SUPREME COURT No. S076337 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

EDWARD CHARLES, III,

Defendant and Appellant.

Orange County Superior Court No. 94NF2611

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Orange

HONORABLE EVERETT W. DICKEY, JUDGE
HONORABLE WILLIAM R. FROEBERG, JUDGE

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GUILT PHASE ISSUES

I

THE TRIAL COURT ERRED IN ADMITTING PROSECUTION EXHIBIT ONE AS AN ADOPTIVE ADMISSION

Appellant's Argument

In his opening brief, appellant argued that the trial court erred in admitting

the letter obtained from informant Pincock, Prosecution Exhibit I, as an adoptive admission for four reasons. First, the defendant never acknowledged writing the letter. Second, the chain of custody was faulty. Third, the defendant was never shown the entire letter, and thus there is no showing he knew of or adopted its entire contents. Fourth, although the defendant responded to the newspaper reporter's questions about the letter, the evidence shows that the reporter's questions dealt with the offenses and the letter indiscriminately. Thus, the defendant's responses are at best ambiguous with regard to the letter. It is not clear that the defendant understood that the reporter was asking about the contents of the letter or questions about the offenses.

Moreover, to the extent that the defense was prohibited by the reporter's shield law from exploring whether the defendant was responding to questions about the letter or separately to questions about the offenses, appellant was unfairly deprived of his Fifth and Fourteenth Amendment rights to due process and a fair trial as well as his Sixth Amendment rights to confront and cross examine witnesses and present a defense and his Eighth Amendment right to a reliable penalty determination.

The appellant was severely prejudiced by the admission of the letter. As noted above, this case was a circumstantial evidence case. There were no eyewitnesses to the homicides. The letter itself amounted to a virtual confession. Additionally, the letter suggested a plot to kill appellant's grandfather thereby making it appear that appellant was trying to direct suspicion away from himself. While the other circumstantial evidence was ambiguous at best, a confession is virtually the strongest evidence that exists. Thus, a jury allowed to hear such evidence would undoubtedly resolve all its doubts and ambiguities against the

defendant. More importantly, because the letter implies the defendant was plotting to kill his aged grandfather, the letter significantly increased the likelihood that the jury would find one or more of the other killings to be premeditated and deliberate. Additionally, allowing the letter to portray the defendant as a vicious, remorseless and calculating killer of his family made the likelihood of imposing the death penalty dramatically more certain.

Respondent's Arguments

Respondent first urges that the letter obtained from the informant was admissible under Evidence Code section 1221. Despite the fact that Saavedra never actually asked appellant if he wrote the letter, appellant's words and conduct in response to Mr. Saavedra's questions constituted an adoptive admission to the entire letter. That is, appellant never denied writing the letter in response to Savedra's assertions that "you wrote here" or this "letter you wrote." Moreover, because there was evidence that one person wrote the entire document, appellant's adoptive admission to any part of it constitutes an admission of the whole. (Respondent's brief at pp. 47-50.)

Second, appellant's claim is barred because at the guilt phase, appellant did not object to Saavedra's opinion that Mr. Charles wrote the letter. That is, the objection during the pretrial and trial phase was that the letter was not an adoptive admission. There was no specific objection, however to Saavedra's opinion that appellant wrote the letter. (Respondent's brief at pp. 50-53.)

Third, the letter was admissible because the defense failed to show that there was a violation of the chain of custody, that is the defense failed to show that the letter was altered in any way before it was seized by Sgt Royer. Claims that the letter was altered are based on nothing more than speculation. Indeed, even the

defense expert opined that a single person drafted the letter. (Respondent's brief at pp. 53-56.)

Fourth, the fact that appellant did not deny writing each part of the letter did not preclude the trial court from admitting the entire letter as an adoptive admission. As respondent noted previously, since the letter was written by a single person, an admission to any part of the letter constituted an admission to the whole. The cases cited by appellant that hold to the contrary (*Simmons, Spencer and Sanders*) are all factually distinguishable. (Respondent's brief at pp. 56-58.)

Fifth, the fact that appellant was not shown all of the pages of the letter did not preclude the trial court from concluding that the entire letter constituted an adoptive admission. Again, since the letter was drafted by one person, appellant's adoptive admission to any part constituted an adoptive admission to the whole. (Respondent's brief at pp. 58-60.)

