactivity did arise here, the result would be the same. Here, when we look to the purpose of the discovery rules adopted in Proposition 115, it is clear that a major purpose was to preclude any discovery that was permitted by earlier cases, but that was not permitted under the express terms of Proposition 115. Indeed, Proposition 115 expressly states, "This chapter shall be interpreted to give effect to all of the following purposes: ... (e) To provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (Penal Code section 1054.) That purpose would be thwarted by the result Respondent seeks. Respondent claims that the purpose of Proposition 115 would be served if *Verdin* was restricted only to mental health exams that occur after *Verdin* became final, since "future defendants would not be ordered to submit to a mental examination." (RB 95.) But, as shown above, the purpose of Proposition 115 was to preclude any discovery not authorized by

statute or required by the United States Constitution. That purpose would **not** be served by delaying the full effect of Proposition 115 for **eighteen years** after the new discovery provisions were adopted.

To turn the table for a moment, suppose that in a trial proceeding that began years after Proposition 115 took effect, a criminal defendant sought discovery that had been sanctioned in earlier cases, but that was not covered in the provisions of Proposition 115. If the trial court denied discovery and the defendant was convicted, the reviewing court would certainly conclude that Proposition 115 precluded the discovery sought below, and would have no problem applying that conclusion "retroactively," even if no prior reviewing court had addressed the application of Proposition 115 to the particular type of discovery sanctioned by earlier cases and sought by the defendant in that case. (See, for example, *People v. Tillis* (1998) 18 Cal.4th 284.)

Donaldson also relied on the rule that in search and seizure cases decisions are generally not given retroactive effect. (*Donaldson v. Superior Court*, *supra*, 35 Cal.3d at pp. 39-40.) The present issue does not involve search and seizure, so that rule does not apply here. *Donaldson* also noted, "Nonretroactivity is the rule **only** when that result does not risk the conviction of innocent persons." (*Id.*, at p. 38, fn. 11, emphasis added.) Here, application of the pre-1990 rule would risk the conviction of an innocent person. For example, Veronica Gonzales cooperated (over objection) with the mental health exam by prosecution expert Dr. Kaser-Boyd, but refused to

be examined by Dr. Mills. Under the pre-Proposition 115 rules advocated by Respondent, that led to an instruction to the jurors allowing them to consider that refusal against Veronica Gonzales when weighing the credibility of her mental health experts. There are many reasons why an innocent defendant might have chosen to refuse to cooperate with Dr. Mills, a hand-picked prosecution expert whose only purpose was to debunk any expert testimony offered by the defense. (See RT 51:5376, where the prosecutor candidly admitted, "I mean, in all honesty, he's a debunker. That's what he is, and that's what I'm going to use him for.")

In sum, the negative testimony by Dr. Kaser-Boyd about her examination of Veronica Gonzales, along with the revelation that Veronica had refused to cooperate with Dr. Mills, and the admonition to use that against her, all could have turned the jury against her and could very well have led to the conviction of an innocent person.

Further useful guidance is contained in *Whorton v. Bockting* (2007) 549 U.S. 406. That decision considered whether *Crawford v. Washington,* 541 U.S. 36 should be applied retroactively. *Crawford* had overruled the long-standing rule of *Ohio v. Roberts,* 448 U.S. 56 and greatly limited the admissibility of hearsay statements. *Whorton* concluded that *Crawford* was merely procedural and not substantive and did **not** announce a watershed rule that implicated fundamental fairness. As a result, *Whorton* concluded *Crawford* could not be given **full** retroactivity, but was instead applicable only to cases not yet final on appeal when *Crawford* was decided. Here,

Veronica Gonzales is not seeking **full** retroactivity; instead, she simply seeks the application of *Verdin* to her case, which still is not final. If *Crawford* applies to cases that were not yet final, there is no apparent reason why *Verdin* should not have similar application.

The *Crawford* situation fully rebuts Respondent's contention that *Verdin* should not be applied "retroactively," even to cases not yet final, because courts and prosecutors have relied on the pre-1990 rules. (RB 95.) The more lenient rules regarding the admissibility of hearsay evidence were certainly relied on by courts and prosecutors who were surprised when *Crawford* changed those rules. Again, while such reliance might be a good argument against full retroactivity that would include cases already final, it did not stop limited retroactivity of *Crawford*, and there is no reason why reliance on the previous rule should have more weight here, particularly in light of *Verdin*'s recognition that the rules changed in 1990. Also, "the factors of reliance and burden on the administration of justice are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is considered." (*In re Johnson* (1970) 3 Cal.3d 404, 410.) As shown above, the question of retroactive application, at least to cases not yet final, was **not** a close one in regard to the purpose of Proposition 115. "When that purpose clearly favors retroactivity or prospectivity, it will be given effect without regard to the weight of the remaining factors." (*People v. Guerra, supra,* 37 Cal.3d at p. 402.)

In sum, neither the purpose of Proposition 115 nor any reliance on the pre-1990 rules helps Respondent in this case. Instead they point squarely in the opposite direction and should resolve this issue in Veronica Gonzales' favor, pursuant to clear rules that have been recognized by this Court:

> "Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim. (See *People v. Mutch* (1971) 4 Cal.3d 389, 395-396.) If in addition, as in the present case, the decision represents the first authoritative construction of the enactment, no history of extended and justified reliance upon a contrary interpretation will arise to argue against retroactivity." (*People v. Garcia* (1984) 36 Cal.3d 539, 549.)

Respondent also claims that application of *Verdin* would give an "'unfair tactical advantage to defendants,'" (RB 95-96), apparently because Respondent believes defendants should not be allowed to present mental health experts of their own, while refusing to be examined by prosecution experts. But if logic was sound, then *Verdin* itself suffers from the same problem; that is, defendants in cases after *Verdin* would have an unfair tactical advantage. Rather than engage in Respondent's twisted logic, it should be recognized that *Verdin* itself rejected such an unfairness argument. Indeed, both defendants and prosecutors can point to provisions in Proposition 115 which they perceive as unfair, or to provisions that could have been included in Proposition 115 but were not, resulting in perceived un-

fairness by their absence. The simple answer is that the People have spoken in their adoption of Proposition 115. Perceived unfairness (that does not violate the federal constitution) is simply a basis for political arguments that should have been made before Proposition 115 was adopted, or that could be made in favor of future legislation. It is not a basis for denial of the benefit of *Verdin* to Veronica Gonzales, just as it was not a basis for an opposite result in *Verdin* itself.

There have been many other examples where retroactivity has been ordered even though it would cause results similar to what Respondent fears here. *People v. Winson* (1981) 29 Cal.3d 711 limited the use of hearsay evidence in probation revocation hearings. *In re Edgerly* (1982) 131 Cal.App.3d 88 concluded the *Winson* holding would apply to cases not yet final when *Winson* was decided, even if the probation revocation hearing had been held before *Winson* was decided. In *People v. People v. Garcia* (1984) 36 Cal.3d 539, this Court considered whether retroactive application should be given to the holding in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, which had held that intent to kill or to aid a killing was an element of a felony-murder special circumstance under the 1978 death penalty initiative. *Garcia* concluded that *Carlos* should not be given full retroactivity, but should apply to all cases not yet final when *Carlos* was granted.

In sum, Respondent's superficial analysis ignores longstanding principles that clearly lead to the conclusion that *Verdin* applies retroactively, at least to cases that were not yet final on appeal when *Verdin* was decided.

2. The *Verdin* Error Below Did Implicate Constitutional Rights and, In Any Event, Was Prejudicial Regardless of Whether the *Chapman* standard or *the Watson* Standard Applies

In this section, it will be shown, the erroneous order directing Veronica Gonzales to cooperate with the prosecution experts, and the admonition that her refusal to cooperate with Dr. Mills could be considered against her, violated various federal constitutional rights. Respondent seeks to rely on Evidence Code section 730 to avoid reversal in the present case, but that section cannot overcome the federal constitutional claims. In any event, even putting aside the federal claims, Respondent's effort to rely on section 730 is based on pure speculation regarding what the trial court would have done in circumstances that were not presented to it. Furthermore, section 730 is not a discovery statute, but instead serves only to supply authorization for the Court to appoint and compensate its own expert in circumstances where the parties already possessed authorization to do so independently.

a. The *Verdin* Error Resulted in the Violation of Various Federal Constitutional Rights

Respondent contends that even if *Verdin* applies retroactively, the error committed by the trial court was nonetheless harmless. To reach this conclusion, Respondent first argues that the error below did not deprive Veronica Gonzales of any federal constitutional rights. (RB 96.) Respon-

dent relies on *Buchanan v. Kentucky* (1987) 483 U.S. 402. (RB 96-97.) That case, however, was not at all similar to the present case; the defendant did not even testify in his own behalf, and was not ordered to submit to an involuntary interview by a prosecution expert. Instead, after a defense expert testified, the prosecution was allowed to cross-examine that expert about the contents of a pre-existing report that had also been requested by the defendant. The issues addressed in *Buchanan* involved only whether the Defendant's Fifth Amendment privilege against self-incrimination was violated because the defendant had never been informed that the earlier report could be used against him, and whether his Sixth Amendment rights were violated because his attorney was not present during the earlier examination. Respondent offers no rationale at all why *Buchanan's* conclusions have any impact in the present case, and no such rationale is apparent.

More to the point, Respondent goes on to cite a number of other cases that found no federal constitutional violation in ordering a defendant to submit to a psychological examination by a prosecution expert after presenting a mental defense supported by psychological testimony. (RB 97.) The first answer to that contention is that Veronica Gonzales did **not** present a mental defense in this case; instead, her defense was that she was not guilty because she neither committed nor aided and abetted the acts that resulted in the death of Genny Rojas. She did not present psychological experts to support a mental defense; she presented them only to explain her actions in failing to protect Genny Rojas from Ivan Gonzales, and in ini-

tially lying to the police in a misguided effort to protect her husband. (See AOB 275-281.)

Second, as set forth in *Verdin* and asserted by trial counsel, Veronica Gonzales had a statutory right (Penal Code section 1054) to refuse to submit to the court-ordered examination below. The arbitrary deprivation of this state entitlement violated her federal 5th and 14th Amendment due process rights. (*Hicks v. Oklahoma* (1980) 447 U.S.343, 346.)

Third, Respondent ignores the fact that the *Verdin* error here did not simply result in a coerced examination by a prosecution expert. It also resulted in a refusal to cooperate with a second prosecution expert. That refusal was disclosed to the jurors, and an admonition was given allowing the jurors to consider that refusal against Veronica Gonzales. *Wallace, supra,* 44 Cal.4th 1032, at p. 1087, expressly held when a court-ordered examination violated *Verdin*, testimony regarding the defendant's refusal to submit to the examination also constitutes error. In the absence of any authorization for the court-ordered examination, such testimony about a refusal to cooperate and an admonition allowing that refusal to be used against the defendant violate the federal Fifth Amendment privilege against self-incrimination.

Fourth, as a result of the trial court's refusal to allow a full explanation of Veronica Gonzales' reasons for her refusal to cooperate, all she was allowed to say here was that her attorney had advised her to refuse. We know now that her attorney correctly advised her to refuse. Thus, the testi-

mony about her refusal and the admonition that the refusal could be used against her, as well as the testimony that her attorney advised her to refuse, all violated her Sixth Amendment right to counsel.

Finally, *Verdin* itself recognized use of evidence from a compelled psychiatric examination against a criminal defendant might well have constitutional implications. *Verdin* noted those constitutional implications raised complicated questions. (*Verdin, supra*, at p. 1110-1114, 1117.) Those questions were not addressed in *Verdin* because the issue in that case was resolved by other means. Respondent's position in this appeal would require this Court to address those federal Fifth and Sixth Amendment issues. (See *Estelle v. Smith* (1981) 451 U.S. 454; see also *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.11.)

b. Evidence Code section 730 Was Not Utilized Below; Any Contention That It Would Have Been Used Is Based on Unsupported Speculation, and, In Any Event, That Section Provides No Support for a Court-Ordered Examination By A Prosecution Expert When Such an Examination Is Not Otherwise Authorized

1). The Present Record Provides No Basis for Concluding the Trial Court Would Have Utilized Evidence Code Section 730 to Appoint and Compensate Any Experts, Let Alone the Prosecution's Hand-Picked Professional Debunker

Respondent offers a convoluted argument that if the trial court had realized that Penal Code section 1054 abrogated the decisions relied on by

the trial court to support its order to submit to prosecution psychological examinations, then the trial court would have made the same order, relying instead on Evidence Code section 730. From this questionable premise, Respondent concludes that the trial court's reliance on the wrong authority for its order was harmless. (RB 97-99.) That argument fails for numerous reasons.

First, the order below was not based on Evidence Code section 730. Any contention that the trial court would have utilized that section is entirely speculative.

Second, while it is true that vague references to section 730 were made below, Respondent completely ignores the fact that an appointment made under section 730 would be very different from examinations that the court actually ordered in this case. Here, the court merely made an order that Veronica Gonzales submit to examinations by two experts chosen by the prosecutor. The prosecution was left to fund those experts from its own resources, and to spend as much money on those hand-picked experts as its resources permitted. The record does not disclose the amount of money the prosecution chose to spend on Dr. Kaser-Boyd and Dr. Mills.

Evidence Code section 730, on the other hand, calls for the court to fix the compensation of any expert it appoints. Since the trial court makes the appointment under that section, payments for the appointed expert would come from the budget of the trial court. Thus, there is simply no basis whatsoever to conclude that the court would have authorized an hourly

rate that would have been sufficient to satisfy both Dr. Kaser-Boyd and Dr. Mills. Indeed, here the trial court expressly recognized that funding would come from the prosecution, which was free to spend its own money as it saw fit. When defense counsel questioned why the prosecution needed to have Veronica Gonzales examined by two experts, instead of just one, the trial court responded, "I don't have to make any ruling with regard to how they spend their money." (RT 51:5377, ll. 6-7.)

On the other hand, if the trial court was dealing with funds from its own budget, in a time of limited judicial resources, the court might well have questioned the need for two prosecution experts instead of one. Dr. Mills graduated from Harvard Law School **and** Stanford Medical School (RT 77:10025) and presumably did not come cheaply. With no indication in the record how much Dr. Mills was paid by the prosecution below, either per hour or in total, there is no basis whatsoever to speculate that he would have been appointed rather than some less-expensive local practitioner.

Even aside from the question of cost, it seems unlikely the trial court would have appointed the **same** experts the prosecutor chose to hire. Respondent offers no reason to assume that it would have. Presumably a trial court, making an appointment pursuant to section 730, would seek an objective evaluator who would assist in the search for truth, rather than a prosecution-oriented hired gun. Here, as noted previously, the prosecutor expressly conceded, in regard to Dr. Mills: "I mean, in all honesty, he's a debunker. That's what he is, and that's what I'm going to use him for." (RT

51:5376.) In light of that concession, and the many good reasons advanced by defense counsel below why Dr. Mills in particular should not be permitted to examine Veronica Gonzales, it is entirely likely that any appointment made pursuant to section 730 would have been for a different expert.

2). Evidence Code section 730 Does Not Authorize Discovery, But Merely Permits a Trial Court to Directly Appoint and Compensate an Expert in Circumstances Where Both Parties Already Possessed Authority to Hire and Compensate Such an Expert

Most importantly, Respondent cites no authority for the proposition that Evidence Code section 730 provides any stronger basis for a court-ordered involuntary psychological examination of a criminal defendant than the authorities relied on by the trial court below and rejected in *Verdin*. Nothing in section 730 purports to authorize discovery that is not separately authorized elsewhere. Section 730 merely allows for an appointment by a court, rather than a party, and provides a mechanism for the court to fix compensation for such an expert. Prosecutorial access to the thought processes of a criminal defendant through means other than cross-examination clearly constitutes discovery and *Verdin* itself makes clear that such discovery is precluded absent express statutory authority. In civil cases, Courts have recognized the distinction between partisan discovery tools on the one hand, and the use of Evidence Code section 730, or similar provisions, on the other hand, for purposes of *impartial* court examinations. (See *Mercury*

Casualty Company v. Superior Court (1986) 179 Cal.App.3d 1027, 1033; *Durst v. Superior Court* (1963) 222 Cal.App.2d 447, 451; Code Civ. Proc. § 2032.020.)

Indeed, *Verdin* expressly noted that the federal Fifth Amendment privilege against self-incrimination normally applies to compelled testimonial disclosures (*Verdin, supra,* 43 Cal.4th at p. 1111), and that the statements a defendant would make in a compelled mental examination "would unquestionably be testimonial." (*Verdin, supra,* 43 Cal.4th at p. 1112.) This Court has recognized there can be no compelled production of defense evidence absent explicit legislative authorization. (*People v. Collie* (1981) 30 Cal.3d 43.) *Collie* arose before Proposition 115 permitted prosecution discovery of evidence, and it contains a thorough review of efforts by courts to formulate rules for discovery by the prosecution. This Court concluded:

> "The difficulty ... courts have had in agreeing on the maximum amount of discovery consistent with the minimum rights of a defendant lends support to the conclusion ... that the courts are not the proper bodies to initially formulate prosecutorial discovery rules." (*Collie, supra,* at p. 52.)

Collie, supra, at p. 54, also referred to court-initiated efforts to frame rules governing prosecutorial discovery as a "dubious battle ... more appropriately left to the Legislature for initial consideration."

In light of this Court's clear recognition that any rules for prosecutorial discovery should be left to the Legislature, rather than the courts, it is

impossible to believe that Evidence Code section 730 was intended to invest trial courts with ambiguous and open-ended power to provide for prosecutorial discovery that exceeds the bounds of Proposition 115, simply because it appears helpful. If Evidence Code section 730 could be construed that broadly, then the express limitations contained in Penal Code section 1054 would be meaningless. A fundamental rule of statutory construction is that interpretations rendering a portion of a statute superfluous must be avoided. (*People v. Superior Court (Douglas)* (1979) 24 Cal. 3d 428, 434; *People v. Jeffers* (1987) 43 Cal.3d 984, 992.)