Sixth, the invocation of the newsperson shield law did not improperly deny appellant the ability to fairly cross examine Saavedra. If appellant wanted to tell the jury something different than Saavedra told the jury, he could have taken the stand himself. Moreover, if Saavedra had been required to testify about matters that were not published, he might have been hindered in his news-gathering efforts in the future. Thus, the restrictions inherent in the newsperson's shield law were properly invoked. (Respondent's brief at pp. 60-64.)

Errors in Respondent's Arguments

There are a number of fatal flaws in respondent's arguments. These flaws may be summarized as follows: First, since Saavedra testified that appellant denied killing anyone and denied a plot to kill his grandfather to escape detection, the letter could not constitute an adoptive admission under any circumstances. It is

axiomatic that a specific denial cannot be construed as an admission, adoptive or otherwise. Moreover, Saavedra also testified that when responding to his questions, appellant did not differentiate between the contents of the letter and the circumstances of the offense generally. Thus, even assuming appellant's statements could be construed as some sort of an adoptive admission (which they cannot) there is no way of knowing whether appellant made any admission **to the contents of the letter**. That is, appellant was responding to the content of Saavedra's questions, NOT the contents of the letter. Absent factual support for these critical factors, there is simply no legal basis upon which the trial court could exercise its discretion to admit the letter as an adoptive admission.

Second, even if the foregoing was not dispositive of the issue (which it is) respondent implicitly assumed that because the letter was written by a single person, the author was appellant. In context, it appears that the letter was written by informant Pincock who provided it to the prosecution in an attempt to gain a reward. Moreover, since the prosecution considered Pincock "a slime ball" it refused to use him to authenticate the contents of the letter. Additionally, since the parties stipulated that the defense handwriting expert would testify that appellant did not write the letter, there was substantial doubt about the authenticity of the document. That doubt was significantly reinforced by the contents of the letter itself. The letter contained seminal "facts" about the crime that were untrue and the prosecution knew were untrue. Thus, if appellant was the killer, the prosecution failed to explain why he would "admit" facts in a letter that everyone knew were untrue.

Moreover, as noted above, because there is no connection between appellant's responses to Saavedra's question and the contents of the document,

this disconnect is a fatal ambiguity. Significantly, these difficulties go to the admissibility of the document itself, not its weight. Therefore, because the trial court failed to resolve these most basic problems with the admissibility of the document, the letter never should have been presented to the jury.

Third, Saavedra's opinion evidence was not properly objected to because appellant was precluded from discovering the basis for the opinion.

Fourth the improper invocation of the newsperson's shield law prevented appellant from uncovering the flaws that went to the admissibility of the document in the guilt phase.

Appellant will deal with each of these problems seriatim.

A Specific Denial Does Not Constitute an Adoptive Admission

The most fundamental flaw in respondent's argument is the failure to come to grips with the essential requirements for an adoptive admission. The gist of respondent's argument is simply that because Saavedra placed parts of the letter against the glass of the jail visiting booth window and told appellant "You wrote here" or "you said here" such statements constituted accusations. Moreover, since appellant never denied those assertions: the letter was written by one person, and appellant talked about the circumstances surrounding the deaths of his family members, the entire letter constituted an adoptive admission. (Respondent's brief at pp. 47-50.) Respondent is in error.

As appellant explained in his opening brief, there are two requirements for the introduction of adoptive admissions. First, "the party must have knowledge of the content of another's hearsay statement." (*People v. Silva* (1988) 45 Cal.3d 604, 623, citing 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 3.3, p. 175.) Second, "having such knowledge, the party must have used words or

conduct indicating his adoption of, or his belief in, the truth of such hearsay statement." (*Ibid.*, see also *People v. Davis* (2005) 36 Cal.4th 510, 535 .)

The test for admitting an accusatory statement against a defendant and the defendant's failure to deny such statement is whether the accusation was made under circumstances calling for a reply. (*People v. McKnight* (1948) 87 Cal.App.2d 89, 92.) Certainly it is not essential that the accusation be made directly and in so many words. *(People v. Riel* (2000) 22 Cal.4th 1153, 1189.) Moreover, a defendant's "'silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' [citation]." (*Ibid.)* Nevertheless, if the defendant expressly denies the statement there is no admission. *(People v. Davis* (1957) 48 Cal.2d 241, 249.)

Here, in order for the entire document to be admissible, appellant would have had to manifest some sort of assent to its **entire** contents, either by affirmative agreement, or conduct that could reasonably be construed to be an agreement, such as failure to deny an accusation that would normally call for a denial. (*People v. Silva, supra,* 45 Cal.3d at p. 623.)

Significantly, however, on the specific issues that the prosecution wanted the document admitted to prove, i.e., that appellant killed his family and wanted to harm his grandfather to deflect suspicion from himself, appellant made specific denials. That is, according to **Saavedra**, appellant ***denied*** killing anyone and ***denied*** that he wanted to hurt his grandfather. (7 R.T. 2064-2065, 2072.)

It is axiomatic that if a defendant makes an express denial, his statements cannot be construed as an adoptive admission. *(People v. Davis, supra*, 48 Cal.2d at p. 249.) Nowhere in respondent's argument does it deal with the fact that appellant denied the specific claims that the prosecution wanted to use the letter to

prove. Given those denials, there is simply no discretionary basis upon which to admit the entire letter as an adoptive admission. (See *Williamson v. United States* (1994) 512 U.S. 594, 597 [129 L. Ed. 2d 476, 114 S. Ct. 2431].)

Respondent attempts to sidestep this problem by asserting that the accusatory statements were Saavedra's declarations that; "I have a letter that you wrote" or "you wrote here." According to Saavedra, appellant never answered "Yes, I did." or "No, I didn't." (3 R.T. 1237.) Therefore, since appellant never denied Saavedra's assertions essentially appellant admitted the contents of the letter. (Respondent's brief at pp. 47-50.)

The flaw with this portion of respondent's argument is that Saavedra's assertions were **NOT** accusations of criminality calling for a reply. Instead, they were simply assertions of Saavedra's own personal belief that appellant wrote the letter. (See *People v. Kazatsky* (1936) 18 Cal.App.2d 105.) In *Kazatsky*, the reviewing court held that silence was not a tacit admission of guilt in an insurance fraud case where a police officer told the defendant, "[w]e know that there was no accident." The court concluded that the officer's statement was merely a declaration of the officers' belief in what the evidence showed, not an accusation calling for a reply. (*Id.* at p. 111.) Additionally, since Saavedra repeatedly admitted that he never actually asked appellant if he wrote the letter (See, e.g., 3 R.T. 1249), it is hard to argue plausibly that Saavedra's statement of personal belief constituted some sort of accusation of criminality. Thus there was nothing for appellant to specifically deny.

More telling, however, at the third penalty phase, Saavedra admitted that when he asked appellant questions about matters raised in the letter, appellant's responses did not discriminate between the letter and the crimes generally. (26

R.T. 3182-3183.) That is, none of appellant's responses were definitively limited to the contents of the letter. (26 R.T. 3183.)[1] For example, Saavedra asked appellant about "monkey boots" because "monkey boots" were mentioned in the letter as having been found in the burned vehicle. (See, e.g., 32 R.T. 4694.) Instead of any comment on the contents of the letter, however, appellant merely responded that monkey boots were "work boots." (32 R.T. 4694.) Since no boots were found in the burned vehicle, had appellant been the perpetrator and if he

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[1] The exact colloquy was as follows:

Defense counsel:

> Can you distinguish in your mind whether or not the conversation you had with Eddie Charles in January of 1995 can be split, if you will, into portions which related to this document you brought with you and portions which did not relate to the document, but were just conversations about the case? Does that make sense to you?

Saavedra:

> I think so.

Defense Counsel:

> Okay. And is that the way the conversation went? Was that a fair characterization?

Saavedra:

> **It was all together. There wasn't a definitive talk about one and then talk about the other. It was all together.** There were points where questions I asked were related to the document or related to what I had read here, or "You said this. You said that." [Emphasis added]

understood that Saavedra was asking him about the content of the letter, appellant likely would have mentioned that no "monkey boots" were found in the car. Thus, absent any clear showing that appellant was responding to Saavedra's questions about the contents of the letter instead of responding simply to the substance of Saavedra's questions irrespective of the letter, appellant's statements obviously cannot constitute an adoptive admission **of the contents of the letter**.

Additionally, since Saavedra could not remember exactly how many pages or even which pages of the letter he showed appellant (3 R.T. 1232), the entire letter could not possibly constitute an adoptive admission. The letter failed the most basic test for admissibility.