It is true that in *Verdin* this Court noted the existence of Evidence Code section 730, only to conclude that the section had not been utilized in the trial court and had not been preserved for appeal. Thus, there was no discussion whether that section could be used for a court-ordered examination of a criminal defendant by a prosecution expert. Clearly, this was an issue that was not considered in *Verdin* and it cannot be argued that *Verdin* is authority for the use of that section in this context.[16] As shown in the

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16 *Verdin* did state in its conclusion that "[t]he People remain free on remand to move the trial court to appoint an expert pursuant to Evidence Code section 730 if, in its discretion, it decides that expert evidence 'is or may be required.'" (*Verdin, supra,* at p. 1117.) Again, this cannot be construed as a holding on an issue the Court had already stated had not been preserved for appeal. Instead, it was merely a recognition that the application of section 730 had not yet been decided, so the prosecution was free to seek to utilize section 730 on remand. Being free to seek an appointment under that section does not mean that the trial court, or any sub-

(Continued on next page.)

preceding paragraph, that section merely grants authority for the court to directly appoint an expert, and provide compensation, in circumstances where there is no other statute that expressly precludes such an appointment. Here, Penal Code section 1054 does preclude such an appointment. Evidence Code section 730 cannot be read as an independent source for discovery that is not otherwise allowed by statute.

Indeed, Evidence Code section 730 existed well before Proposition 115 was enacted. Prior to 1990, the Legislature had resisted for years any effort to create a statutory rule authorizing prosecutorial discovery. *Collie, supra,* at p. 54 recognized "the almost insurmountable hurdles likely to thwart any attempts to devise constitutionally permissible discovery rules applicable to defendant or defense material." It is simply impossible to believe that a pre-Proposition 115 Legislature would have enacted Evidence Code section 730 with any intent that it would be used to allow trial courts to fashion their own open-ended rules for prosecutorial discovery. Respondent offers no authority whatsoever for such a broad construction of section 730.

(Continued from last page.)

sequent reviewing court, would conclude such an appointment was authorized.

c. The Errors in: 1) Ordering Veronica Gonzales to Submit to an Examination by Prosecution Experts; 2) Precluding Her From Explaining Her Reasons for Refusing to Cooperate With Dr. Mills; and 3) Admonishing the Jury that Her Refusal to Cooperate with Dr. Mills Could Be Used Against Her Were All Prejudicial Regardless of Whether the *Chapman* Standard or the *Watson* Standard Is Utilized

Although the trial court had admonished the jury that Veronica Gonzales' refusal to cooperate with the court-ordered examination by Dr. Mills could be used against her, Respondent summarily dismisses the claim that error occurred when the trial court did not allow Ms. Gonzales to explain her reasons for that refusal. (RB 102.) Respondent notes that Ms. Gonzales was able to begin a sentence that referred to advice by her attorney, before the prosecutor's sustained objection cut short that sentence. Respondent blindly describes this as a complete answer requiring no further explanation. Respondent's position is unsupported by logic or by any citation to authority.

As shown at AOB 288-289, Veronica Gonzales clearly had more to say and wanted to explain what her attorneys said regarding **why** she should not cooperate. It was also shown at AOB 289-290 that the explanation Ms. Gonzales was not permitted to give would have been completely admissible and that the objections offered below were not well taken. Respondent does not dispute any of that, but merely contends that no further explanation was necessary.

Respondent's unsupported and unexplained belief that no further explanation was necessary does not answer the question whether a further explanation would have been helpful to the defense. Here, the jury was left knowing only that she refused to cooperate because her attorneys told her to refuse. It is not unusual for jurors to distrust defense attorneys in general and being told only that the defendant refused to obey a court order because her attorneys told her to refuse would very likely have left the jurors feeling that her attorneys were trying to hide something or were otherwise seeking to obstruct justice. On the other hand, if Ms. Gonzales had been able to explain that her attorneys had very good reasons for advising her not to cooperate with a very biased "debunker" who had access to Ivan Gonzales that Veronica's own attorneys did not have, then the jurors would have been unlikely to use the refusal against her. That, in turn, would have increased the likelihood that one or more jurors would have accepted the Battered Spouse's Syndrome evidence, which was the heart of the defense. Thus, it was reasonably probable that a more favorable result would have occurred below, absent this error.

Respondent goes on to contend that any error in ordering the examination constituted only state law error, so the *Watson* standard should be utilized on review instead of the more stringent *Chapman* standard. (RB 102.) However, as shown above and in the opening brief, a number of federal constitutional rights were implicated, so it is the *Chapman* standard that should apply. As shown in the opening brief, at pp. 315-317, the vari-

ous errors that occurred below were prejudicial under either standard. Respondent's argument that the errors were harmless distorts the record and ignores the position taken by the prosecutor below.

As shown above and in the opening brief, the prosecutor fought long and hard every step of the way to persuade the trial court to make the series of rulings that resulted in the errors set forth in this argument. It is clear that the prosecutor believed it was absolutely necessary to obtain court-ordered examinations, to have Dr. Mills conduct one of those examinations, to have the jury admonished that the refusal to cooperate with Dr. Mills could be used against the defendant, and to preclude the defendant from explaining her reasons for her refusal. It has also been shown that the prosecutor strongly exploited these errors in his argument to the jury. In light of this undisputed record, it borders on the absurd to contend now that none of these matters actually made any difference at all.

Respondent sees no harm in evidence that Ms. Gonzales refused to be examined by Dr. Mills, or in the admonition that allowed the jurors to use that refusal against her. (RB 102-103.) Respondent's basis for this position is simply that Ms. Gonzales was allowed to tell the jury that she refused because her attorneys advised her to refuse. As shown above, that cut-off explanation was clearly not sufficient to assure that the jurors would conclude there was no reason to hold Ms. Gonzales' refusal against her. While counsel was able to expand on her reasons for the refusal in argument, the jury was advised that argument is not evidence.

Respondent sees no harm in the evidence resulting from Ms. Gonzales compelled examination by Dr. Kaser-Boyd since much of Dr. Kaser-Boyd's testimony would have been admissible even if there had been no compelled examination. (RB 103-105.) That is like saying a defendant's erroneously admitted confession was harmless because the rest of the prosecution evidence would have been admissible.

The inescapable fact is that the credibility of Dr. Kaser-Boyd's opinions about Veronica Gonzales were significantly enhanced by the fact that she had personally conducted a psychological examination of Veronica Gonzales. Furthermore, the tests Dr. Kaser-Boyd administered and the statements made by Ms. Gonzales during the examination were stressed by the prosecutor and were relied on in his argument to the jurors that they should disbelieve the defense experts and accept the prosecution experts.

Respondent sees no harm in the inadmissible portions of Dr. Kaser-Boyd's testimony because they were countered by testimony from a defense expert. (RB 104-105.) But the only thing we know for sure is that the jury unanimously voted in favor of the prosecution position below. The likelihood seems strong that these jurors credited the prosecution experts over the defense experts, so it cannot be said that the testimony by defense experts overcame and negated the impact of inadmissible testimony by the prosecution experts. The record does not disclose whether the jury's decision to favor the prosecution point of view resulted only from the evidence that would have been admitted anyway, or whether the evidence that should

not have been admitted and the admonition that should not have been given tainted the jury's decision. The bottom line is that it is at least reasonably probable that these errors impacted the decision of at least one of the jurors in regard to whether to find the defense experts or the prosecution experts more credible. That decision, in turn, went to the very core of the trial.

Respondent ignores the fact that this case was very close, when the evidence is viewed in its entirety rather than by just looking at snippets of evidence taken out of context. The closeness of the case was shown throughout Argument IV, at AOB 372-373, 374-375, 379-381, 383, 388-389, and in Argument VI, section B, at AOB 407-409. Instead, Respondent repeats points that were made previously and fully rebutted at ARB 46-52, above. As an example of Respondent's utter disregard for context, Respondent states:

> "...Gonzales's own expert testified Gonzales lied (74 RT 9502), and Gonzales admitted that she lied numerous times to numerous persons (67 RT 7734-7735), including her own expert witnesses (68 RT 8052, 8178), therefore Dr. Kaser-Boyd's testimony that the tests showed Gonzales to exaggerate was information already known to the jury." (RB 105-106.)

But the lies that Veronica Gonzales admitted and that her own expert discussed all occurred in the initial police interviews in the first few days after the death of Genny Rojas, and in the early stages of the relationship formed by Ms. Gonzales and her court-appointed counsel. Those lies were explained by the evidence that Ms. Gonzales was still under the influence of

the effects of Battered Spouse's Syndrome during those periods, and that it took her some time to determine that she could trust her attorneys. That evidence was not at all comparable to the disputed testimony by Dr. Kaser-Boyd, supported by inadmissible evidence, that Veronica Gonzales was still exaggerating throughout her relationship with her own expert witnesses and during her examination by Dr. Kaser-Boyd. In sum, the contention that Dr. Kaser-Boyd told the jury nothing they did not already know is simply untrue.

E. The Testimony Given By Dr. Mills Did Amount to Improper Profile Evidence and Was Highly Prejudicial

The opening brief, at pp. 294-296, summarized the many bases upon which trial counsel objected to the testimony expected to be given by the prosecution's hand-picked professional debunker, Dr. Mills. Respondent claims that these numerous bases for objection failed to include specific claims that the testimony would amount to profile evidence, or that the testimony would violate Ms. Gonzales' federal constitutional rights. (RB 106, 109.) As a result, Respondent claims those specific bases were forfeited.

Strangely, in regard to the profile evidence claim, Respondent also states: "Profile evidence is inadmissible because it is irrelevant, lacks sufficient foundation, or is more prejudicial than probative. It is not a separate ground for excluding evidence. (*People v. Smith* (2005) 35 Cal.4th 334, 357.)" But here, trial counsel repeatedly did object on all three of these

bases – lack of relevance, lack of foundation, and, if there was any relevance, it was negligible and was outweighed by the prejudicial impact. (See RT 76:9996, lines 13-14, 17 and 26 ["...we're objecting on the basis of relevance. We're objecting on the basis of 352." "... it may also be part of the lack of foundation analysis." "And I don't believe there is foundation ..."]; see also RT 76:9997, lines 5-7; RT 76:10001, lines 6-8; 76:10002, lines 10-13; 76:10006, lines 5-6 and 19-20; 76:10007, lines 15-21; 76:10018, lines 2-4 and 20-23; 76:10019, lines 18-20.) Thus, it is not at all clear how Respondent can conclude that the profile evidence claim was not adequately preserved. Although the word "profile" might not have been used below, it clearly was used in the opening brief in the sense this Court described in *Smith* – a shorthand reference to the relevance, section 352, and foundation problems that underlie improper profile evidence.

In regard to the constitutional claims asserted in the opening brief, it is well-established that "constitutional issues may be reviewed on appeal even where defendant did not raise them below." (*People v. Barber* (2002) 102 Cal.App.4th 145, 150; see also People *v. Allen* (1974) 41 Cal.App.3d 196, 201, fn. 1; *People v. Norwood* (1972) 26 Cal.App.3d 148, 153.) A similar principle was set forth in *Hale v. Morgan* (1978) 22 Cal.3d 388, 394: "We have held that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts." (See also *Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1476-1477.) *Hale v. Morgan, supra,* 22 Cal.3d at p. 394 also noted that, "our courts have sev-

eral times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved (e.g., *People v. Allen* (1974) 41 Cal.App.3d 196, 201, [and] the asserted error fundamentally affects the validity of the judgment (e.g., *People v. Norwood* (1972) 26 Cal.App.3d 148, 152-153) ... ."

The federal constitutional errors that Veronica Gonzales seeks to raise on appeal regarding Dr. Mills' testimony are all based on undisputed facts below. They are all based on the same facts and principles underlying the evidentiary claims below, and thus were fairly presented to the trial court. In other words, if counsel had added the words, "These very same problems also resulted in the deprivation of Veronica Gonzales' federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to a fundamentally fair trial by jury, to present a defense, and to reliable fact-finding underlying a potential death verdict," the analysis performed by the trial judge would not have changed. Indeed, this Court has expressly applied such principles in the precise context of an Evidence Code section 352 objection below that was also raised as a federal Due Process claim on appeal:

> "To the extent, if any, that defendant may be understood to argue that due process required exclusion of the evidence for a reason different from his trial objection, that claim is forfeited. Defendant could have apprised, but did not apprise, the trial court of such a claim. But defendant primarily makes a two-step argument on appeal: (1) the trial court erred in

overruling the trial objection, and (2) the error was so serious as to violate due process. (Footnote omitted.) To consider this narrow due process argument on appeal 'entails no unfairness to the parties,' who had the full opportunity at trial to litigate whether the court should overrule or sustain the trial objection. (*People v. Yeoman, supra*, 31 Cal.4th at p. 118.) Defendant's limited due process claim 'merely invites us to draw an alternative legal conclusion [i.e., that erroneously admitting the evidence violated due process] from the same information he presented to the trial court [i.e., that the evidence was more prejudicial than probative]. We may therefore properly consider the claim on appeal.' (*Id.* at p. 133.)

When a trial court rules on an objection to evidence, it decides only whether that particular evidence should be excluded. Potential consequences of error in making this ruling play no part in this decision. A reviewing court, not the trial court, decides what legal effect an erroneous ruling has. Here, the trial court was called on to decide whether the evidence was more prejudicial than probative. It did so. Whether its ruling was erroneous is for the reviewing court to decide. If the reviewing court finds error, it must also decide the consequences of that error, including, if the defendant makes the argument, whether the error was so serious as to violate due process. The consequences of hypothetical error are not something the trial court ordinarily can or should consider when making the initial ruling. The trial court merely rules on the actual objection. Ordinarily, it does not, and usually cannot, base this ruling on whether admitting prejudicial evidence would render the trial fundamentally unfair. Once the reviewing court has found error in overruling the trial objection, whether that error

> violated due process is a question of law for the reviewing court, not the trial court in ruling on the objection, to determine in assessing the consequence of that error." (*People v. Partida* (2005) 37 Cal.4th 428, 436-437.)

Next, Respondent defends the admission of Dr. Mills' testimony based on proffers made by the prosecutor below. (RB 107-108.) However, as shown in the opening brief, the actual testimony by Dr. Mills did not match the proffer, and in numerous respects the defense below accurately predicted the problems that occurred in the testimony. (AOB 294-306.)

Notably, Respondent explains that, "Dr. Mills opined that based on the conflicting data given by Gonzales, there was insufficient evidence to reliably conclude that she had PTSD. (77 RT 10051.)" (RB 109.)[17] Assuming Dr. Mills also meant that conflicting data given by Veronica Gonzales also meant there was insufficient evidence to reliably conclude that she suffered from Battered Spouse's Syndrome,[18] there is a blatant flaw in such an analysis, demonstrating that Dr. Mills, who admitted he was no expert in Battered Spouse's Syndrome, had no business testifying in the present trial. That flaw is simple – the undisputed evidence by

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17 Respondent repeatedly use "PTSD" (Post-Traumatic Stress Disorder) and "BWS" (Battered Wive's Syndrome) as if the two terms were interchangeable. In fact, as will be shown, they are not.

18 If that was not what he meant, then this is another demonstration of why his testimony was not relevant to the actual issues presented at trial.

both defense and prosecution experts below was that conflicting statements over time are common in virtually every instance of Battered Spouse's Syndrome. Thus, if Dr. Mills' analysis was properly relevant to dispute the present claim that Veronica Gonzales suffered from the effects of Battered Spouse's Syndrome, that would mean there would never be any instance in which any expert could have sufficient evidence from which to conclude that a particular subject suffered from Battered Spouse's Syndrome.

Put differently, this was a classic example of circular reasoning that goes nowhere. One of the classic symptoms of Battered Spouse's Syndrome is that the person suffering from it lies to protect the other spouse. According to Dr. Mills, such lies make it impossible to ever properly diagnose Battered Spouse's Syndrome. That does fit in with the prosecutor's candid admissions that Dr. Mills was a professional debunker. In other words, Dr. Mills apparently believes that testimony about Battered Spouse's Syndrome never has a proper place in a criminal trial. But most of his profession, and this Court, have recognized that Battered Spouse's Syndrome can be properly diagnosed and does have an important role in the courtroom.

For example, in *People v. Riggs* (2008) 44 Cal.4TH 248, a case with striking similarities to the present case, a defendant charged with robbing and murdering a woman claimed that his wife was

the actual murderer. The wife was called as a prosecution witness and insisted it was the defendant who killed the victim. The wife admitted she was with her husband when the crimes occurred, assisted him with knowledge that he intended to kill the victim, stayed with him for over a year, and when they were finally arrested she initially lied to the police and denied that she or her husband killed the victim.[19] In her testimony, she also said that she did nothing to prevent the murder, did not subsequently abandon her husband, and initially lied to the police because her husband had physically and mentally abused her and threatened to harm her and her family. A prosecution expert testified that the wife's actions were consistent with "battered woman accommodation syndrome", and the defense argued that testimony was irrelevant and should not have been admitted. This Court strongly disagreed:

> ...expert BWS testimony is relevant to explain that it is common for people who have been physically and mentally abused to act in ways that may be difficult for a layperson to understand. (*People v. Humphrey* (1996) 13 Cal.4th 1073.) The use of BWS evidence in this

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19 Indeed, during the lengthy period between the murder and the arrests, there was even a three-month period in which the husband was in jail for other reasons and the wife, living apart from her husband, still failed to contact the authorities. (*Riggs, supra*, at p. 261.)

> manner is statutorily authorized by Evidence Code section 1107. (Evid. Code, § 1107 ["[i]n a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence"].) The relevance of this evidence is based on the possibility that the jurors will doubt that a witness who claims to have been abused has indeed acted in the manner to which he or she testified, and therefore the jurors might unjustifiably develop a negative view of the witness's credibility. (*People v. Brown* (2004) 33 Cal.4th 892, 906-908.) Even if the defendant never expressly contests the witness's credibility along these lines, there is nothing preventing the jury from ultimately finding in its deliberations that the witness was not credible, based on misconceptions that could have been dispelled by BWS evidence. (*Riggs, supra,* 44 Cal.4th at p. 293.)

This Court explained further:

> In the absence of the BWS evidence, the jury might have discredited Hilda's testimony based upon a misconception that anyone who was physically and mentally abused in the severe manner to which she testified would not have remained in a relationship with her abuser, even when he was incarcerated in a different state from where she was residing. Moreover, the BWS evidence was especially relevant in the present case because, while Hilda accused defendant of having shot Bowie, defendant in his statements to the police said that it was Hilda who committed the murder. In addition, as it turned out, defendant ultimately presented an alibi defense, appearing to shift the entire

> blame for the crime to Hilda and Robert Beverly. Without expert testimony explaining that an abused person's failure to act to prevent a crime by her abuser and her subsequent failure to leave the perpetrator and report the crime is consistent with a psychological syndrome caused by the abuse, the jury might have mistakenly believed the only reasonable explanation for Hilda's failure to do these things was that defendant's statements to the police and his defense at trial were true -- in other words, that Hilda did not prevent the crime or leave defendant and report it because she, in fact, was the murderer. (*Riggs, supra*, at pp. 293-294.)

In sum, both this Court and the Legislature (in enacting Evidence Code section 1107), have expressly recognized the validity of expert testimony pertaining to BWS, for the very purposes for which Veronica Gonzales offered it below. When a jury has to decide whether a particular claim of BWS is truthful or not, the jury is not assisted by expert testimony that a symptom always present in BWS cases proves that the diagnosis is unreliable. In other words, what Dr. Mills had to say was a feature in virtually every instance of BWS, so its presence in the present case does nothing whatsoever to help a jury sort out whether the claim is or is not truthful in this case.

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code section 210.) Dr. Mills relied on factors that would always be present, regardless of whether the claim of

BWS was true or false. Thus, his testimony could not help the jurors determine whether the present claim of BWS was true or false, and his testimony therefore had no tendency in reason to prove or disprove any disputed fact. Instead, the real purpose of his testimony was to persuade the jury that no claim of BWS should ever be accepted – a position that has been rejected by this Court and the Legislature, and that should not have been presented to the present jury.

Respondent refers to testimony by defense expert witness Dr. Kenneth Ryan regarding the fact that Veronica Gonzales suffered from Post-Traumatic Stress Disorder (PTSD). (RB 109, referring to RT 73:9240-9242.) Respondent concludes that this made it necessary for the prosecution to offer Dr. Mills to rebut that particular claim. (RB 109-110.) It is true that Dr. Ryan briefly referred to his conclusion that Ms. Gonzales suffered from PTSD, but he offered no opinion as to how that fact related to any contested issued in the present case. Instead, he was actually offered as an expert in Battered Wife's Syndrome. (See RT 73:9210-9214.) His testimony covered 192 transcript pages (RT 73:9205-9397), and only two of those pages were spent in the brief reference to PTSD. (RT 73:9240-9242.) In sum, the brief references to PTSD were a collateral matter, having nothing to do the actual contested issue of whether Veronica Gonzales' failure to protect Genny Rojas and her early lies to protect Ivan Gonzales were explained by BWS.

Respondent also defends the portion of Dr. Mills' testimony in which he opined that Veronica Gonzales was not a credible witness because she faced a potential death sentence, which gave her a great incentive to lie. (RB 111.) Once again, as explained above and in the opening brief, this is a factor that does not help the jury at all, and therefore has little or no probative value. It may be true that the prospect of a death sentence provides a great incentive to lie, but that does not mean that every defendant facing a potential death sentence necessarily lies. The jury faces the task of determining whether this particular defendant, facing a potential death sentence, was lying or was telling the truth. Repeatedly reminding the jury that the potential death sentence would cause some or many or most defendants in capital trials to lie does nothing to help the jury determine whether this particular defendant is lying. Instead, the obvious real purpose was to add more weight to the prosecutor's improper attempt to influence this jury by pressing hot buttons which distracted the jurors from the real issues. The prosecutor relied on visceral reactions to emotional sound bites, rather than logical responses to probative evidence.

Respondent even tries to argue that the prosecutor did nothing wrong because it was the witness who brought up the subject of the death penalty. (RB 111-112.) Respondent points to the fact that the trial court initially seemed to be leaning in favor of allowing such testimony, but the only reason there was never a final ruling is that the prosecutor ended the debate:

> Mr. Goldstein: Let's nip this in the bud, though, so we don't have to go round and round about it. I'm not going to ask Dr. Mills if the prospect of a death penalty would cause somebody to lie, or anything like that. Maybe a murder charge, but I don't want to bring penalty into this trial. (RT 77:10012.)

With this statement, the prosecutor took responsibility for keeping references to the penalty out of the guilt trial. The prosecutor clearly should have cautioned his witness not to refer to the death penalty, as the witness had done previously, whether it was in his report or in his prior testimony at Ivan Gonzales' trial. The prosecutor's failure to adequately caution his witness, after unequivocally promising to keep penalty out of the testimony, constituted misconduct.

Respondent appears to argue that the defense failed to preserve this issue by not seeking a mistrial when the reference to penalty occurred (RB 111), but the trial court expressly agreed that the defense had preserved its earlier objections to such testimony without the need to repeat them in front of the jury. (RT 77:10053, ll. 27-28.)

In the opening brief, at p. 299, it was shown that Dr. Mills improperly gave testimony that amounted to a clear, argumentative, and improper conclusion that he believed Veronica Gonzales was a liar. Respondent points to a reference by Dr. Mills to the fact that "... none of us have perfect memories; we all have psychological reasons to embellish or minimize." (RB 112; RT 77:10045, ll. 19-21.) But Respondent ignores the fact that Dr.

Mills went on to brush this aside as being limited to insignificant discrepancies in the statements of a witness:

> But if one finds glaring discrepancies in the account that somebody has given, one either has to believe that at one or both of those occasions the person was lying or the person has some kind of significant memory problem the way somebody with advanced Alzheimers might or the person has some kind of other brain disease that allows them not to remember correctly. (RT 77:10046.)
>
> With this sweeping pronouncement, Dr. Mills made it as clear as he could that he believed the discrepancies in the statements that had been made by Veronica Gonzales were glaring and that he was convinced she was lying.

Respondent agrees that profile evidence is not sufficiently probative when it relies on characteristics that are as consistent with innocence as with guilt. (RB 115, quoting from (*People v. Smith* (2005) 35 Cal.4th 334, 358.) But Respondent then argues that Dr. Mills' testimony was not improper profile evidence because he did not describe characteristics of child abusers or child murderers and did not conclude that Veronica Gonzales fit such a profile. However, Respondent completely misses (or seeks to evade) the point actually made in the opening brief.

What Dr. Mills did was to describe what he mistakenly believed were characteristics of lying defendants. He pointed to factors such as wanting to avoid a death sentence, and glaring discrepancies in statements made over time. He clearly conveyed to the jury his conclusion that Veron-

ica Gonzales met the profile of a lying defendant. However, as has been shown, the characteristics he pointed to are as consistent with innocence as with guilt. The fact that a person facing a potential death sentence might have a strong incentive to lie does not mean a particular defendant facing a death sentence must lie. The strong incentive to lie does nothing to help distinguish an innocent defendant facing a potential death sentence from a guilty person facing a potential death sentence. Similarly, the fact that some discrepancies in statements over time are a product of lies does not mean that all discrepancies in statements over time are a product of lies and does nothing to help the present jury determine whether discrepancies in the statements made by Veronica Gonzales over time meant that her trial testimony or her statements to her own experts or the prosecution expert who interviewed her were lies.

Finally, Respondent contends that even if there were errors in the admission of Dr. Mills' testimony, they were harmless. (RB 116-117.) Ignoring the arguments made to explain the importance of Dr. Mills' testimony, Respondent switches gears and argues that Dr. Mills did not tell the jurors anything they did not already know. Of course, that is precisely why his testimony was not proper expert testimony. But that does not make it harmless. As explained in the opening brief, the harm here was that Dr. Mills' testimony amounted to a preview of the prosecutor's argument, allowing the prosecutor to make the same argumentative points over and over again. Dr. Mills' testimony did not give the jurors any new facts that were

relevant to any disputed issue, but they did make it clear that an expert psychiatrist working in tandem with the prosecution had studied all the available information and concluded that Veronica Gonzales should not be believed.

Respondent also contends that expert testimony by defense experts lessened the impact of the discrepancies in her statements. (RB 116.) But Respondent has already argued that the whole purpose of Dr. Mills' testimony was to lessen the impact of these very same defense experts. Thus, it is entirely circular for Respondent to argue that Dr. Mills properly impeached defense experts, but if the impeachment was improper it was harmless because the defense experts outweighed Dr. Mills. Instead, the proper analysis is that if the impeachment was improper, then the impact of important defense experts was improperly reduced. That is why Veronica Gonzales was prejudiced.

F. Respondent Should Not Be Heard to Argue That the Ivan Gonzales Statements Offered by the Defense Were Unreliable, While Simultaneously Relying on Comparable Statements Made by Veronica Gonzales to Uphold Her Conviction

Echoing the trial court, Respondent continues the argument that all statements made by Ivan Gonzales were not admissible pursuant to the statement against interest exception to the hearsay rule because those statements were not reliable since, overall, Ivan was denying responsibility. (RB 121.) But it was shown in the opening brief that portions of Ivan's

statements were strongly against his penal interest since they absolved Veronica Gonzales of guilt, and if she was not guilty, then Ivan must have been guilty.

Regarding the alternative "consciousness of guilt" theory offered in the opening brief for other portions of Ivan Gonzales' statements, Respondent concedes that the statements made by Ivan Gonzales that were inconsistent with the physical evidence were highly incriminating to him. (RB 122.) Respondent then loses track of the issues and argues that the statements were nonetheless inadmissible because Ivan did not sufficiently incriminate himself, and because his answers were false and therefore unreliable. (RB 122-123.) This is gobbledygook.

When the purpose of the statements is to show consciousness of guilt, the issue is whether the statements were made, not whether they were true. That is, a "reliable" statement can be taken for its truth; a false statement can be "reliable evidence" of consciousness of guilty by the mere fact that it was made. Respondent repeatedly points to similar false statements in Veronica Gonzales' early police interviews to show consciousness of guilt on her part, and repeatedly contends they constitute reliable evidence of her guilt. Respondent never addresses the key issue – if such statements can be sufficiently reliable to be used to find Veronica Gonzales guilty beyond a reasonable doubt, and to sustain her conviction and death sentence on appeal, how can similar lies by Ivan Gonzales be unreliable to show consciousness of guilt on his part?

Respondent comes close to addressing this key point by making the almost absurd argument that the admissions exception to the hearsay rule does not require reliability. (RB 125.) That may be true in the limited sense that the Evidence Code section 1220 does not expressly require reliability, but Respondent ignores the undeniable federal Eighth Amendment requirement of reliability in the fact-finding that supports a death verdict. The real point is that section 1220 does not require reliability because, as explained above, even false statements by a party against whom the statements are offered can be incriminating evidence of a consciousness of guilt. To the extent that Veronica Gonzales' false statements were used against her below, and are still being used against her by Respondent, they must either be deemed reliable evidence of consciousness of guilt, or they must fail as evidence to uphold her conviction.

The bottom line is that when these statements are used for the non-hearsay purpose of showing consciousness of guilt, they do not depend on the admission against interest hearsay exception or the statement of a party hearsay exception. Instead, they are simply not hearsay at all and need not come within any hearsay exception. The relevance of such statements does not depend on their truth, but only on the fact the statements were made.

Regarding the other non-hearsay argument, that portions of Ivan Gonzales' statements were needed to set the record straight about the defense utilized by Ivan, Respondent falsely states that this basis for admis-

sion was forfeited because it was not urged below. (RB 123.) In fact, as noted at AOB 314, the defense did make this argument below:

> So I'm asking for a mistrial, number one. Number two, if the court is inclined to deny that mistrial, **I'm reasking the court to allow me to go into Ivan's declarations against interest, which will set the record straight** as to what Ivan actually did say as far as his involvement is concerned, so they have the whole picture.
>
> That isn't something that Ivan is just claiming that he was a battered man. He made certain statements in those, those interviews that, that he was the one who was in this with Genny when the tub was burning: "if she just told me it was hot, I would have taken her out." (RT 7871, ll. 1-11, emphasis added.)

Respondent relies on another bankrupt position in arguing that another reason for upholding the rulings below is that if the portions of Ivan Gonzales' statements sought by the defense were admitted, then the trial court would have had to admit all of Ivan Gonzales' statement, and that would have harmed Veronica Gonzales and consumed an inordinate amount of time. (RB 123.) But neither the trial court below, nor Respondent now, offers any explanation as to why it would have been necessary or appropriate to admit **all** of Ivan Gonzales' statements. It may be that very limited portions of those statements **could** have been offered by the prosecution to establish a context for the statements offered by the defense, but that was never done by the prosecution below. Thus, it is entirely speculative to claim that any such statements would have been admissible to estab-

lish context, or that any significant amount of time would have been consumed by whatever portions might have been admissible.[20]

Indeed, it is completely unclear what kind of context would have been needed. To the extent that some statements by Ivan Gonzales tended to absolve Veronica Gonzales, it does not matter that other portions were meant by Ivan Gonzales to absolve himself. That might have been important context in the separate trial determining Ivan's guilt. But in Veronica Gonzales' trial, it was not relevant whether Ivan tried to absolve himself. To the extent that some statements by Ivan tended to show his own consciousness of guilt, it is not clear why it would have mattered that other portions did not. If it was somehow necessary for the prosecution to show that other portions did not show consciousness of guilt, that could have been accomplished by testimony by the officer who interviewed Ivan briefly summarizing such other portions.

To the extent that portions of Ivan's statements would have demonstrated that he, as well as Veronica, made statements that incriminated the speaker while protecting the spouse, it made no difference that he, like Ve-

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20 Notably, the trial court frequently indulged the whims of the prosecutor, allowing inordinate amounts of time to present evidence having minor probative value at best. (See, for example, Argument I, subd. D, at AOB 276-299, and Argument I, subd. C, at pp. 59-78, earlier in this brief, regarding the ruling that allowed the prosecution to present evidence of conflicting reports of different psychiatrists regarding whether Ivan Gonzales was a battered husband.)

ronica, made other statements absolving the speaker. To the extent that portions of Ivan's statements would have set the record straight by showing that in the only statements Ivan ever made about the crime he denied knowledge of how Genny Rojas received her fatal injuries and denied his own responsibility and that of Veronica Gonzales, rather than claiming a battered spouse defense as the prosecution implied to the jury, Respondent fails to suggest what other prosecution evidence would have been needed to establish context.

Regarding the argument that the evidence sought by the defense would have led to the admission of other statements that might have been harmful to Veronica Gonzales, it is nice that Respondent is suddenly so concerned about her welfare, but that is really a decision for defense counsel to make. In any event, nobody has ever identified what additional statements would have been offered by the prosecution, so the defense was never presented with the actual tactical decision of whether the potential benefits outweighed the potential detriments. The simple fact is that the erroneous ruling below cut the debate short prematurely. It was the actions of the prosecutor and the trial court that ended the discussion without ever making a record of exactly what else might have been admitted and why, so the inability of this Court to reach any intelligent conclusion on this speculative point cannot be blamed in any way on Veronica Gonzales.

Respondent states it was "not relevant how Ivan acted when interviewed about a serious crime." (RB 124.) But if that was not relevant, then

how was it relevant what Ivan's expert concluded about whether Ivan was a battered husband. Respondent simply cannot have it both ways. It may be true that Appellant also cannot have it both ways, but it is sufficient if Appellant has it one way or the other – either would establish serious error by the trial court.

In the opening brief, at pp. 310-311, *People v. Jackson* (1989) 49 Cal.3d 1170, 1184-1187 was cited for the proposition that statements can be admitted for the non-hearsay circumstantial evidence purpose of showing consciousness of guilt. Respondent dismisses *Jackson* as not involving a statement against penal interest. (RB 124.) That may be true, but it was not cited in regard to a statement against penal interest; it was cited in regard to a statement that evidenced consciousness of guilt. Respondent then tries to deflect that purpose by stating that Veronica Gonzales' claimed nonhearsay purpose was of little or no relevance and would have consumed inordinate time. (RB 124.) Those points have been fully rebutted above and in the opening brief. Respondent adds that the evidence would have caused confusion of the issues, but fails to explain what would have been confusing or why that should outweigh Veronica Gonzales' legitimate interest in defending herself.

Respondent states that admission of Ivan's statement admitting he was in the bathroom with Genny would not negate the false claim that he relied on a battered spouse defense just like Veronica Gonzales did. Of course, it would have served several other purposes, discussed in the open-

ing brief and above in this brief. In regard to the specific point of showing that Ivan did not rely on the same battered spouse as did Veronica, that would not have been shown by this specific statement standing alone, but the defense argument on this point is that the totality of Ivan's statements would have shown that he never once stated to anybody that he was an innocent battered spouse.

Respondent again attacks any argument that portions of Ivan's statements, sought by the defense, should have been admitted, without admitting all of Ivan's statements. (RB 125.) Respondent states, without explanation, that Ivan's statements had to be viewed as a whole. Respondent never explains why admission of a handful of statements would require admission of an entire interview, lasting hours. It may be that admission of a handful of statements would have opened the door to a handful of other statements. We cannot even answer that, because nobody has ever identified what other statements the prosecution might have offered and why.

In any event, Respondent then turns to another muddled discussion of the lack of trustworthiness of self-serving statements by Ivan. Again, that has been addressed above and in the opening brief. What Respondent really seems to be saying is that it is unseemly for Veronica Gonzales to be arguing for the admission of some statements by Ivan, while seeking to keep out others. (RB 125.) But the simple fact is that some statements by Ivan were clearly admissible as hearsay exceptions or as relevant for non-

hearsay purposes. Most or all of Ivan's other statements are not admissible under our rules of evidence. Respondent never counters this simple fact.

Respondent again argues that even if there were errors, they were harmless (RB 127-128), but Respondent explains this conclusion by repeating the claim that all of Ivan's statements would have been admitted and that would have harmed the defense. As shown above, that "sky is falling" argument is simply unsupported by the present record.

II. THE PROSECUTION'S USE OF THE ABUSE VERONICA GONZALES SUFFERED AS A CHILD AS PROOF THAT SHE WAS MORE LIKELY THAN HER SPOUSE TO ABUSE GENNY WAS IMPROPER, AND THE ERROR WAS GREATLY EXACERBATED BY RULINGS THAT PRECLUDED THE DEFENSE FROM SHOWING THAT IVAN GONZALES WAS ALSO ABUSED AS A CHILD

A. Respondent Minimizes and Distorts the Evidence Presented to Show That Veronica Gonzales' Sad Childhood Made It Very Probable That She, Rather Than Ivan Gonzales, Was Responsible for Harming Genny Rojas

Respondent claims that the opening brief mischaracterized the evidence that was actually admitted. (RB 129.) That is untrue. The opening brief fully described the arguments made on each side, to put the issue in a proper context. The factual summaries in the open brief make a clear distinction between what was argued and what was actually admitted in evidence. In summarizing what was actually admitted, some inferences are drawn, but Respondent fails to show that any such inference was unreasonable.