Thus, far from wholesale adoption of the contents of the letter, appellant's responses to Saavedra's questions were entirely independent of the contents of the letter. This disconnect between appellant's answers and the letter itself is a fatal ambiguity that goes to **the admissibility of the document itself** rather than its weight before the jury. (*See, United States v. Datz* (2005 CAAF) 61 M.J. 37; 43-44.)[2] As explained above, the test is whether the party "used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement." (*People v. Silva, supra*, 45 Cal.3d at p. 623; see also *People v. Davis, supra,* 36

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[2] In *United States v. Datz, supra*, 61 M.J. the investigator testified that he could not remember exactly what he asked the defendant, but it was 'Isn't it true that the invitation wasn't directed toward you, but in fact it was directed toward a large group of people?' . . . 'Isn't it true the door wasn't meant to be unlocked for you but somebody else? Something along those lines.'" (*Id.,* at p. 43.) Further, the defendant's responses such as a nod of the head were equally ambiguous. (*Id.,* at p. 43.) Under those circumstances, the ambiguity that failed to adequately connect the questions to the responses was fatal to the admissibility of the evidence, and did not go solely to the weight of the evidence. (*Id.*, at p. 43.)

Cal.4th at p. 535.) Absent a proper showing that there were allegations of criminality to which a defendant could be expected to reply and absent a colorable showing that appellant actually manifested assent to or adoption of the entire written statement, there were no grounds for the trial judge to admit the letter into evidence.

Even if that were not so, as appellant explained in his opening brief, when a long accusatory statement is read to or by the defendant[3], it may contain a great deal of information that is otherwise inadmissible or statements which a defendant might not otherwise be reasonably expected to refute, from lack of time, inattention, or failure of memory, if nothing else. If the entire statement is given to the jury under the guise of an adoptive admission, that otherwise inadmissible evidence or statements come before the jury in such a way that not even a cautionary instruction may overcome the prejudice. (*People v. Davis* (1954) 43 Cal.2d 670, 671.)

More important, ""[I]t is fundamentally unfair to expect point-by-point denials of long narrative statements, containing several facts as well as theories and inferences - particularly where the statements are not in question form." (*People v. Sanders* (1971) 75 Cal.App.3d 501, 508.) See also, *People v. Simmons* (1946) 28 Cal.2d 699, 716-717 [The practice of obtaining evidence by means of tacit admissions by reading detailed statements of the crime purportedly made by a codefendant or companion in the crime with a view toward eliciting either a complete confession or an admission by silence to be used against the defendant to whom the statement is read, is improper], accord, *People v. Spencer* (1947) 78

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[3] In this case, the document shown to appellant was approximately 18 pages.

Cal.App.2d 652, 657-658 [The practice of confronting a defendant with a codefendant's statement containing a vast amount of hearsay testimony otherwise utterly inadmissible and offering the entire statement in evidence merely because defendant did not flatly deny everything in the statement, is prohibited. The admission of such a statement constitutes an abuse of the trial court's discretion.] The federal courts have adopted a similar rule. (See, e.g., *Williamson v. United States* (1994) 512 U.S. 594, 599-602 [129 L. Ed. 2d 476, 114 S. Ct. 2431].)

Williamson is significant in this regard, because it sets forth the rationale for admitting this type of hearsay evidence. In *Williamson*, the United State Supreme Court concluded that the trial court erred in admitting a lengthy narrative as a statement against penal interest under Federal Rules of Evidence, rule 804(b)(3)[4] on the ground that it was generally self-inculpatory. The High Court instructed that each individual statement within the longer narrative should have been examined to determine whether it was inculpatory or exculpatory. The reason for the narrow construction of the meaning of a "statement" flows from "the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does **NOT** extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." (*Id.* at p. 597.)

Respondent asserts that *Simmons*, *Sanders and Spencer* are easily distinguishable on their facts. (Respondent brief at pp.57-58 .) The essence of

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[4] Although *Williamson* deals specifically with the federal rule of evidence, the California rule is similar in the pertinent respects.

respondent's argument is that in *Simmons,* the police interrogated the defendant and the defendant refused to respond to written accusations by the officers, In *Spencer*, the defendant refused to respond to lengthy accusations by a codefendant. In *Sanders*, the defendant refused to fully respond to all the accusations made in a long taped interrogation. (See respondent's brief at pp. 57-58.) Here by contrast, the reporter asked questions in serial fashion and waited for answers to each question. (Respondent's brief at p. 58.)

Conspicuously omitted from respondent's brief, however, is any discussion of Saavedra's admission that when responding to his questions, appellant talked about the crimes and the letter indiscriminately. That is, appellant's responses to Saavedra's questions did not differentiate between the contents of the letter and comments on the situation generally. (26 R.T. 3182-3183.) Thus, there is no showing that appellant was responding to anything contained in the contents of the letter. Absent that critical factual foundation, there is no basis for admitting the entire letter as an adoptive admission. (*Williamson v. United States, supra*, 512 U.S. at pp. 599-602 [129 L. Ed. 2d 476, 114 S. Ct. 2431]; see also *United States v. Datz , supra,* 61 M.J. at pp. 43-44.)

More to the point, Saavedra also testified that appellant specifically denied killing anyone and specifically denied a plot to kill his grandfather. (7 R.T. 2064-2065, 2072.) As explained above, a specific denial cannot be construed as any sort of adoptive admission. (*People v. Davis, supra*, 48 Cal.2d at p. 249.) Therefore, appellant's specific denials of criminality - particularly on the matters for which the prosecution wanted the letter admitted - are absolutely fatal to respondent's claim that the entire document constitutes an adoptive admission.

The Chain of Custody Was Not Properly Established.

Respondent attempts to deal with the foregoing problems by asserting that , since the trial judge and the prosecutor determined that the letter was written by one person and appellant never specifically denied writing the whole letter, an adoptive admission of any part of the letter constitutes an adoptive admission to the whole letter. (Respondent's brief at pp. 54-60.)

Respondent errs. While it is certainly true that at trial the parties agreed that the letter was written by one person, they did not agree that it was written by appellant. When the document was first offered by the prosecution, the parties stipulated that the defense handwriting expert would testify that it was NOT written by the defendant. (3 R.T. 1217.)[5] Thus, even if it could be said that appellant adopted some portion of the content of the letter [which it cannot] if some other person wrote the letter, it does not necessarily follow that the entire letter constituted **appellant's** adoptive admission.

A more fundamental problem with respondent's argument, however, is that

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[5] It is certainly true that appellant's ex girlfriend, Kimberly Speare testified that she thought the letter was written by appellant. (6 R.T. 1804.) Obviously, however, she was not a handwriting expert. Moreover, even assuming that girlfriend-as- handwriting-expert was an appropriate method of authentication, it is certainly curious why the prosecution never asked Jill Roberson if she could authenticate appellant's handwriting on the letter. Jill Roberson was a later girlfriend of appellant and was called by the prosecution to testify. During that testimony, she noted that while appellant was in jail awaiting trial, she and appellant wrote literally hundreds of letters to each other. (7 R.T. 1934-1935.) Nothing in the record indicates that Kim Speare saw anywhere as much of appellant's handwriting as Ms. Roberson. At the fourth penalty phase, prosecution witness Roberson was shown the letter for the very first time and asked if it was the defendant's handwriting. She replied that it was not. (33 R.T. 4791.)

it does not fully address the deficiencies in the chain of custody. As appellant explained in his opening brief (see appellant's opening brief at pp. 70-77), in *People v. Catlin* (2001) 26 Cal.4th 81, this court concluded that the party offering the evidence must demonstrate with reasonable certainty that under all the circumstances, including the ease with which the evidence could be altered, that the evidence was not altered. Morever, the reasonable certainty requirement is NOT met when some vital link in the chain is missing. Under those circumstances, it is as likely as not that the evidence was altered. Left only to speculate on whether the evidence was in its original form, the court must exclude it. (*Id.* at p. 134.) Conversely, when there is only the barest speculation that there was tampering, it is proper to admit the evidence and let any remaining doubt fall to the jury for resolution. While a perfect chain of custody is preferable, gaps are permissible as long as the remaining links do not raise serious questions of tampering. (*Id.* at p. 134.)

Here, Sgt. Royer testified that he received the letter from Cezar Pincock , a conceded jailhouse informant who was seeking favors in his own case. (8 R.T. 2104-2108.) For the reasons set forth in appellant's opening brief at pp. 120-128 and incorporated herein by reference, it appears that the letter was written by informant Pincock based on information that he obtained from police reports, and probably the press or innocent conversations with appellant. (See, e.g., 5 R.T. 1340-1341 1350-1361; 35 R.T. 5222-5224.) Obviously, some of the information contained in the document was probably correct and appellant might well have agreed with it if Saavedra queried appellant about those specific matters.[6]

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[6] The prosecution evidence left it unclear exactly what Saavedra asked appellant or exactly what appellant said in response. For example, Saavedra

Saavedra's opinion was an inappropriate vehicle for carrying that burden. Moreover, since "[t]rial judges are presumed to know the law and apply it making their decisions" (*Walton v. Arizona* (1990) 497 U.S. 639, 653 [111 L. Ed. 2d 511, 110 S. Ct. 3047] [overruled, on a different ground, in *Ring v. Arizona* (2002) ___ U.S. ___ 122 S.Ct. 2428, 2431; ___ L/Ed.2d ___]), the guilt phase trial judge in the instant case reasonably could be expected to have understood the entire legal basis for a challenge to the evidence, including the fact that Saavedra's opinion evidence was inadmissible. Certainly if the penalty phase trial judge understood that problem, it would be hard to argue persuasively that the trial judge was ignorant of it. The law is clear that when the issue is understood by the parties, it is preserved for appeal. (*People v. Diaz* (1992) 3 Cal.4th 495, 528.)