Respondent also claims that evidence that abuse suffered by a child could cause that child to be abusive to his/her own children later in life was never admitted. (RB 129.) But later Respondent quotes the actual testimony of prosecution witness Dr. Kaser-Boyd, who clearly said that children who suffer abuse experience terror, which leads to changes in the personality and in the developing brain, often damaging parts of the brain required for

good emotional control. (RB 134, quoting from RT 78:10151.) She also testified that children who are abused often grow up to imitate the behavior they saw in their childhood home. (RT 78:10159, ll. 19-28.) This testimony came immediately after she testified about the evidence that Veronica Gonzales was a victim of child abuse. (RT 78:10149-10150.) She also testified that that a person who is a victim of child abuse will "**often**" grow up to behave toward children the same way their abusive parents behaved toward them. (RT 78:10152, ll. 1-6.) Thus, it is difficult to understand Respondent's claim that such evidence was never admitted.

Respondent more specifically sets forth three quotations from the opening brief and claims that Dr. Kaser-Boyd never gave such testimony. (RB 130.) It is important to note that, while Respondent quotes from the opening brief, the opening brief itself was clearly summarizing testimony and did not purport to be quoting directly from that testimony. As shown in the preceding paragraph, those factual summaries were quite accurate. Respondent's effort to downplay the significance of the evidence that was admitted falls flat.

Respondent states the evidence that was admitted "was necessary to rebut the defense expert witness testimony that child abuse affects a woman and sets her up for becoming a domestic violence victim ..." (RB 131.) But proper and relevant rebuttal should have been directed at contesting the inferences sought by the defense. That is, the prosecutor could have properly tried to show that Veronica Gonzales was not abused as a child, or that

such abuse is not consistent with becoming a victim of spousal abuse. Clearly either such effort would have failed, which explains why the prosecutor was so eager to find another way to combat the impact of this powerful defense evidence. That is, the prosecution did not simply try to rebut the defense evidence; instead, it sought to turn defense evidence into affirmative prosecution evidence that was not a logical rebuttal of the defense evidence.

Alternatively, the prosecutor could, and did, try to show that abuse suffered during childhood could cause a person to grow up to be a battering spouse, rather than a battered spouse, or both. The bottom line is that the defense never once tried to contend that victims of child abuse do not abuse their children when they become adults. The entire defense effort was aimed at corroborating the Battered Spouse Syndrome evidence. Thus, the defense effort was to show a relationship between abuse suffered as a child and the potential nature of the **spousal** relationship that child has when s/he becomes an adult. The defense **never** sought to draw any inference about abuse suffered as a child and how the adult that child becomes acts toward children. Thus, there was no necessity whatsoever for the prosecutor to elicit evidence regarding the likelihood that an abused child will grow up to become a child abuser. Instead, the prosecutor was faced with very powerful defense evidence and sought to negate its impact by any means, fair or foul.

Respondent's own factual summary nicely demonstrates the logical inconsistencies in the reasoning of the trial court. Respondent notes that the trial court "would not allow a suggestion that someone who had violent parents is likely to grow up violent,.." (RB 132), but "[t]he court also explained the prosecutor could draw reasonable inferences from the evidence Gonzales presented–for example, that she learned how to abuse Genny from her own childhood abuse."[21] (RB 132.) How can one argue that Veronica Gonzales learned how to abuse Genny from her own childhood experiences, without suggesting that someone with violent parents was likely to grow up to be violent?

Respondent notes that the argument in the opening brief relied heavily on *People v. Walkey* (1986) 177 Cal.App.3d 268. (RB 136.) Respondent seeks to minimize the impact of *Walkey* by showing that the circumstances there were not **identical** to the present circumstances. (RB 136-138.) That may be true, but that is usually true when a case is cited. The important thing is that much of the rationale underlying *Walkey* applies fully to the present case, as explained in detail at AOB 331-335. Respondent never ex-

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21 The prosecutor did just that during penalty phase argument:

> One other thing that proves she did it, and that's her child abuse history. She learned, she was schooled in terror. She has a bachelor's degree in child abuse. She learned to discipline and she learned to punish. She is Tillie -- actually, she's worse than Tillie. She's graduated. She has a Ph.D. in child abuse. (RT 90:12060.)

plains why the rationale in *Walkey* should not apply to the present circumstances.

Respondent emphatically insists that Dr. Kaser-Boyd never testified that abused children tend to grow up and have rage management problems. (RB 139.) However, even portions of Dr. Kaser-Boyd's testimony quoted by Respondent clearly imply what Respondent seeks to deny. (See RB 134, quoting RT 78:10151.) She spoke of abused children with role models who go into a rage and abuse children, causing those children to have damage to the parts of the brain that is needed for good emotional control. In her very next answer, she explained that this **often** leads to such children growing up to imitate the behavior of their abusive parents. (RT 78:10152.)

In the opening brief, it was noted that there was no evidence whatsoever that Veronica Gonzales ever acted in any way inappropriately towards any of her six children, and there was ample undisputed evidence that she had a loving relationship with them. (AOB 336.) Respondent seeks to dismiss this contention by arguing there was ample evidence that Veronica Gonzales tortured, hung, bound, and murdered Genny Rojas. (RB 139.) Aside from being unresponsive to the point that was made about Ms. Gonzales' relationship with her own children, this is a classic example of bootstrapping. Every single point made by Respondent in this damning paragraph is again based on taking snippets of testimony out of context and ignoring all contrary testimony. In other words, in trying to defend the proof of Ms. Gonzales' guilt, Respondent starts by assuming her guilt.

Respondent next argues that if there was any error it was harmless. (RB 140-141.) Once again, Respondent grounds this argument of harmlessness by contending that "[t]he evidence that was ultimately admitted was not particularly forceful." (RB 140.) One has to wonder why the prosecutor below fought so long and hard for the admission of pointless evidence. Indeed, if Respondent is to be believed, then the prosecutor below not only wasted everybody's time in the relentless pursuit of this pointless evidence, but did so repeatedly, in all the instances described in the previous argument in this brief. However, the truth is that this strong emphasis on Veronica Gonzales' unfortunate childhood, and the claim that this trained her to abuse children, was the strongest evidence the prosecution could muster to persuade jurors that it must have been Veronica Gonzales, rather than Ivan, who took the lead in abusing and eventually killing Genny Rojas.

B. Having Allowed the Prosecution to Imply That Veronica Gonzales' Ruined Childhood Made Her, Rather Than Ivan, the Probable Aggressor Against Genny Rojas, It Was Unconscionable to Disallow Evidence of Ivan's Childhood Abuse, Thereby Deceiving the Jury

Respondent claims the trial court ruled to exclude evidence that Ivan Gonzales had an idyllic childhood. (RB 143.) But Respondent only tells half the story. In that very ruling, the judge made clear that there was no reason to allow any more such evidence, because Veronica Gonzales had

already testified (albeit in a completely different context) that Ivan Gonzales had an idyllic home life as a child. (RT 74:9609, ll. 16-20.) In other words, the judge did not exclude such evidence; instead he recognized that such evidence was already in the record, so there was no need to let the prosecutor "muddy that up." (RT 78:9609, l. 20.)

Next, Respondent argues there was no error in precluding evidence that Ivan's childhood was, in reality, far from idyllic, since the witnesses with such knowledge were never called. (RB 143-144.) But once the court ruled decisively that Armando Gonzales could not be asked if he sodomized his brother, and Dr. Weinstein could not be asked about Ivan's statements that Armando had abused him, the defense was left with no reason whatsoever to call either of these witnesses. The defense had expressed its clear intent to ask these questions if the judge would allow them, and it would have been easy enough to subpoena these witnesses if the judge ruled favorably, but there was no reason at all to do so after the erroneous ruling. In other words, Respondent seeks to avoid the detrimental consequences of the error by relying directly on the very fruits of the error. Whatever is lacking in the record is not the fault of the defense attorneys, but instead was caused directly by the erroneous ruling.

Respondent quickly slips around the fact that if the defense had been allowed to ask Armando about his sexual assaults against his young brother there would have been no hearsay problem at all. (RB 143-145.) Instead, Respondent simply moves on to the potential hearsay issues in regard to

Dr. Weinstein. Respondent concocts reasons why it was not necessarily against Ivan's societal interests to tell his expert witness about his childhood history of being sodomized by his older brother and his uncle. Respondent seeks a rule that would allow trial courts to point to some evidence that a statement is against societal interest and some that it is not, and then to be able to let the evidence in without error if it helps the prosecution, but keep it out without error if it helps the defense. That, of course, would not lead to fundamentally fair jury trials with reliable verdicts that satisfy the federal Fifth, Sixth, Eighth, and Fourteenth Amendments. Instead, the appropriate rule should be that when there is substantial evidence a statement is against societal interest, the hearsay exception is established even if there is potential speculation that the statement was not against the speaker's societal interest. Indeed, under Respondent's rule there would **always** be a speculative explanation that the statement was not against the speaker's interests; the very fact that the statement was made demonstrates that the speaker thought there was some potential benefit in making it.

In any event, if the jury heard evidence of Ivan's statements about being sodomized by his older brother and his uncle, then if the jury believed that evidence, it would have fairly neutralized any inference that Veronica Gonzales' childhood history of abuse made her the likely instigator of abuse against Genny. On the other hand, if the jury concluded Ivan was lying to his own expert witness, then that would have fairly demonstrated the defense point (made in Argument I, subd. (D) at AOB 252-275) that the

conflict in the conclusions reached by various expert witnesses who examined Ivan was based on the flawed data relied on by Ivan's expert, and not on any inherent lack of reliability in testimony by mental health experts.

Respondent reverts to another "sky-is-falling" argument in contending that if Dr. Weinstein had been called as a witness, he would have undoubtedly asserted a patient privilege on behalf of Ivan. (RB 147.) However, that contention is easily resolved without "time consuming" litigation.[22] Any privilege Ivan may have had was waived when he prematurely gave copies of Dr. Weinstein's report to the prosecution and to Veronica Gonzales' defense counsel.

> A patient has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and the patient's psychotherapist. (Evid. Code, § 1014.) However, that privilege is waived with respect to that communication if the patient has disclosed a significant part of the communication to anyone else. (Evid. Code, § 912, subd. (a).) Here, the defendant concedes that the pretrial disclosure of Kania's report to the prosecutor waived the psychotherapist-patient privilege to the statements made by the defendant to Kania. (*People v. Crow* (1994) 28 Cal.App.4th 440, 449; see also p. 452.)

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22 Note should be made about the real time-consuming litigation that the trial court permitted (see summary at AOB 318-329) in order to allow evidence that Respondent now argues was "rather benign." (RB 140).

Indeed, the case for waiver is especially compelling here, because the disclosed evidence was not even being used against Ivan, who was not a party to the present trial.

Respondent suggests that any abuse Ivan suffered as a child was irrelevant, since it was sexual abuse rather than physical abuse. (RB 147,) But the testimony given by Dr. Kaser-Boyd relied entirely on the theory that childhood terror leads to brain damage that leads to poor ability as an adult to control rage or emotions. Surely a child who is regularly sodomized by a brother and an uncle will also experience terror. In any event, the jury had already heard testimony that Ivan had an idyllic childhood. If Veronica's unfortunate childhood was to be used against her, then the sexual abuse suffered by Ivan as a child was important to rebut the evidence of his supposedly idyllic childhood.

Respondent argues that Veronica's statement about Ivan having a good upbringing was not harmful to the defense because Veronica also explained the context in which her statement was made. (RB 147.) But that was not helpful in regard to the jury, since the statement about Ivan's good upbringing was left unscathed. The fact that Veronica's statement was made to a social worker deciding whether to allow the Gonzales children to live with Ivan's parents, rather than being divided in foster homes, was not evidence that the statement was untrue or mistaken. On the other hand, evidence that Ivan had been regularly sodomized by a brother and an uncle

would have demonstrated that Veronica's statement was made in ignorance of the truth.

III. THE VARIOUS INSTRUCTIONS RELATED TO MAYHEM, MURDER, AND CORRESPONDING MENTAL STATES WERE HOPELESSLY CONFUSING AND COULD NOT HAVE BEEN HELPFUL FOR LAY JURORS

In the opening brief, it was shown that the various jury instructions regarding mayhem and torture and their requisite mental states for the substantive crimes and for the use of these two crimes to support second-degree felony murder or first degree felony murder or torture or mayhem special circumstances, all complicated even further by whether the jury found the defendant to be a direct perpetrator or an aider or abettor, were hopelessly confusing and could not have been properly understood by the lay jurors. (AOB 345-368.) Respondent claims that no authority was cited to support these arguments. (RB 148.) Apparently, Respondent believes that "authority" should be limited to cases that expressly reject the instructions given in this trial.

Such authority would be nice, but if it existed the instructions probably would not have been given in the first place. Lacking such authority, it was necessary to rely on more general principles of law, which do constitute authority. Thus, the authority relied on in the opening brief was the well-established rule that the trial court must instruct on the general principles of law relevant to the issues raised, to the extent "**necessary for the jury's understanding of the case.**" (*People v. St. Martin* (1970) 1 Cal.3d 524, 531, *People v. Sedeno* (1974) 10 Cal.3d 703, 715-716, *People v. Wickersham* (1982) 32 Cal.3d 307, 323-324; emphasis added.) Based on

that undisputed authority, the claim in the opening brief was that the totality of the instructions given was insufficient to allow lay jurors to understand the fine distinctions between the various mental states required, or to understand when differing phrases meant the same thing.

Respondent goes through the various instructions one-by-one and claims they are not confusing or that they have been upheld in various reviewing courts. But the issue is not whether individual instructions, in contexts very different from the present case, might have been comprehensible. Instead, the issue is whether the unbelievably complicated and confusing **totality** of all of these instructions **in combination**, in the context of the present evidentiary showing, would have been comprehensible to a lay juror. Respondent simply never addresses this issue, preferring instead to look at each instruction in isolation, rather than analyzing how they could have all fit together.

Respondent also argues that many of the instructions were included in a list of standard instructions requested by defense counsel, so that any error was invited, precluding any appellate challenge. (RB 148.) But Respondent ignores the lengthy recitation set forth at AOB 346-352, where it was shown that attorneys for each side, as well as the judge, all equipped with law degrees and years of trial experience, had a great deal of trouble understanding the meaning of these instructions and how they might work in combination, with each party and the court often changing their minds as the discussion progressed. In this recitation, it was shown that defense

counsel did regularly dispute the contents of various instructions. Thus, it cannot be said that the defense made a tactical choice to request each of these instructions as given.

The essence of the argument in the opening brief is that it is simply not possible to make sense of these complex concepts when similar words are used to convey very different meanings in so many different contexts at the same time. Perhaps legal scholars could sort all this out, but lay jurors could not.

Respondent also points to failures to raise precisely the same objections below, which, according to Respondent, results in a waiver. But, as just shown, and as shown in the opening brief, defense counsel did often dispute the elements of various mental states with the prosecution and the court, often arguing that the standard instructions were inadequate to convey the meanings that had been ascribed in various appellate opinions. Thus, there was no waiver. Moreover, Respondent concedes there is no waiver if substantial rights were affected. (RB 148; Pen. Code, §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247.) Respondent's answer is to simply assert that no substantial rights were affected. That begs the question. If it is true that the instructions were hopelessly confusing, then substantial rights were certainly affected. Thus, the claim of waiver does nothing to advance the discussion. If the claim has merit, it was not waived. If the claim has no merit, it does not matter whether it was waived. Respondent contends that "it is not a claim of error that an instruction is 'circu-

lar.'" (RB 150, fn. 33.) But the argument that an instruction contains circular reasoning is just another way of saying that the instruction would not adequately aid the jury in understanding the basic principles of law needed to decide the case.

Respondent notes that the jury was told that the special circumstance of murder in the commission of mayhem required the specific intent to commit mayhem. (RB 151.) From this, Respondent reasons that the jury could not have been led to believe that the special circumstance required only the intent to vex or annoy or injure. (RB 151-152.) But Respondent again views the instruction in isolation, instead of following the undisputed rule, which Respondent well knows, that the instructions are to be taken "as a whole, viewing the challenged instruction in context with other instructions...." (*People v. Wilson* (2008) 44 Cal.4th 758, 803, cited at RB 156.) As shown in the opening brief, one instruction told the jury that the special circumstance required a finding of the specific intent to commit the crime of mayhem. (CT 16:3654, RT 82:10644; CALJIC 3.31.) But another instruction told the jury that the crime of mayhem required an intent to vex or annoy or injure. (CT 16:3665; RT 82:10650-10651; CALJIC 9.30.) Thus, it would have been only logical for the jurors to conclude the special circumstance required a specific intent to vex or annoy or injure. That could very easily have resulted in an erroneous finding that the special circumstance had been proved.

Respondent notes that in one instance, when defense counsel attempted to explain to the jurors the difference between second degree torture murder and first degree torture murder, counsel described the difference as simple. Respondent reasons that this proves the distinction was simple, not confusing. The first problem with this analysis is that this is probably the only instance wherein Respondent concludes that something said by defense counsel in argument was absolutely true. The reality is that defense counsel was faced with a hopeless task of trying to help the jurors make sense of an incomprehensible combination of instructions. That counsel tried as hard as he could does not mean the problem was solved.

Indeed, one need only read the portion of counsel's argument quoted by Respondent to see that the matter was not so simple. (See RB 155-156, quoting from RT 83:10939.) In any event, the jury was told that argument was just argument, and that it was the instructions given by the court that controlled the case. There is no basis to conclude the jurors accepted counsel's best, albeit convoluted, attempt to simplify, and disregarded the confusing instructions.

Respondent argues that the terms "extreme and prolonged pain," used in the first degree torture murder instruction, and the phrase "extreme cruel physical pain and suffering," used in the torture murder special circumstance instructions, are both made up of words that would be commonly understood. (RB 161.) Assuming that is true in the abstract, it begs the real question – would lay jurors have concluded these two phrases are

interchangeable, or would they have concluded that the court used different words for a reason, so that the meanings were different? Respondent seeks to avoid that question by concluding without explanation that there was "...no issue that Genny did not suffer 'extreme cruel physical pain and suffering' and 'extreme and prolonged pain.'" (RB 161.) Putting aside the double negative, there certainly was an issue regarding how quickly Genny went into shock and lost consciousness after receiving the fatal scalding burns. If she did lose consciousness very quickly she might have suffered pain that was **not** prolonged. She may have suffered pain that was extreme, but not cruel, whatever that means. We simply do not know how much pain she experienced, nor do we know how the jurors interpreted these two different phrases.

In sum, the instructions were hopelessly confusing. None of Respondent's contentions rebut that fact.

IV. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT EITHER THEORY OF FIRST DEGREE MURDER OR EITHER SPECIAL CIRCUMSTANCE

Respondent starts by citing a well-established rule: "The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on isolated bits of evidence. (*People v. Slaughter*, *supra*, 27 Cal.4th at pp. 1187, 1203.)" (RB 162-163.) However, as will be seen, Respondent repeatedly relies on fanciful speculation and isolated bits of evidence taken out of context, sometimes twisted to convey precisely the opposite of what was actually said.

A. First Degree Mayhem Felony Murder

Respondent agrees that the first degree mayhem felony murder can only be upheld if a specific intent to maim was shown, rather than an indiscriminate attack. (RB 164.) Respondent then proceeds to list a series of acts that occurred weeks or even months before the fatal scalding and which had nothing to do with the fatal scalding. (RB 164.) Moreover, Respondent states that the listed acts were admitted by Veronica Gonzales, but those "admissions" were all accompanied by an insistence they occurred with an innocent or benign intent. Respondent fails to explain how these prior acts

are at all relevant to the state of mind of the person who placed Genny in the scalding hot water. [23]

Respondent insists that the **only** reasonable explanation of the evidence is that either Veronica Gonzales or Ivan Gonzales or both made a cold and calculated decision to spend fifteen minutes filling the bathtub with hot water while planning to disfigure and disable a four-year-old child. (RB 165.) Of course, if it was Ivan who filled the tub, while Veronica was in another room preparing dinner, then there is no basis for concluding that Veronica knew what Ivan was doing, or that she shared Ivan's intent. That problem will be addressed later in this argument, in the section dealing with aiding and abetting.

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[23] In other words, even if there was a basis for the finder of fact to conclude that Veronica Gonzales committed some or all of these earlier acts with a malicious state of mind, or that she intentionally allowed Ivan to commit these acts, that still does not establish that she wanted Genny dead, or so disfigured that she could never hope to explain what happened. The acts that caused the fatal injuries go far beyond anything that had occurred previously. One possibility is that there was an escalating malicious state of mind, but there are many other possibilities, including the possibility that the fatal injuries were the result of an unplanned explosion of violence, even if the earlier acts were committed by Veronica Gonzales, with a malicious state of mind.

Thus, even if the prior acts are viewed in the worst light, and it is assumed that Veronica Gonzales was responsible for the death of Genny Rojas, the evidence still does not establish first degree felony murder based on mayhem.

Putting that problem aside, there are still other scenarios that are fully consistent with the evidence. First, even looking only at the various theories posited by the prosecution witnesses, the tub could have been filled to a sufficient height with sufficiently hot water in much less than fifteen minutes. (See summaries at AOB 75 and 80-81.) In any event, no matter how long it took, somebody may well have started filling the tub, mistakenly turning on only the hot water, and then left the bathroom while the tub continued filling. That same person (or the other spouse) could have returned to the steamy bathroom, blamed Genny for making the bath too hot, and grabbed her and put her in the tub in a misguided effort to show her just how hot the water had become.

While such a scenario may seem somewhat improbable, so is the scenario relied on by Respondent. The simple truth is that we do not know just what happened. It is no answer to say that there were several possibilities and we should assume the jury settled on the one Respondent proposes. The rule permitting a reviewing court to review the evidence most favorably to the position of the prevailing party (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 61 L.Ed.2d 560, 573) only makes sense in the context of conflicting evidence that is resolved by the fact-finder's resolution of credibility issues. But when credibility issues are resolved and the evidence accept by the fact-finder still leaves multiple possible scenarios, it is not rational to allow, or assume, the fact-finder can just pick any one theory and proclaim it proved beyond a reasonable doubt. (*People v. Johnson*

(1980) 26 Cal.3d 557, 577-578.) Instead, if the evidence accepted by the fact-finder still leaves open the possibility of multiple scenarios, then it is pure speculation to simply pick one and reject the others. Rational fact-finders do not make their determinations by simply picking one of multiple, equally possible, scenarios. Rational fact-finders must find a reasonable doubt in such circumstances. If there is not enough evidence to reject a potential scenario that points toward innocence, then there is not sufficient evidence to uphold a guilty verdict.

> Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. **Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact**. (*People v. Redmond* (1969) 71 Cal.2d 745, 755; emphasis added.)

> [W]ell-grounded suspicion is not proof, and especially is it not proof beyond a reasonable doubt. (*In re Eugene M.* (1976) 55 Cal.App.3d 650, 658.)

In other words, rational jurors can decide that the testimony of two witnesses is inconsistent, so that one of the witnesses must be lying or mistaken, and rational jurors can then decide to believe one witness and reject the other. If that is enough to resolve the guilt issue, then a guilty verdict is proper. For example, where Witness says "I saw Defendant commit the crime," and Defendant says "I did not commit the crime," the jury can decide Witness appeared credible and Defendant did not. In those circumstances, a guilty verdict is proper. But if the evidence remaining after

credibility determinations have been made still leaves multiple scenarios that are all reasonably possible, there is no justifiable rule that allows a jury to just pick one possible scenario that points toward guilt. To do that would be to disregard the requirement to consider the evidence as a whole. In those circumstances, no reasonable juror could conclude guilt was proved beyond a reasonable doubt. Even if it could be said that one potential scenario is more likely than the other, that is not sufficient to constitute proof beyond a reasonable doubt. Instead, it would still be a matter of speculation. "Substantial evidence to support a verdict must be of solid value and must consist of **more than a mere possibility** that something happened; ...." (*People v. Houts* (1978) 86 Cal.App.3d 1012, 1019; emphasis added.)

> We may *speculate* about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, '"""""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.) (*People v. Morris* (1988) 46 Cal.3d 1, 21.)

In sum, there is no rule that allows a jury to make credibility determinations that still leave open a number of reasonable possibilities, and

then pick one of those at random (or worse) and call it a verdict.[24] A reviewing court cannot just rubber-stamp any such arbitrary choice, call it a reasonable inference from the facts, and use that to justify an affirmance. Instead, this Court must recognize that speculative possibilities, or even well-grounded suspicions, are not sufficient to uphold a verdict. Proper inferences cannot be based on an arbitrary choice among reasonable possibilities. Instead, a proper inference must be based on evidence that supports that inference while excluding other reasonable possibilities.

Indeed, even if there was a proper basis to presume the worst about Veronica Gonzales and her state of mind toward Genny during the months preceding the murder, and to also presume that she placed Genny in the hot bathtub, knowing how hot it was, that **still** does not establish that she acted with a specific intent to commit mayhem. If, in that worst-case scenario,

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24 It is unlikely that a jury, faced with a number of reasonable possibilities, would pick one at random. However, it is entirely possible that a jury, faced with a number of reasonable possibilities, would choose one for a reason even less defensible than a random choice. In the context of the present case, a jury, faced with a number of reasonable possibilities, would have very likely chosen the possibility that would lead to a conviction of first degree murder and a true finding on the special circumstance allegations. That is, the nature of the present crime, especially as shown in the photographs of the victim, would have created an overpowering desire to hold someone responsible. (See (*People v. Thompson* (1980) 27 Cal.3d 303, 325.) Other improper reasons would include an overall disapproval of the lifestyle of the Gonzales family, or knowledge that Ivan Gonzales had been sentenced to death, accompanied by a feeling that Veronica should be treated the same as Ivan, since there was no way to determine which of them did what.

her state of mind was simply to finally do away with Genny, then we would be left with an intent to kill, but not a **specific intent** to commit mayhem. Thus, Respondent is wrong in asserting that the "only reason" for immersing Genny in the hot tub was to intentionally maim her. (RB 168.) As shown above, there was a very real possibility that the immersion was a spontaneous act resulting from anger, with no specific intent at all, and there was also the possibility that the state of mind was to kill, without thought about the probability that maiming would occur during the process of killing. Indeed, either of these other possibilities was more likely than the possibility that anyone had the specific intent required for mayhem.

B. First Degree Torture Murder

The first degree torture murder requires "willful, deliberate, and premeditated intent to inflict extreme and prolonged pain ..." (Pen. Code § 189.) Thus, much of what was said in the last section of this argument, pertaining to the insufficiency of the evidence to prove a specific intent to commit mayhem, applies equally here. Similarly, what was said about the impropriety of relying on speculative possibilities, rather than evidence-based inferences that exclude alternative reasonable possibilities, also applies equally here.

As a result, Respondent's repeated reliance on acts that occurred weeks or months before the fatal injuries is insufficient to show the necessary intent at the time the fatal injuries were inflicted. (See RB 169.) Again,

there were less culpable possibilities, including a spontaneous explosion of violence or a misguided attempt to discipline. Again there was also the possibility of a simple intent to kill, without any thought to how much pain might be suffered before death. Experts disagreed about how long it could have taken Genny to lose consciousness or to die, but none of that really mattes in this context. Even assuming she remained conscious for a significant period of time, and experienced excruciating pain during that time, there is no evidence that Ivan or Veronica Gonzales knew that would happen. At most, the prior burning incident shows they likely knew that pain would result, but that does nothing to exclude the reasonable possibility that the person believed that such a substantial immersion in water as hot as it was would cause immediate death, or at least immediate loss of consciousness and a death soon afterward. There is simply no evidence that the person consciously intended to inflict extreme and prolonged pain, rather than simply intend to inflict fatal injuries.

Respondent seizes on one passing comment in *People v. Steger* (1976) 16 Cal.3d 539, 548-549 to concoct an argument that can only be described as bizarre. (RB 170.) Respondent notes that *Steger* mentioned that if a defendant had "trussed up" a victim and inflicted pain continuously over a long period, that might support a conclusion that the elements of torture were proved. In order to attempt to squeeze this case into that scenario, Respondent asserts, without foundation, that Genny had been bound.

Respondent does not make clear whether the claim is that Genny was bound before she was immersed in the hot water, or whether this is a reference to prior incidents that may have included binding. If Respondent means the latter, then Respondent fails to explain why binding during very different incident that occurred weeks or months earlier had anything to do with the mental state present during the commission of the acts that caused the fatal injury. More likely, Respondent means the former, as Respondent had previously made such a claim. (RB 168.) But the record references supplied by Respondent completely fails to support the conclusion. RT 59:6573 says nothing at all about Genny's hands being tied when the fatal injuries were inflicted. RT 56: 5957 contains speculation by a witness that, when Genny was placed in the water, her hands were held in a manner that prevented her from using them to try to get out of the water.

Even assuming this speculation could be deemed sufficient to support a legitimate inference, holding Genny's hands during the few seconds she spent in the water is very different from the *Steger* example of tying a victim while continuously inflicting pain over a **lengthy** period of time. Thus, Respondent's attempt to place the present case within the example of torture described in *Steger* utterly fails.

Respondent's list of previous injuries inflicted on Genny also do not bring the present case within the *Steger* example. *Steger* described a lengthy and **continuous** period of the infliction of painful injuries to a bound victim. The prior acts described by Respondent occurred in individ-

ual assaults over a lengthy period of time, with substantial breaks during which no injuries were inflicted. Many of those acts did not involve any binding of the hands. Respondent even accused Appellant of improperly looking at "isolated bits of evidence..." (RB 171), but that is exactly what **Respondent** has done. Once again, Respondent's attempt to place this case within the *Steger* example of torture utterly fails.

Even assuming there is a sufficient basis to conclude that the prior acts constituted torture, that still would not prove that there was a conscious intent to torture at the time the fatal injuries were inflicted. It is at least equally reasonable to conclude that the prior incidents of physically abusing the young child demonstrated that the person who inflicted the prior injuries had a short fuse that might well have led to an explosion of violence that resulted in the fatal injuries. The present charge requires proof that murder occurred during the commission of torture, not during a spontaneous explosion of anger that was preceded by torturous assaults weeks or months earlier.

Respondent's reliance on *People v. Mincey* (1992) 2 Cal.4th 408 (RB 172) is also misplaced. In *Mincey*, **hundreds** of injuries were inflicted on a five-year-old boy during a **continuous** period of 24-48 hours. This is far different from the present case, where the various injuries were spread out over a period of several months, and each incident was followed by a substantial period during which no injuries were inflicted, and during

which the Gonzales family frequently interacted with friends and relatives who saw only a loving relationship between Veronica Gonzales and Genny.

Finally, since the filing of the opening brief, this Court rendered another opinion which found insufficient evidence to support a torture-murder special circumstance. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1136-1139.) Much of the discussion in *Mungia* applies equally to the present context of first degree torture murder. In *Mungia*, the evidence showed the defendant entered the victim's home with the intent to kill her in order to prevent her from testifying about a previous robbery the defendant had committed. The defendant bound the victim's hands and feet and hit her in the head and face twenty-three times, with a blunt instrument. The pathologist "characterized her injuries as extremely painful and some of the most brutal that he had ever seen." (*Id.*, at p. 1110.) This Court concluded the killing was "brutal and savage," (*Id.*, at p. 1137) but found no intent "to inflict '"pain in addition to the pain of death."' (Citation omitted.)" (*Id*, ap. P. 1138.)

Thus, binding a victim during the infliction of fatal injuries is not sufficient to prove the intent element of torture in the present context. Neither is a pre-existing intent to kill by brutal means. Neither is the knowledge that the defendant in *Mungia* must have had – that repeated blows to the head of a helpless victim with a blunt object would be painful.

C. Mayhem Special Circumstance

Everything said in the earlier section pertaining to the mayhem felony murder theory applies equally to the mayhem special circumstance.

D. Torture Special Circumstance

Everything said in the earlier section pertaining to the torture murder theory applies equally to the torture special circumstance.

Once again, Respondent sets forth the same listing of prior incidents without explaining how they were connected to the infliction of the fatal injuries. Certainly it cannot be contended that the prior injuries were inflicted with an intent to kill, an essential element of the torture special circumstance. Thus, it is not at all clear how these prior incident would help to prove an intent to kill when the fatal injuries were inflicted.

Notably, Respondent is caught in a conundrum with respect to this special circumstance, which requires proof of **both** an intent to kill and an intent to torture. But if the evidence shows an intent to kill, and immersion in the hot tub was the means of achieving this intent, what evidence is left to prove there was **also** an intent to torture? Conversely, if the evidence does show an intent to torture, then what evidence is there to show there was also an intent to kill?

The bottom line is that there simply is no evidence of the state of mind of the person who immersed Genny in the hot bath tub. Indeed, we don't even know who that person was – Veronica, or Ivan, or both.

E. Aid and Abet Theories

Yet again, Respondent goes back to the list of prior incidents. Respondent argues these prior incidents, if committed by Ivan, demonstrate that Veronica at least knew of Ivan's unlawful purpose in abusing Genny. (RB 177.) Even if we accept that much of Respondent's argument, that still does not prove that Veronica shared whatever **intent** Ivan may have had in committing those prior acts. Moreover, even if there was sufficient evidence to prove that Veronica shared Ivan's intent during those earlier incidents, that still does nothing whatsoever to prove that, at the time Ivan immersed Genny in the hot bath tub, Veronica shared any intent he had with regard to inflicting mayhem, inflicting torture, or to kill.

That last point bears repeating for emphasis – even if there was enough evidence to prove that Veronica actively assisted in the prior acts, and fully shared any evil state of mind, that does nothing to establish her guilt of murder if Ivan placed Genny in the hot water while Veronica was in the kitchen preparing dinner. The bottom line is that there are simply too many unknowns. Assuming Ivan was the one who placed Genny in the hot tub, we know nothing about his state of mind at the time, for all the same reasons set forth earlier in this argument and in the corresponding argument in the opening brief. But even if his state of mind was sufficient to satisfy any or all of the various mental states required for the murder theories or the special circumstances, we know even less about Veronica's state of mind at the time the fatal injuries were inflicted. It is entirely possible she

was in the kitchen unaware of what was happening in the bathroom. If so, how could she have intended to aid a killing that occurred without her knowledge?

Respondent relies on Veronica Gonzales' testimony that she started running the bath water for Genny. (RB 178, citing to RT 66:7679, 7685, 68:8026, 8071.) But in giving that testimony, she also said that she checked the water and it was warm, that Genny got into the tub herself, and that a substantial amount of time passed before she heard Genny's screams. (RT 66:7685, 7687-7691.) If this testimony is believed, then at some point the tub must have been fully or partially emptied and refilled with hot water. But even if this testimony is not believed, that does not prove that the opposite is true – that Veronica turned on the hot water that was used to kill Genny. Disbelief of a witness is not proof that the opposite is true. (*Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1229; *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal. App. 3d 1, 48; *Hicks v. Reis* (1943) 21 Cal.2d 654, 660.)

Thus, it still remains entirely possible that Veronica started Genny with her bath and then returned to the kitchen to prepare dinner, while Ivan subsequently had some reason, unknown to Veronica, to become angry at Genny. One possibility is that Genny ended her bath prematurely and drained the tub, causing Ivan to get angry, refill the tub with hot water, and then immerse her in the tub. The bottom line is that Veronica's mere act of

starting to fill the tub does not prove that she "instigated and facilitated the murder." (RB 178.)

Respondent also relies on the failure to get medical treatment for Genny after she was removed from the tub. Respondent asserts that the failure to get medical attention proves Veronica "aided and facilitated Ivan in murdering Genny." (RB 178.) But there are a great many possible reasons for the failure to get medical attention. The Gonzales family did not have a phone. Veronica testified that Ivan soon left the house and she assumed he was going to get help. After he returned and she realized he had not sought help, she then promptly took Genny and ran to a neighbor's house to seek help.

Notably, Veronica's explanation makes more sense than any other explanation. We know from other witnesses that Ivan did go to the nearby store at a time that must have been after Genny was taken out of the tub, but before help was sought from neighbors. If the events did not occur as Veronica testified, then what was happening during this period of time? Respondent offers no alternative explanation, and none is apparent.