Even if that was not the case, the rule barring appellate review does not apply where a new theory on appeal raises only a question of law arising from facts which are undisputed or not open to controversy. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) In addition, consideration of points not raised below may be permitted when important issues of public policy are involved. (*Hale v. Morgan, supra*, 22 Cal.3d 388, 394; see also *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173 and cases cited therein.) Certainly that is the situation here. Not only are important questions of constitutional due process involved, but the facts are fully set forth on the record. Moreover, even if it could be persuasively argued that the issue was not properly preserved, "[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) Under the circumstances presented here this issue should be considered on appeal.

Respondent urges that even if it was error to allow the Saavedra opinion testimony, the error was harmless. The jury was instructed in accordance with CALJIC 2.20 (believability of a witness) CALJIC 2.71 (admissions) CALJIC 2.71.5 (adoptive admission accusatory statement received solely to supply meaning to accused's response) and CALJIC 2.81 (opinion testimony of lay witness.). Thus, respondent argues, the jury knew that it did not have to accept Saavedra's opinion testimony for its truth. (Respondent's brief at pp. 52-53.)

Respondent's argument misses the point. While the foregoing instructions may have told the jury that it did not have to accept Saavedra's opinion testimony for its truth, nothing in those instructions told the jury that his opinion testimony **should not have been considered** when making the determination whether appellant adopted the admissions in Prosecution Exhibit 1.[7] Indeed, it is highly likely that the jurors treated the letter not as an adoptive admission explaining some other conduct of Charles's, but as an admission regarding the crimes themselves.

Absent Saavedra's opinion testimony, however, one or more jurors may have believed that appellant did NOT write the letter. This is especially likely since the only handwriting expert in the case testified that the letter was not in appellant's handwriting, and the jury was aware of obvious discrepancies between the material facts set forth in the letter and the undisputed facts resulting from the investigation. More importantly, juror number 2 wrote the court a note

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[7] The only evidence that jurors are required to accept as true are stipulated facts. Thus respondent's argument that the jury was free to disregard Saavedra's opinion is apropos of nothing. The jurors were free to doubt the veracity of every witness' testimony in the case.

specifically asking how Pincock obtained the letter. (8 R.T. 2342-2344.) Thus, there is a fair inference that juror #2 was at least skeptical of the claim that Charles was the author of Prosecution Exhibit 1.

As appellant explained in his opening brief, the standard for assessing the effect of an error in a trial of a capital case is set forth in *Sullivan v. Louisiana* (1993) 508 U.S. 275. There, the Court noted that a reviewing court does not consider whether the jury would have convicted the defendant in a hypothetical trial in which the error did not occur but rather whether the conviction in this case was "surely unattributable to the errors." (*Id.* at p. 279.) That is, the judgment must be reversed if there is any reasonable likelihood that the improper evidence affected the verdict. Given the circumstances here, particularly the jury note, it is difficult to argue plausibly that this improper evidence had absolutely no effect on the outcome of this case. Indeed, it is only necessary for one juror to have voted differently in order to obtain a more favorable verdict. (See *Duest v. Singletary* (11th Cir. 1993) 997 F.2d 1336, 1339-1340.)

News Person Shield Law Improperly Invoked

The essence of respondent's argument is that the invocation of the news person shield law did not deprive appellant of a fair trial because Saavedra was concededly a newspaper reporter engaged in news gathering (and thus fit within the statute); appellant could have taken the stand to rebut Saavedra's testimony, and cross examination might have compromised Saavedra's ability to persuade future news sources to talk with him. (Respondent's brief at pp. 60-65.)

Not only are these arguments without merit, but completely omitted from respondent's claims is any acknowledgment that Saavedra's opinion was essentially bogus. That is, at the guilt phase Saavedra was allowed to testify that in

his opinion appellant wrote prosecution Exhibit 1. The defense was prohibited from cross examining Saavedra on the facts supporting his opinion. Yet at the third penalty phase when those restrictions were removed by the new trial judge, Saavedra testified that the defendant talked about the letter and the incident indiscriminately. (26 R.T. 3182-3183.) Thus, cross examination revealed that there was absolutely no factual basis to support Saavedra' opinion that appellant wrote the letter.