Next, Respondent asserts that, "[t]o hide their acts of abuse, Gonzales and Ivan murdered Genny." (RB 178.) This also makes no sense. If they were concerned that somebody would discover the acts of abuse that had been committed against Genny, a gruesome murder would only assure they would be caught and punished severely. They certainly could not have planned to hide the body and hope that nobody would notice.

Respondent closes with the contention that a juror is free to reject some portions of a witness' testimony and accept others. (RB 178.) That is true, but tempered by the requirement that the decisions must be rational. A jury cannot arbitrarily accept isolated snippets of testimony that are incriminating standing alone, and then reject explanatory comments that accompany that testimony. Furthermore, as noted above, disbelief of a witness' testimony simply means that testimony have no effect; it does not somehow get converted into affirmative evidence that the opposite is true.

F. Additional Impact of New Authority on Aid and Abet Theories

In addition to the arguments set forth above and in the opening brief, there was a further serious problem with the aiding and abetting theory utilized below. Here, the jury was instructed as follows:

> Persons who are involved in committing a crime are referred to as principals in that crime. **Each principal, regardless of the extent or manner of participation, is equally guilty**. Principals include, number one, those who directly and actively commit the act constituting the crime or, two, those who aid and abet the commission of the crime. (RT 82:10643; emphasis added.)

In a decision published after the filing of the opening brief, the Court of Appeal in *People v. Samaniego* (2009) 172 Cal.App.4th 1148, held that "... an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state." In such circumstances, it

is error to instruct the jury that an aider and abettor is necessarily equally guilty.

Samaniego went on to find such an error harmless where the jury necessarily found that the aider and abettor acted willfully, with the intent to kill. Such a finding was made in *Samaniego* in a separate verdict finding true a special circumstance, which required intent to kill.

In the present case it is a very real possibility is that the jury concluded that Veronica Gonzales actively assisted Ivan in some or all of the prior incidents that resulted in injuries to Genny.[25] As also discussed above, according to Respondent, that would apparently be enough to allow the jury to conclude that Veronica Gonzales was liable for aiding and abetting Ivan Gonzales, even if Veronica Gonzales was in the kitchen when Ivan placed Genny in the hot bath water. The jury, following the erroneous instructions, would have then concluded that Veronica Gonzales was equally guilty, without considering whether her state of mind was less culpable than Ivan's state of mind, at the time of the act that resulted in the

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25 This in no way negates the arguments made above that there was insufficient evidence to support such a finding. The fact remains that the jury returned a guilty verdict. If this Court agrees the evidence was insufficient, this portion of the argument will be moot. In the event this Court rejects the sufficiency of the evidence arguments, then this is a separate point that must also be resolved.

death of Genny.[26] In other words, if the jury concluded that Veronica Gonzales did aid and abet in some of the earlier acts, then, according to Respondent, the jury could have further concluded that she aided and abetted the acts that led directly to Genny's death, even if she was in the kitchen when those acts occurred. From that, the instructions required the jury to conclude she was equally guilty of the homicide, even if she had no intent to harm Genny on the day Genny was killed, and even if she had no knowledge of what Ivan was doing to Genny in the bathroom while Veronica was in the kitchen.

It is true that here, as in *Samaniego*, there was a separate special circumstance finding which included an intent to kill element. However, the *Samaniego* conclusion of harmless error cannot apply under the circumstances of this case. As shown in all sections of this argument above and in the opening brief, the crucial instructions on all murder and special circumstance findings were hopelessly complicated and confusing. Adding to that intolerable mix an erroneous instruction telling the jurors that anyone who

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26 Notably, even if Veronica Gonzales did aid and abet Ivan Gonzales in the prior incidents, it cannot be said that Genny's death by scalding burns in a hot bathtub was a reasonably foreseeable consequence of those prior acts. Alternatively, even if aiding the prior acts could be enough to make Veronica Gonzales liable for the death of Genny, that would not necessarily establish the mental states necessary for mayhem or torture. That, in turn, would negate the theories of first degree murder relied on below, and the special circumstances. But none of that mattered when the jury was told that if she aided and abetted, she was automatically equally as guilty as Ivan Gonzales.

aids and abets is necessarily equally guilty with the direct perpetrator only exacerbates an already complicated and confusing situation. That added degree of complication and confusion could have also impacted the special circumstance finding.

In other words, if one or more jurors believed Veronica Gonzales aided and abetted Ivan Gonzales and was therefore equally guilty without regard to her particular state of mind at the time of the act that resulted in Genny's death, the same error could have very well carried through to the special circumstance finding. One or more jurors could well have concluded that Veronica's own state of mind was uncertain, but that since she was equally guilty with Ivan, who had an intent to kill, a true finding could be returned on the special circumstances as well as on the murder count.

G. Conclusion

There is simply a lack of evidence regarding the state of mind of whoever immersed Genny in the hot water. Respondent relies on repetition of the horrible injuries suffered by Genny, but no matter how many times Respondent repeats that litany of horror, it does not supply the missing state of mind evidence.

V. THE CRIME OF MAYHEM HAD NO INDEPENDENT FELONIOUS PURPOSE, AT LEAST UNDER THE FACTS AND THE THEORIES RELIED ON BY THE PROSECUTION, IN THE PRESENT CASE

In the opening brief, it was shown that the merger doctrine of *People v. Ireland* (1969) 70 Cal.2d 522 is directly applicable to the present conviction of first degree murder, insofar as that conviction rested on a felony-murder theory with mayhem as the underlying felony.[27] (AOB 390-405.) Respondent's position boils down to one simple, but unsupported, contention – that mayhem, in the present case (and apparently in every case), had an independent felonious purpose and therefore did not merge into the homicide. (RB 179-185.) Respondent is wrong for two reasons. First, the rationale advance by Respondent would apply equally to a number of crimes that have been held to come within the *Ireland* doctrine. Second, in the present case the prosecution argued, and the jury found, that the very acts constituting mayhem were committed with the intent to kill Genny Rojas, and there is no evidence whatsoever that the acts resulting in the death

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27 Recently, in *People v. Farley* (2009) ___ Cal.4th ___ (S024833, filed 7/2/09, slip op. at p. 90), this Court overruled *People v. Wilson* (1970) 1 Cal.3d 431 and concluded that the *Ireland* merger doctrine should apply only to second degree felony-murder, and should no longer apply to first degree felony murder. However, this Court expressly concluded that this resulted in a judicial enlargement of a criminal statute that cannot be applied retroactively. Thus, *Farley* has no application to the present argument, and *Wilson* still applies to this case.

of Genny Rojas were committed with **both** the intent to maim and a separate and independent intent to kill.

Respondent contends that mayhem has a purpose independent of murder, since it requires an intent to maim. (RB 182.) But *Ireland* has been applied to felony-murder where the underlying felony is burglary based on entry with intent to commit a felonious assault. (*People v. Wilson* (1970) 1 Cal.3d 431, *People v. Sears* (1970) 2 Cal.3d 180.) In the same way that Respondent contends that the requisite intent to maim in the present case is independent of the homicide, so would be the intent to commit a felonious assault. The flaw in Respondent's reasoning is that in both cases, the intended crime (to maim or to assault feloniously) is committed by the very act that causes death. Thus, Respondent fails to distinguish the present case from *Wilson* or *Sears*. Indeed, Respondent fails to even discuss *Wilson* or *Sears*, except for a brief mention in passing.

Similarly, in *People v. Smith* (1984) 35 Cal.3d 798, one could say that the underlying felony child abuse was committed simply to abuse the child, a purpose independent of homicide. But once again, as here, it was the very acts that constituted abusing the child that also resulted in the death. Respondent fails to distinguish *Smith* from the present case.

Indeed, Respondent expressly recognizes that, "[i]n cases where the conduct was a direct assault on the child resulting in death, the *Ireland* doctrine applied because the purpose of the child abuse 'was the 'very assault that resulted in death.'" (Citation omitted.)" (RB 184.) This is **precisely**

what happened in the present case. Here, the conduct constituting mayhem (placing Genny in the tub full of hot water) was a direct assault on Genny, resulting in her death. The purpose of the mayhem was the "very assault that resulted in death." (*Id.*) Thus, Respondent's contention of an independent felonious purpose fails.

Secondly, respondent contends that **in this case** the act of burning Genny in the hot bathtub had the independent purpose of maiming her, and therefore did not merge into the homicide. (RB 182.) But **in this case**, the prosecution below argued successfully that the crime of torture was committed with the intent to kill Genny. (See Argument IV, earlier in this brief and in the opening brief.) That crime of torture was based on the very same acts as the crime of mayhem – placing Genny in the hot bath tub. Even the prosecutor conceded below that the torture and the mayhem were based on the very same act. (RT 80:10530-10531.) In finding the torture-murder special circumstance true, the jury expressly found that that the act constituting torture – placing Genny in the hot water – was committed with the intent to kill. Therefore, the act constituting mayhem – the same act as the act constituting torture – was found by this very jury to have been committed with the intent to kill.

Respondent has pointed to no evidence whatsoever that the person who placed Genny in the hot water did so with two separate and independent intents – to kill and to maim. It is not at all clear that, in the present circumstances, two such separate and independent intents could have existed.

But even if it is **possible** that the person acted with two such independent intents, it certainly was not proved in the present case. (See Argument IV, earlier in this brief and in the opening brief.)

Cases applying the *Ireland* doctrine make it clear that whether the doctrine applies or not can depend on the specific facts of a particular case, rather than on the particular crime in the abstract. As Respondent noted, this Court in *Smith* distinguished *People v. Shockley* (1978) 79 Cal.App.3d 699 because the malnutrition and dehydration in *Shockley* was not child abuse based on a severe beating, as was the child abuse in *Smith*. (RB 184.) Thus, the express finding of an intent to kill in this case should be considered, even though intent to kill is not an element of mayhem in the abstract.

Also, Respondent's attempt to compare mayhem to other felonies enumerated in Penal Code section 189, such as robbery or rape (RB 180-182) fails. Robbery is a crime that requires an assault, but does not typically involve a battery. That is, in most robberies, it is the threatened physical harm that causes the victim to part with property, and actual physical harm does not typically result. Thus, where actual physical harm does occur, and it results in death, it makes sense to apply the felony-murder rule. Similarly, while rape necessarily involves a battery, not just an assault, it is not normally a life-threatening sort of battery. When a life-threatening battery does occur and results in death, it makes sense to apply the felony-murder rule. But mayhem necessarily involves a battery that it so serious it would always constitute great bodily injury. At least in circumstances

where an intent to kill is also found, the felony-murder rule serves no deterrent purpose and *Ireland* should control.

In sum, Respondent has failed to show that the present acts constituting mayhem had any independent felonious purpose from the very act that resulted in the death of the victim.

VI. THE PRESENT CASE WAS UNUSUALLY CLOSE, AND ANY SUBSTANTIAL ERROR MUST BE DEEMED PREJUDICIAL

In the opening brief, it was shown that the present case was unusually close, both on the issue of whether Veronica Gonzales was criminally liable for the death of Genny Rojas, and, if she was, whether the requisite mental states for either theory of first degree murder or either special circumstance were proved beyond a reasonable doubt. It was also shown that several well-established principles support the conclusion that any substantial error, in a case like the present one, must be deemed prejudicial. (AOB 406-415.) Respondent simply argues that there were no errors, except for the one error Respondent conceded in Argument I, and that the evidence was compelling, not close. (RB 185-190.)

Respondent is absolutely wrong in contending that Veronica Gonzales' own statements to the police were ignored in the opening brief. (RB 186.) Rather, they were set forth in detail in the Statement of the Facts section of the opening brief, and were expressly discussed at AOB 408-409. Respondent describes her trial testimony as self-serving, but that can be said about any defendant who testifies, and saying it does nothing to help anybody decide whether a particular defendant's testimony is truthful or not.

Respondent is correct in noting that Ms. Gonzales admitted a number of lies to the police, and even to her own experts in the early stages when she was slowly getting to know them and learning to trust them. (RB

186.) But her trial testimony did explain clearly why she had lied to the police and, initially, to her own experts. That trial testimony was strongly supported by very credible experts. Respondent chooses to disbelieve that testimony, which is something Respondent must do in order to argue in support of the verdicts reached below. But the real issue is whether reasonable jurors could have accepted the explanation given by Veronica Gonzales and her experts. Respondent does not explain why reasonable jurors would have necessarily rejected the defense offered in this case.

Respondent claims that the prosecution did not rely on the various statements by Ivan Gonzales, Jr.[28] (RB186.) Having said that, Respondent proceeds to rely on them. Respondent notes that the various interviews of Ivan, Jr. consumed nearly six hours (RB 188), so it is not surprising that Respondent is able to find a handful of instances where Ivan, Jr.'s statements were corroborated by other evidence. (RB 186-187.) But the issue is

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28 As shown in detail in the opening brief, the statements made by Ivan, Jr. helped the defense in some areas and helped the prosecution in other areas. Most of the statements were inadmissible hearsay. Both sides went back and forth, during pretrial and trial stages, in deciding whether they wanted these statements admitted or not. Eventually, both sides reached agreement to admit most of Ivan, Jr.'s various statements without any hearsay objection. It was obvious that both sides had difficult tactical considerations, and that the prosecution would have likely sought admission of some of the statements if the defense did not. Thus, the fact that it was the defense that technically offered them in this case (see RB 186) is of little significance. It was crystal clear that the defense was not vouching for the truth of the totality of Ivan, Jr.'s statements.

not whether Ivan, Jr. occasionally gave accurate responses. Instead, the issue is whether he gave so many responses that were internally inconsistent, or were demonstrated to be false, that no reasonable juror could have relied on the contested portions of his statements to find guilt proved beyond a reasonable doubt. Respondent simply fails to address that at all, preferring instead to ignore that problem and rely on factors that prove nothing.

In any event, the present argument is **not** that the statements by Ivan, Jr. were inadmissible or unfairly prejudicial. Instead, the present argument is only that the statements were part of the totality of the evidence that was before the jury. The present argument is that those statements were unreliable for many reasons, in the context of measuring the closeness of the case for the purpose of determining whether various errors were harmless or prejudicial. In that context, it makes no difference who offered the evidence; all that matters is whether it added significantly to the strength of the prosecution case.

Also, it should be stressed that **none** of the statements made by Veronica Gonzales or by Ivan Gonzales, Jr. provide significant assistance to Respondent in arguing to uphold the adequacy of the proof of the various mental states required for either theory of first degree murder or the special circumstances. Respondent is conspicuously silent on this point. Even if it could possibly be said that any reasonable juror would have necessarily rejected all of Veronica Gonzales' testimony, there still is no compelling evi-

dence to prove the necessary mental states. The case must be deemed a close one, and any substantial error must be deemed prejudicial.

Respondent is again wrong in contending that Veronica Gonzales seeks a lower standard of prejudice because the evidence gave the jurors strong reason to dislike her, even if she was entirely innocent of the present charges. (RB 189.) Respondent distinguishes the context in *People v. Thompson* (1980) 27 Cal.3d 303, 317, but fails to offer any explanation why the principles expressed in the *Thompson* context should not be applicable in the present context. The simple truth is that this Court has recognized in *Thompson* and in other cases that when a crime is especially horrific, or when jurors have reasons to dislike a defendant, juries are more likely to disbelieve defense testimony and/or to want to return a guilty verdict, regardless of whether the evidence is strong or weak. In such cases, meaningful appellate review requires special sensitivity to the potential impact of errors. Veronica Gonzales is not seeking a different standard of prejudice. Instead, she seeks only the recognition of the fact that in a case such as the present one, errors that might be harmless in a different case are more likely to be prejudicial, while applying the applicable *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) or *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) standard that would apply in every case.

VII. RESPONDENT HAS FAILED TO DEMONSTRATE ANY RELEVANT CONTENT IN THE CONTESTED PORTIONS OF THE CROSS-EXAMINATION OF VERONICA GONZALES' SISTER, AND HAS NOT EXPLAINED HOW THE CONTESTED PORTIONS OF THE PROSECUTION ARGUMENT AMOUNTED TO ANYTHING OTHER THAN A BLATANT APPEAL TO RAW EMOTION

In the opening brief, it was shown that several improprieties occurred in the prosecutor's cross-examination of Mary Rojas, and that the errors were greatly exacerbated by a series of improprieties in the prosecutor's argument to the jury. (AOB 422-444.) Respondent tries in vain to ascribe a relevant purpose to cross-examination and argument that plainly had another purpose – obtaining a death verdict by any means, no matter how foul.

A. Improper Prosecution Questions and Related Erroneous Evidentiary Rulings

Respondent begins with an unusual footnote, dismissing as improper the introductory portion of the argument in the opening brief. (RB 190, fn. 35.) That introduction was simply, and properly, intended to set the context for the errors that occurred during the penalty phase.

Respondent complains about references to pre-trial plea negotiations, but they were legitimate background information to make clear how much was at stake in the prosecutor's extreme gamble. With great uncertainty about who did what, and about the state of mind of Ivan and Veronica Gonzales, and with the total absence of any significant prior record for

either defendant, this was a case that should have been settled without a trial, unless the defendants refused to consider any such resolution. But here, both defendants were willing to plead guilty and spend the entire remainder of their lives in prison, with no possibility of parole, in an effort to save their children from the trauma that would have resulted if they had been forced to testify against their parents. The prosecution first praised the defense offer, but after it had been presented to a reviewing committee in the District Attorney's Office it was summarily rejected. This led to two separate long and expensive guilt trials, and three separate expensive penalty trials, all for the sake of gaining death sentences against both parents.

This background was crucial to explain why the prosecution would stoop to such a cruel and distasteful means to win their very risky gamble. As Respondent recognizes, some decisions by this Court reject claims of prosecutorial misconduct unless there is a showing of "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820, cited at RB 211.) In order to demonstrate that the present prosecutor did resort to such means, the context and other disparaging comments about the prosecutor were necessary and appropriate. Furthermore, the summary of the background, is necessary to demonstrate that the prosecutor was highly motivated to resort to any means, fair or not, to secure not just a conviction, but also a death sentence. Certainly the underlying facts justify the inferences made in the opening

brief, at least as much as the inferences utilized by Respondent to justify upholding the present verdicts.

A large portion of Respondent's argument seeks to justify the prosecutor's blatant attack on the character of Mary Rojas as necessary to rebut claimed defense efforts to show that Mary was a loving mother of Genny, but nonetheless still believed that Veronica Gonzales should be allowed to live. Respondent greatly overstates that position; the direct examination of Mary touched on her feelings about Genny only briefly and tangentially. Respondent cites RT 89:11913. (See RB 197.) However, the entire relevant portion is as follows:

> Q And, Mrs. Rojas, when she was alive, did you love your daughter Genevieve?
>
> A yes.
>
> Q Do you miss your daughter?
>
> A Yes.
>
> Q Is it hard for you to talk about your daughter?
>
> A Yes.
>
> Q Has there been times over the last few years where you have just been unable to even talk about her?
>
> A Yes.
>
> Q Mrs. Rojas, your daughter's death has been very hard on your family, hasn't it?

A Yes.

This half-page of direct examination was a brief portion of a direct examination that covered 21 transcript pages. Moreover, in context, it appears largely directed at an effort to explain the demeanor of the witness – that is, that it was difficult for her to appear in a courtroom and testify about her deceased daughter.

In any event, even if we give the prosecutor the benefit of the doubt and assume, for the sake of argument, that there was a legitimate need to show that Mary Rojas was **not** a loving mother, Respondent still fails utterly to explain how the contested examination and argument was a legitimate means to such an end. Whether Mary's abusive and exploitative mother received funds from the state for Genny's burial and then squandered those funds does nothing whatsoever to dispute Mary's claim of love for Genny. The length of time it took an impoverished mother of six to pay off the cost of Genny's burial and to obtain a tombstone does not render improbable Mary's claim that she loved her deceased daughter. The fact that Mary made a choice to occasionally see her off-limits husband, and to allow him to father another child does not show that Mary had no love for Genny. The fact that Mary had another child a year after Genny died, and chose to give the new child the same name as the deceased child does not demonstrate that Mary had no love for the first Genny.

Instead, the manner in which the prosecutor elicited and exploited these facts demonstrate his real purpose was to ridicule and denigrate Ve-

ronica Gonzales' entire family, in a misguided, reprehensible, and deceptive, albeit successful, effort to make the jurors feel comfortable about condemning Veronica Gonzales to death.

It is true that the defense politely tolerated much of the prosecutor's unseemly examination of Mary Rojas, failing to object to many of the initial portions of the examination. Nonetheless, this portion of the examination was set forth in the opening brief in order to place what followed in a proper context and to demonstrate the relentlessly reprehensible theme leading up to the prosecutor's ensuing misconduct.

Respondent takes the position that Mary Rojas lied on direct examination about her relationship with Pete Rojas, making cross-examination on the subject necessary in order to prove she was not a credible witness and therefore should not be believed in her testimony that she wanted Veronica Gonzales to be allowed to live despite the fact that Ms. Gonzales had been convicted of murdering Ms. Rojas' daughter. (RB 195, 202-203.) But all that Mary said on direct examination was that Pete Rojas was not allowed to live with her and her children, and that he was not living with them. (RT 89:11910.) Nothing the prosecutor asked thereafter did anything to show that this testimony was untrue.

Putting this matter in context, Genny Rojas died on July 21, 1995. About a year later, Mary Rojas had another daughter and gave her Genny's name. Pete Rojas was the father of that daughter. (RT 89:11948-11949.) That would mean the last daughter was conceived in the latter part of 1995.

Mary Rojas testified on May 14, 1998. Thus, the fact that Mary had sexual relations with Pete 2-1/2 to 3 years before her testimony does nothing to rebut her claim that Pete was not living with her at the time she testified.

On cross-examination, the prosecutor also elicited the fact that Pete Rojas was at Mary's house when a prosecution investigator appeared there on January 28, 1997. (RT 89:11948.) The fact that Pete came to her house occasionally, and was there on a specific occasion four months before Mary testified, also does nothing to dispute the truth of the claim that Pete did not live in Mary's home. Indeed, Respondent fails to explain how any portion of the cross-examination was designed to rebut in any way the claim that Pete no longer lived with Mary, even assuming that had anything whatsoever to do with whether the appropriate penalty of Veronica Gonzales was death or life without parole.

Respondent over-inflates the actual evidence in claiming that Mary testified that she never saw the father of her children at all anymore. (RB 202-203.) But as shown above, Mary said no such thing. She never said anything more than that Pete was no longer living with her, and the prosecutor never made any effort to dispute that claim. Nothing in the cross-examination showed any lack of credibility.

Respondent notes that the defense objection was sustained when the prosecutor asked, "Can you -- can you tell me why maybe you wouldn't want to wait awhile until you got the old Genny a headstone?" (RT 89:11929; see RB 200.) Respondent concludes there is no merit to the

complaint on appeal because the objection was sustained. But the reason the objection was sustained was because it was argumentative. The problem with argumentative questions is that they permit the person asking the question to present what amounts to argument. Thus, the prosecutor's improper purpose was fully achieved simply by asking this improper question. No answer was needed to bring home the prosecutor's insinuation that having a new child before being able to afford a headstone for Genny, and/or naming the new child Genny, somehow demonstrated that Mary never really cared for the first Genny. This was all part of the prosecutor's continuing theme of trashing the entire family in order to make the jurors comfortable with voting for death for Veronica Gonzales.

Respondent valiantly tries to defend the prosecutor's despicable questions and photographs regarding Genny's burial site by noting that Mary testified on direct examination about Genny's burial in an attempt "to bolster Mary's love..." (RB 200.) The facetiousness of Respondent's claim is obvious in light of the actual direct testimony about the burial:

> Q Okay. Now, where is your daughter buried?
>
> A In Norco.
>
> Q Is she buried in the cemetery?
>
> A Yes.
>
> Q Is that a family plot, the place in the ground where she's buried?

A Yes.

Q Who else is buried there?

A Susanna.

Q Is that your mother's sister?

A Yes.

Q Is her last name Becerra?

A Yes. (RT 89:11911.)

It is not at all apparent how this colloquy constitutes an attempt to "bolster Mary's love" for Genny. Even assuming that this did constitute an attempt to bolster Mary's love for Genny, it is even less clear how that is rebutted by showing that Mary could not yet afford a headstone for Genny,[29] or by showing off the prosecution photos of the burial site. Instead, this was simply one more excuse for the prosecutor's snide insinuations about Mary Rojas.

Respondent goes in circles in regard to whether the photos of the gravesite could be justified as victim impact evidence. (RB 200-201.) First,

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29 Mary testified that she not used drugs for 4 years prior to her testimony (or about a year before Genny's death) (RT 89:11910) and no evidence was ever offered to dispute this. Thus, the prosecutor could not contend that Mary chose to spend money on drugs rather than on a headstone. On the other hand, it is not at all surprising that a single mother with six children and a history of drug abuse would have little, if any. money available for a headstone. Thus, no proper purpose is apparent for the prosecutor's shameless exploitation of Mary Rojas' economic circumstances.

it is not at all clear how the photos could constitute victim impact evidence. If they did constitute victim impact evidence, it is still unexplained how they became relevant to the real issue – whether the appropriate penalty for Veronica Gonzales was death or life without parole.

Respondent complains that there was no objection on the ground that the photos constituting victim impact evidence without the required notice. (RB 202.) The reason there was no such objection is readily apparent – the court's ruling allowing the use of the photos was not based on victim impact evidence, but was instead clearly based on a misguided conclusion that the photos constituted proper rebuttal of Mary's claim that she cared about Genny. As discussed above, the photos did not rebut Mary's testimony; they merely constituted more fodder for the prosecutor's ceaseless efforts to ridicule and insult the entire family. Thus, the ruling was erroneous. It was noted in the opening brief that any attempt on appeal to alternatively justify the photos as victim impact evidence should also fail because this was not victim impact evidence, and even if it was, the required notice was never given. (AOB 428-430.) Respondent cites no authority for the novel claim that the failure to make a futile objection below constitutes acquiescence to any attempt by a reviewing court to substitute an alternative theory when the theory relied on by the trial court was erroneous.

Respondent also argues that Penal Code section 190.3 allows victim impact to be introduced in rebuttal without prior notice. (RB 202.) But that section does no such thing. If the evidence is admissible only as victim im-

pact evidence, section 190.3 requires advance notice. If evidence is admitted as relevant rebuttal, then no notice is required, but the evidence remains rebuttal evidence, not victim impact evidence. Here, the photos were not proper rebuttal evidence. If the photos did constitute victim impact evidence, but not relevant rebuttal evidence, then they could only be admitted in the prosecution's case-in-chief, with proper notice. Nothing in this analysis renders the last sentence of section 190.3 meaningless – that sentence simply allows relevant rebuttal evidence to be introduced without prior notice.

B. Improper Prosecution Argument

Respondent notes that after the prosecutor started reading his lengthy "letter to Genny," a defense objection was overruled, but the trial court admonished the jury that "...the personal opinion of none of the attorneys in this case is relevant to you, Ladies and Gentlemen." (RB 209, quoting RT 90:12037.) A very important question remains unanswered by Respondent – if the personal opinions of the attorneys are irrelevant, then why was the prosecutor permitted to express his personal opinions at great length, over defense objection? Because the trial court overruled the well-taken objection, the admonition could have only confused the jurors, rather than negating the harm caused by the prosecutor's blatant emotional appeal.

Respondent contends that there was no objection to the prosecutor's discussion of the testimony given by Mary Rojas, so any appellate claim

was waived. (RB 210-211.) But there was no point in objecting to the prosecutor's argument since the trial court had overruled defense objections and permitted the testimony in the first place. Once the objections to the prosecutor's improper questions were overruled, any objection to argument about those matters would have been clearly futile.[30] (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 852-853.) Furthermore, the trial court and prosecutor expressly agreed that unsuccessful objections made before the argument would be deemed made during argument, and it would also be deemed that an admonition was requested, so that objections were preserved without the need to repeat them during argument. (RT 90:12011-12012.)

Respondent seeks to summarily dismiss the contention that the prosecutor committed misconduct in arguing that Veronica Gonzales' personal history of being abused as a child proved she was responsible for abusing Genny, since she had learned how to abuse children. (RB 210, fn. 36.) Respondent contends that claim was not properly presented, so it apparently merits no response. Respondent concedes that the contention referenced the discussion in Argument II regarding similar misconduct in the guilt phase. The point made at AOB 443-444 was simply that the improper

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30 Indeed, the trial court had previously made clear its erroneous belief that once evidence had been admitted, the court had no power to stop a party from using it in argument. (RT 87:11524.)

theme started in the guilt phase was continued in the penalty argument, so the same guilt phase error therefore became a penalty phase error as well.

Respondent reiterates the contention that the prosecutor properly attacked Mary Rojas' credibility, and properly commented about the matter. (RB 212.) Interestingly, Respondent nicely summarizes what the defense had tried to do:

> Gonzales wanted to create an impression for the jury that even Genny's mother was willing to ask to spare Gonzales's life. This testimony was much more forceful if Mary was portrayed as a caring, loving mother who was grieving for the loss of her daughter. (RB 212.)

But nothing in the prosecutors improper questions or argument rebutted whatever inference may have been made, that Mary loved her deceased daughter and grieved for her after her death. Instead, the prosecutor simply resorted to hyperbole and insinuations to persuade the jury that Mary was still a worthless human being, even though there was no evidence to back up that insinuation. If that is not an unfair and reprehensible argument, then it is unclear what could be.[31]

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31 Respondent contends that Mary did not even know Genny's birth date, as if that somehow proves Mary had no love for Genny. (RB 212.) However, at the page cited, the prosecutor asked multiple questions about the birth date without waiting for any response. Mary finally responded, "Wait. You're going too fast." (RT 89:11916.) The trial court apparently agreed with Mary, adding, "Give her a chance to answer." Mary then said that Genny was born in January and was four years old when she died. (RT 89:11916.)

(Continued on next page.)

Respondent contends that it was proper for the prosecutor to comment on the fact that Mary did not have an appropriate reaction to the death of her child. (RB 212.) But what was inappropriate about Mary's reaction? What is the standard of appropriateness? Is there any appropriate way to respond to such a tragedy? Respondent fails to tell us what is an appropriate reaction, or what was inappropriate about Mary's reaction. According to the prosecutor below:

> Real parents who lose a child freak out. They lose their minds. They wear their child's death on their sleeve as a badge. They never get over it. It alters their lives forever. They lose their marriages. They lose their jobs. They end up with alcohol problems. They commit suicide because, when you lose a child, you lose a part of you. RT 90:12025-12026.)

(Continued from last page.)

To the extent Mary was unable to state the exact birth date, it is not surprising that a woman who had given birth to seven different children, and who was suffering from serious alcohol and drug abuse problems at the time Genny was born, could get confused or flustered when asked about Genny's birth date in a stressful courtroom setting. But Mary's testimony that she had remained sober for 4 years preceding her testimony went unrebutted. The issue (if any), in regard to credibility, was whether Mary was truthful in her trial testimony that she loved Genny and grieved for her.

Thus, whether Mary had been a good mother at the time Genny was born or during the time Genny had lived with her was not relevant to Mary's credibility. Indeed, Mary forthrightly acknowledged she had not been a good mother during the years she suffered from addiction problems. (RT 89:11923-11924.) As for any feelings about Genny that Mary expressed in her testimony, not one point was rebutted by any evidence.

The prosecutor cited no authority for his contention that this is how parents are supposed to react to the loss of a child. In reality, it seems likely that some parents react in some of the ways the prosecutor described, but not in all of the ways he described, and some do not have any of these reactions, but express their grief privately or in ways other than those described by the prosecutor. Notably, Mary had already lost her marriage and had already been through alcohol addiction and was trying to recover from it when Genny died. In sum, it is not at all clear what it would have taken to satisfy the prosecutor below, or Respondent now. What is clear is that it has not been shown that Mary's reaction to the death of Genny was inappropriate.[32]

Respondent appears to argue that the prosecutor's lengthy "letter to Genny" was not calculated to arouse passion or prejudice. (RB 213.) But if that is correct, then what was the purpose? Respondent cites no case that approves the reading of such a lengthy "letter", not written by any witness

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32 Of course, the prosecutor below made it clear that he believed it was inappropriate for the mother of a murdered child to plead for mercy for the person who was convicted of that murder. (See (RT 90:12024-12025, quoted at AOB 433.) But that person was also Mary's sister. Defense lawyers and prosecutors could have endless debates about what a mother and sister should do in such circumstances, but the reality is that there is no standard regarding what is appropriate in such difficult circumstances. More to the point, even if it was fair to say that Mary reacted inappropriately to Genny's death, what would have to do with whether the appropriate penalty for Veronica Gonzales is death or life in prison with no hope for parole?

but by the prosecutor himself. Respondent may be able to resort to phrases such as expressing the outrage of the community, but this "letter" was over the top. The real intent - to arouse passion and prejudice - is obvious. This was far from mild or brief and fleeting, and cannot be justified by cases that allowed comments that were mild or brief and fleeting.

Respondent relies on the trial court's admonition to channel emotion through the factors in aggravation and mitigation. (RB 214-215.) The inadequacy of this admonition was already discussed at AOB 437-438. Respond notes there was no objection to the admonition. (RB 214-215.) But there had been ample objection to the reading of the "letter" itself, both prior to argument and during argument. Those objections were erroneously overruled, and once the argument was permitted, no admonition could cure the damage. Moreover, the court gave no opportunity for input from counsel before delivering the admonition. Instead, the court overruled the proper defense objection and then instantly gave the admonition. (RT 90:12035.)

Respondent takes issue with the claim that the lengthy "letter to Genny" was the centerpiece of the prosecutor's argument. (RB 216-217.) Respondent points to other matters that were discussed during the prosecutor's argument. But it was never claimed that the "letter to Genny" was the **entire** prosecution argument. The fact that other matters were also discussed does not change the fact that this "letter" was the most powerful and

memorable part of the prosecutor's argument, because of its outrageousness and its drama and pathos.[33]

C. The Errors Were Prejudicial

Finally, Respondent contends that even if there was misconduct there was no reasonable probability that a more favorable result would have occurred absent the error. (RB 217-218.) Respondent is mistaken in seeking to apply the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. The correct standard for non-constitutional penalty phase error was set forth in *People v. Brown* (1988) 46 Cal.3d 432, 448.) Subsequent to *Brown*, this Court has clarified that the *Brown* "reasonable possibility" test is really the same as the beyond-a-reasonable-doubt test for prejudice articulated in *Chapman* v. *California* (1967) 386 U.S. 18. (*People* v. *Wallace* (2008) 44 Cal.4th 1032, 1092.)

Respondent appears to base the harmless error claim on the mistaken belief that the guilt phase evidence against Veronica Gonzales was "compelling." (RB 218.) It has already been shown earlier in this brief and in the opening brief that the guilt phase evidence was far from compelling. But even if the guilt phase evidence was compelling, that is not the issue in the penalty trial. After all, no penalty trial ever occurs until the defendant has

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33 The reading of the "letter" consumed 5 transcript pages (RT 90:12033-12038) in an argument that was 43 pages long. (RT 90:12023-12066.)

been found guilty beyond a reasonable doubt. Thus, a compelling showing of guilt should be the norm, before any penalty issue arises. The issue at the penalty trial is the weight of the aggravating evidence versus the weight of the mitigating evidence.

Respondent simply fails to comment on this issue. That is not surprising, since the weight of the mitigating factors was strong here – Veronica Gonzales had no prior record, was convicted of only one crime, and had a tragic childhood of her own, with a relentless pattern of both sexual and physical abuse at the hands of both her mother and her step-father. In aggravation, Respondent had only the circumstances of the present crime. As deplorable as those circumstances were, this is simply not a case where reasonable jurors could have only opted for death.

Indeed, Respondent has already argued that the mitigating impact of Mary Rojas' plea for the life of her sister was powerful if she was a loving mother to Genny, but much less so if she was not a loving mother. Misconduct that improperly insinuated she was not a loving mother was, inevitably, very damaging to the defense. This case must be considered extremely close in regard to penalty, and the errors discussed in this argument were very substantial. Thus, these errors were highly prejudicial.