Nevertheless, turning to Saavedra's status as a reporter, there is no dispute concerning Saavedra's status. Appellant's argument is that even if Saavedra was a reporter, that status is not sufficient, by itself, to overcome appellant's Fifth, Sixth and Fourteenth Amendment rights to cross examine and to secure federal and state Due Process in a fair trial. The problem here is that once Saavedra established that he was a newspaper reporter and wished to assert the privilege, the trial court essentially granted the privilege and ended the inquiry.

As appellant explained in his opening brief, even if the proponent of the evidence establishes at least a prima facie basis for a privilege, that circumstance alone does not preclude a court from finding the privilege inapplicable for other reasons. *(United States v. Zolin* (1989) 491 U.S. 554, 568.) [Although attorney-client privilege was factually established during *in camera* hearing, court is permitted to hear evidence of "crime fraud" exception which would tend to negate the privilege.])

In order to overcome that prima facie showing by a newsperson, a criminal defendant must show a reasonable possibility that the information will materially assist his or her defense. In that regard, a defendant's right to a fair trial includes disclosure of evidence that may, *inter alia*, **impeach a prosecution witness**; or, in

capital cases, establish mitigating circumstances. (*Delaney v Superior Court* (1990) 50 Cal.3d 785, 809 (Emphasis added).) Moreover, a criminal defendant is not required to show that the information goes to the heart of the case. (*People v. Cooper* (1991) 53 Cal.3d 771, 820; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 234.)

If a defendant satisfies the threshold showing, the court proceeds to the second stage of the inquiry and balances "the defendant's and newsperson's respective, perhaps conflicting, interests." (*Delaney, supra*, 50 Cal.3d at p. 809.)

Further, as the court explained in *People v. Vasco* (2005) 131 Cal.App.4th 137, although the purpose of the shield law is to "protect a newsperson's ability to gather and report the news." (*Delaney, supra*, 50 Cal.3d at p. 806, fn. 20); nevertheless, "[w]here the defendant is both the source of the reporter's information and the person requesting the disclosure, there is no risk the reporter's source (the defendant) will complain her confidence has been breached. (Citation.) Nor is the separate policy of safeguarding press autonomy in any way compromised. (Citation.)" Additionally, "where the defendant is the reporter's source of information, there appears no reason to assume disclosure would hinder the reporter's ability to gather news in the future." (*Id.* at p. 152, fn 3.)

The record shows (and respondent does not contest) that appellant continuously objected to the invocation of the reporter's shield law as an unwarranted infringement on his right to cross examine Saavedra (*see, e.g.* 5 R.T. 1217-1218, 1224-1227),[8] and that he argued that the document itself should have

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[8] At the guilt phase, even the prosecutor conceded that the invocation of the shield law could not contravene the defendant's constitutional rights under the Sixth Amendment. (7 R.T. 2056.) Indeed, as a matter of law, a defendant's

been excluded. (5 R.T. 1260.)

The trial court should have engaged in a balancing of the newspaper's interest in preserving confidences against the constitutional rights of appellant. Moreover, because, as the *Vasco* court pointed out, the newspaper had no valid interest in keeping confidential the information about Saavedra's conversation with appellant where appellant himself was the source of the information, the trial court should have concluded that the proponent did not meet its burden to establish the privilege.

Even if that were not so, because this is a capital case, the procedural requirements of the state newsperson's shield law may not be used in a way that impermissibly infringes on the jury's ability to assess credibility. (Cf. *Davis v. Alaska* (1974) 415 U.S. 308, 320 [39 L.Ed.2d 347, 356, 94 S.CT. 1105]; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 674, 106 S.Ct. 1431].) Such a procedure would unconstitutionally compromise the reliability of the truth determining function. (See *Kentucky v. Stincer* (1987) 482 U.S. 730, 736 [96 L.Ed.2d 631, 641-642, 107 S.Ct.. 2658] "We cannot overemphasize the importance of allowing a full and fair cross-examination of government witnesses whose testimony is important to the outcome of the case." *(United States v. Brooke* (9th Cir. 1993) 4 F.3d 1480, 1489). Further, because the evidence at the guilt phase is admissible in the penalty phase, any errors affecting the reliability of the