VIII. THE TRIAL COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO MAKE A COMPARATIVE ARGUMENT AND THEN IMPROPERLY PRECLUDED A LEGITIMATE RESPONSE

In the opening brief it was shown that the prosecutor should not have been allowed to argue that "[i]f any murder requires the death penalty, this is it. If this isn't an appropriate case for capital punishment, then nothing is." (RT 89:12042.) That error was seriously compounded when the trial court simultaneously forbid any defense argument that referred to cases that were a matter of common knowledge, or to argue that those cases were worse than the present case. (AOB 445-455.) Respondent insists the prosecutor made no comparisons and really meant nothing more than, "this case deserves a death sentence." Respondent further insists that the trial court understood its full range of discretion and did not abuse that discretion in also precluding any defense response that would refer to other specific cases. (RB 218-231.) Respondent's position is untenable.

Respondent proceeds as if it is well-established that the type of argument the defense wanted in this case was improper, but the very cases Respondent cites demonstrate the opposite. Before discussing those cases, it is important to pinpoint exactly what the defense sought in this case. Strangely, Respondent nicely summarizes what the defense wanted to do, just before Respondent attempts to recharacterize the defense desire into something entirely different:

> ... defense counsel explained he wanted to comment on two or three other cases in which the death penalty was not given to show that the death penalty is not required in every horrible case, such as for the murder of Dr. Martin Luther King, or of Wayne Williams in Atlanta, who murdered several children, Terry Nichols, who was instrumental in the Oklahoma City bombing, or Ted Kaczynski. (89 RT 12003-12004.) (RB 219.)

Thus, all of the concerns raised by the trial court, and repeated by Respondent, regarding time-consuming discussions of factual details from other cases, or comparisons of charging policies in various prosecution offices, were simply not at issue at all in this case. (RB 219-220, 222-224.) Here, the defense never asked to do anything more than make a brief reference to two or three cases which were common knowledge, simply to illustrate vividly the point that "the death penalty is not required in every horrible case."

With that in mind, it is clear that the cases relied on by Respondent actually support the defense argument, rather than Respondent's position. *People v. Saunders* (1995) 11 Cal.4th 475, 554-555 merely upheld a trial court preclusion of references to the well-known *Manson* case. But the Manson case is unlike any of the cases listed by defense counsel here. In *Manson*, the prosecution sought death and the jury voted for death. That death sentence was overturned on appeal because the death penalty in existence when Manson's crimes were committed had been ruled unconstitutional. Thus, the eventual lack of a death sentence in *Manson* was unrelated to any choice by prosecutors or jurors. In contrast, in **every one** of the cases

mentioned by defense counsel as possible examples, the lack of a death sentence was directly attributable to decisions made by prosecutors or by jurors.

In *People v. Marshall* (1996) 13 Cal.4th 799, 854, the defense wanted to "argue the factual elements involved in certain comparable cases in which other Stanislaus County juries had returned death verdicts." (*Id.*, at p. 853.) This Court upheld the preclusion of such a detailed comparison of facts of other local cases. As explained above, that is **not** what defense counsel wanted to do here.

In *People v. Roybal* (1998) 19 Cal.4th 481, 528-529, the defense wanted to refer to the Billionaire Boys Club case and to discuss specific facts about the backgrounds of the defendants in that case. Once again, this Court upheld the trial court order precluding such argument, again pointing to the danger of time-consuming references to specific mitigating and aggravating factors in other cases. In contrast, in the present case, defense counsel never suggested any desire to discuss the specific facts of other cases or of the backgrounds of other defendants. Instead, counsel here wanted only to make brief reference to two or three well-known cases, simply to make the point that there were other horrible murders where no death sentence was imposed.

In *People v. Hughes* (2002) 27 Cal.4th 287, 398-400, the prosecutor made reference to one specific other case and the defense responded by making specific comments about two other cases. The defense wanted to

continue with more specific cases, but the trial court cut the defense argument off at that point. That is far different from the present case, where the defense argument was cut off before it even began. Also, this Court in *Hughes* specifically noted that the argument that defense counsel was simply rebutting the prosecution's own intercase proportionality discussion was never advanced in the trial court. In contrast, in the present case, the defense below very specifically argued it simply wanted to rebut the prosecution argument that if any case deserved a death sentence, this was it.

Finally, *People v. Benavides* (2005) 35 Cal.4th 69, 110 **supports** the present defense position, not Respondent's position. There, the defense started listing other cases and discussing their facts in some detail. The trial court cut that argument short, stating:

> "I have no problem with your talking about Charlie Manson . . . Adolf Hitler . . . the Boston Strangler . . . in general terms . . . suggesting that it is the people who commit crimes of such atrocity who are entitled to the death penalty. . . . And suggest then that by comparison an individual who has taken the life of an infant or someone who has gone in and shot two people while in their sleep ought not to receive the death penalty.
>
> But . . . you cannot appropriately single out one, two or three cases, talk about the facts in general and say this person killed nine nurses, fourteen nuns, did whatever, left them and then turned around and got life without parole. . . . ."

This Court merely upheld the preclusion of detailed references to the specific facts in other cases. Thus, the trial court **allowed** precisely the kind of argument the defense wanted to offer here. The court only precluded the more time-consuming argument that would have discussed detailed facts in other cases. Again, the present defense never asked to discuss specific details from other cases.[34] Instead, defense counsel merely wanted to refer to two or three cases in general terms, to make a point that would have directly rebutted the prosecution argument. This Court had **never** upheld a preclusion of such a limited and general defense reference to other well-known cases.

Respondent repeatedly acts as though the present prosecutor did nothing more than state, "This is a case that merits the death penalty." (See RB 227, 228.) In fact, the present prosecutor said much more than that. He said, "[i]f any murder requires the death penalty, this is it. If this isn't an

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34 Respondent raises the overstated specter of the need for the prosecution to respond to the desired defense argument with a time-consuming reference to all the facts in mitigation and aggravation in whatever other cases defense counsel discussed. (RB 220.) But it was not reasonably probable that the prosecutor here would have really wanted to try to argue that the killer of Martin Luther King, Jr. or one of the men responsible for 168 deaths in the Oklahoma federal building bombing had more factors in mitigation than did Veronica Gonzales.

Of course, if the prosecutor was reckless enough to want to attempt such an argument, that would have been the proper time for the trial court to step in and say, "Enough is enough."

appropriate case for capital punishment, then nothing is." (RT 89:12042.) Such a statement does not simply refer to what is appropriate in the present case; instead, it necessarily incorporates a comparison of this case to other cases. This statement says quite clearly that, in the entire range of murder cases, this one is worse than all others, or at least as bad as the worst of them. Once this argument was made, a defense response that said simply, "you're all familiar with other cases that are worse than this case and still did not result in a death sentence" would have had no teeth.

What this argument really boils down to is simple fairness. There was no need for the prosecutor to make the statement he made. He could have simply said, "this case deserves a death sentence." True, that would have also had no teeth, compared to the argument the prosecutor did make. But the bottom line is that the trial court was willing to go to great lengths to allow the prosecutor to make his argument in the most dramatic way he could, while at the same time insisting that the defense be limited to the weakest possible response. To paraphrase the prosecutor, if that is not an appropriate point to find an abuse of discretion, then what is?

Respondent disputes the opening brief contention that the trial court erroneously believed it had no discretion to allow the argument sought by defense counsel below. (RB 222.) Respondent claims this contention rests solely on a misreading of what the trial court meant when it referred to black letter law. But it is Respondent who is mistaken. The defense contention rests on this statement made by the trial court:

> First off, I think the law -- I think it's pretty much black-letter law. I'm not aware of any counter-decisions. That reference to other cases is, as a matter of law, irrelevant. I think *People vs. Pride*, 3 Cal.4th 195, interior cite 261, stands for that proposition, that such is **irrelevant as a matter of law**. (RT 89:12005; emphasis added.)

When a trial court cites a Supreme Court case and states that it holds that references to other cases is irrelevant as a matter of law, and that there are no other contrary decisions, that can only mean that the trial court believes it has no discretion and must disallow the evidence. But, as shown above and in the opening brief, references to other cases have only been characterized as irrelevant when they include specific details about the crime and/or the background of the defendant. In contrast, general references such as those proposed by the defense below have not been held irrelevant, and are clearly admissible pursuant to other authorities cited in the opening brief. There was no exercise of discretion to control the argument here; there was only a mistaken belief that no discretion existed.

Ignoring this reality, Respondent instead sets forth a lengthy quote from the trial court. (RB 222-223.) But the comments in that quote have nothing to do with exercising discretion; instead they describe a series of perceived problems that had nothing to do with the actual proposal made by the defense. That is, the trial court talked about the potential problems when trying to discuss other local cases, or when getting into different charging policies among different county district attorney offices. But that

is not what defense counsel sought below. The trial court did not exercise discretion; it simply stated what it believed was an inflexible rule, then gave a rambling description of extreme situations, not pertinent to defense counsel's actual proffer, to explain why the trial court fully agreed with the perceived rule.

Next, Respondent makes the surprising claim that *People v. Woodson* (1965) 231 Cal.App.2d 10 has no application here because trial counsel was "attempting to rely on argument about a subject that was not common–what the aggravating and mitigating facts were in other well known murder cases. (Citation.)" (RB 223.) Once again, Respondent seeks to prevail by positing a situation very different from what occurred here. Trial counsel never sought to discuss aggravating and mitigating facts in other well-known cases; he merely sought to make a general reference to two or three well-known cases to make the point that even the worst crimes do not always result in a death sentence. Respondent is simply changing the facts to fit the cases Respondent likes, but the actual circumstances here are controlled by other cases that compel a contrary result.

Thus, it is completely untrue to say that counsel sought to argue about a subject that was not common. To the contrary, when this case was tried in 1998 the Unabomber case and the Oklahoma federal building bombing were very much matters of common knowledge. The killing of Martin Luther King, Jr. was decades old by then, but was also still quite

familiar to most persons of the age of the jurors. Thus, this case comes squarely within the principles set forth in *Woodson*.

Respondent goes on to defend the ruling that allowed the prosecutor to make his argument that if there was ever a case that deserved the death penalty, this is it. (RB 226-230.) But Respondent sets forth this analysis in a vacuum. Cases Respondent cites to support such arguments did not face the present circumstances, where the prosecutor was not only allowed to make such an argument, but the defense was then precluded from making a legitimate response.

Here, the trial court knew in advance exactly what the prosecutor wanted to argue **and** the response the defense wanted to give if the prosecution argument was permitted. If the trial court was sincerely concerned about where this might all lead, then the proper response was to nip this in the bud by precluding the prosecution argument. Defense counsel made it clear he had no desire to make his proposed comments unless the prosecutor first made his proposed argument. But once the trial court allowed the prosecution argument, it was a clear abuse of discretion to simultaneously preclude the meaningful defense response.

Respondent argues that prosecutors are permitted to argue that death is the appropriate punishment. (RB 230.) But the argument here went far beyond such a statement. Here the prosecutor argued that if death is not appropriate in this case, then it would never be appropriate. This goes well beyond the facts of the present case, and transparently tells the jurors that if

they meant it in voir dire when they said they could impose death in an appropriate case, then they would have to vote for death in this case or be exposed as perjurers.

Respondent pretends to see no indication at all that the prosecutor was implying that any juror who failed to vote for death in this case was violating his or her earlier promises to vote for death in an appropriate case. "The prosecutor did not argue the jurors would be violating their oath; nor did he reference their statements in voir dire." (RB 228.) But the prosecutor made his challenged statement at the last half of RT 89:12042, and just 2 pages later he argued:

> And I asked you, "if the aggravating factors substantially outweigh the mitigants, can you follow the law?" "If you believe that death is appropriate, would you come back with death?"
>
> And you said "yes."
>
> "Could you take these seats and could you look the defendant in the eye and say, 'Yes, I believe death is the appropriate verdict'?"
> And you said "Yes." (RT 89:12044.)

Thus, the prosecutor did squarely reference the statements the jurors made during voir dire.

Respondent argues that hyperbole is not improper **unless it is misleading**. (RB 229.) But that was exactly the defense position here – that the prosecutor's hyperbole was, in fact, misleading. That was all that the de-

fense wanted to demonstrate to the jury – that the hyperbole was misleading.

Finally, Respondent once again argues that this penalty phase error was harmless because "the evidence against Gonzales was compelling." (RB 230.) This is no response at all. As noted earlier, there should **never** be a penalty trial at all unless the guilt phase evidence was compelling. Thus, even if it were true in this case that the evidence of guilt was compelling (and it is not), that has nothing to do with determining whether penalty phase error is harmless or prejudicial.

Here, there were no aggravating factors other than the circumstances of the crime, and the mitigating factors were numerous and strong. Respondent contends that if the defense had been permitted to make its desired argument, it would not have changed the outcome. (RB 230-231.) But it would have deflated the prosecutor's hyperbole and his appeal to emotions and that might very well have changed the outcome. This was not a case where a death sentence was the only reasonable outcome. This was a case that should not have resulted in a death sentence at all. At worst, this was such a closely balanced case that any significant error could very well have changed the outcome.

IX. CALIFORNIA'S DEATH PENALTY LAW IS RIDDLED WITH CONSTITUTIONAL FLAWS

In the opening brief, a number of contentions that have previously been rejected by this Court were briefly set forth in order to preserve them for federal review. (AOB 456-464.) While Respondent disputes each contention (RB 231-239), they have been fully and fairly presented and no further reply is necessary, with minor exceptions noted below, and denoted with the same subdivision used in the opening brief.

B. Respondent is unable to understand why the failure to require written findings as to aggravating factors relied on by the jury results in a lack of meaningful appellate review. (RB 233, fn. 38.) The answer is simple. Meaningful appellate review is not possible without a mechanism for knowing which aggravating factors the jury actually relied on in reaching their verdict. Absent such a mechanism, this Court can find error but deem it harmless by assuming the jury relied on factors that the jury might well have actually rejected. That is not meaningful appellate review.

D. Respondent misunderstands the claim made with regard to intracase proportionality review. (RB 234, fn. 39.) It is the lack of any intracase proportionality review at the trial level, in the jury determination of the appropriate penalty that is the problem. Any possibility of intracase proportionality review on appeal does not solve the problem. In determining whether death or life imprisonment was the appropriate penalty for Veron-

ica Gonzales, the jury that decided her fate should have been permitted to compare her culpability to that of Ivan Gonzales.

G. Respondent contends that the extraordinary delays in automatic appeals in California causes no conceivable prejudice even if the appeal results in the reversal of the death judgment. (RB 236.) But if the appeal, or a subsequent habeas corpus petition results in a reversal of the guilt finding, and Ms. Gonzales prevails in any retrial proceedings, then the fifteen-to-twenty-five years she will have spent in prison will certainly constitute prejudice. Also, even if only a penalty reversal is eventually obtained, the fifteen-to-twenty-five years delay is likely to result in the loss of favorable witnesses and/or failures of recollection on the part of witnesses is likely to result in the impossibility of a fair retrial.

X. BECAUSE OF THE EXTREME CLOSENESS OF THE PENALTY ISSUE IN THIS CASE, ANY SUBSTANTIAL ERROR MUST BE DEEMED PREJUDICIAL, INCLUDING ANY GUILT PHASE ERROR THAT COULD HAVE IMPACTED THE PENALTY DETERMINATION, EVEN IF IT WAS FOUND HARMLESS IN REGARD THE GUILT DETERMINATION

In the opening brief, it was shown that errors that may have been harmless during the guilt phase of the trial could nonetheless be prejudicial at the penalty phase of the trial. (AOB 465-467.) It was next shown that at least under the circumstances of the present case, any substantial error that impacted the penalty determination must be considered prejudicial. (AOB 467-474.) Finally, it was shown that the present penalty trial was unusually close, so that no error that impacted the penalty determination can be considered harmless. (AOB 474-476.)

Respondent summarily rejects these contentions, concluding once again that the evidence of guilt was compelling and the crime was so horrible that even if this Court agrees that every argument pertaining to guilt and penalty phase error is correct, the cumulative impact of all of these errors would still have made no difference at all on the penalty verdict. (RB 239-241.) In other words, Respondent apparently believes no reasonable juror could have possibly considered life without parole appropriate in this case.

Respondent's position is so extreme that, if accepted, it would demonstrate that meaningful appellate review of any California death sentence is unattainable. In this case, the defendant is a woman who had no prior felony conviction and no prior violent criminality, who was subjected

felony conviction and no prior violent criminality, who was subjected to serious and continuous physical and sexual abuse at the hands of her parents from the time she was an infant until the time she left home in her early teens, who then married while still a child herself, had six children in eight years, all while being subjected to continuous physical abuse at the hands of her husband. If that is not enough to cause a juror to feel some degree of compassion, then what would it take? Nonetheless, Respondent believes that no rational juror could have possibly entertained life without parole as an appropriate penalty here.

Respondent contends that the crime for which Veronica Gonzales was convicted was indefensible, and the evidence of guilt was compelling. (RB 240.) But if the crime had not been indefensible, or the evidence had not been compelling, then there should have been no conviction for first degree murder. Respondent could and would say the same things about **every** crime that resulted in a death verdict. Indeed, Respondent would say the same things about every first degree murder conviction that did not result in a death verdict. Compelling evidence and an indefensible crime has little or nothing to do with the determination whether a person found guilty beyond a reasonable doubt of murder with special circumstances should live or die.

In other words, compelling evidence and an indefensible crime are prerequisites to a penalty trial. If compelling evidence and an indefensible crime meant that no reasonable juror could consider life without parole ap-

propriate, then there would be no need whatsoever for penalty trials. Respondent would apparently be comfortable with such a death penalty procedure, but the United States Supreme Court would not.

Moreover, no matter how indefensible the present crime might have been, the fact remains we know **nothing** about the state of mind of Veronica Gonzales during the events that led to the death of Genny Rojas, except for what Veronica Gonzales herself had to say in her testimony. The jury apparently rejected that testimony, which still leaves us knowing **nothing** about Ms. Gonzales' state of mind.

Respondent's position is untenable and must be rejected. The arguments set forth in the opening brief have not been rebutted in any reasonable manner. Under the circumstances of the present case, any guilt or penalty phase error that might have impacted the penalty determination cannot be deemed harmless.

CONCLUSION

For the reasons set forth in the opening brief and in this brief, the convictions should be reversed, and/or the penalty should be vacated.

DATED: September ___, 2009

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, Ellen I. Cutler, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is P. O. Box 172, Cool, CA 95614-0172.

On September __, 2009, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelope in the United States Mail at Cool, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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

Executed this _____ day of September, 2009, at Cool, California.

_____