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federal constitutional rights to confront and cross examine under the Sixth Amendment, and a fair trial under the due process clause of the Fifth and Fourteenth Amendments trump the shield law. (Cf. *Miller v. Superior Court* (1999) 21 Cal.4th 883, 897; *Delaney v Superior Court, supra*, 50 Cal 3d at pp. 805-806; *Fost v Marin County Superior Court* (2000) 80 Cal.App.4th 724, 731)

guilt determination necessarily affect the reliability of the penalty phase as well, thus violating the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Respondent does not address the trial court's failure to engage in a balancing of competing interests. Instead, respondent asserts that Mr. Charles was an alternative source of the information protected by the shield law. Therefore, he could have taken the stand to deny authorship of the letter or at the very least to rebut Saavedra's claims. (Respondent's brief at p. 64.)

To the extent that respondent urges that appellant could have taken the stand to explicitly deny authoring the letter, the argument fails for three reasons. First, it shields the reporter's information at the expense of the defendant's Fifth Amendment right to silence. Second, it shifts the burden of producing evidence to the defendant, and, third, as a practical matter, the testimony of the defendant and the testimony of the reporter are not equal in weight. The reporter, as a presumably unbiased witness, undoubtedly would be viewed as far more credible than the defendant. Nowhere in respondent's argument does it address these obvious constitutional and practical concerns. Indeed, it is hard to conceive of any plausible response to these concerns.

To the extent that respondent's argument is somewhat more broad - that is if defendant took the stand, his testimony might impeach Saavedra - that argument is also fatally flawed. As defense counsel pointed out at trial, such a claim is predicated entirely on the unsupported assumption that Mr. Charles could remember exactly what happened as well as Saavedra. (5 R.T. 1233.) There is nothing in the record supporting that assumption and respondent has not directed this court's attention to any evidence supporting that assumption.

Perhaps even more fundamentally, how would appellant know what facts supported Saavedra's subjective opinion? Suppose for example, Saavedra based his opinion on his characterization of the look on appellant's face when confronted with the letter? How would appellant know that his own facial expression was the basis for Saavedra's subjective opinion? More to the point, how would appellant be able to refute the basis of that opinion? If respondent's argument was persuasive, appellant would not only have to be able to divine what Saavedra thought of his facial expression but then refute that basis without ever having been able to see his own facial expression. Thus, the claim that appellant's testimony would be factually sufficient to impeach Saavedra's subjective opinion is patently absurd.

A problem closely related to the factual impossibility underlying respondent's claim that appellant's testimony is an adequate substitute for cross examination is that such a claim is legally untenable as well. Early in its history, the United States Supreme Court looked at the truth-finding function embodied in the Sixth Amendment and compared the evidentiary value of written testimony from an absent witness to the value of live testimony. The Court observed: "The primary object of the [Sixth Amendment] was to prevent depositions or ex parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox v. United States* (1895) 156 U.S. 237, 242-243 [39 L.Ed. 409, 15 S.Ct 337]; See also *Kirby v. United States*

(1899) 174 U.S. 47, 53 [43 L.Ed. 890, 19 S.Ct 574].) The opportunity to test a witness' recollection, biases, and ability to perceive is absolutely critical to maintaining the integrity of the trial process. Justice Scalia observed: "The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it."(*Coy v. Iowa* (1988) 487 U.S. 1012, 1019 [108 S.Ct. 2798, 2802, 101 L.Ed.2d 857].)

Moreover, a denial or significant diminution of the right to cross-examine deprives the accused of an "essential means to test the credibility of his accusers and thus 'calls into question the ultimate 'integrity of the fact-finding process' ...." (*People v. Anderson* (1987) 43 Cal.3d 1104 at p. 1119-1120, citations omitted.) Indeed, cross examination is a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial. (*Kentucky v. Stincer, supra,* 482 U.S. 730, 736 [96 L.Ed.2d 631, 641-642, 107 S.Ct. 2658].)

While requiring the defendant to testify is certainly better than reliance on an absent witness' written testimony, still, it is nowhere near the functional equivalent of cross-examination. It does not test the prosecution witness' memory or sift his conscience nor does it allow the jury to judge his demeanor under adverse questioning.

Moreover, if any further justification for the need for cross examination was required, in the third penalty phase trial when the defense was permitted to cross examine Saavedra on the basis for his opinion, Saavedra admitted that when responding to his questions, appellant talked about the crimes and the letter indiscriminately. That is, appellant's responses to Saavedra's questions did NOT differentiate between the contents of the letter and comments on the situation generally. (26 R.T. 3182-3183.) Thus, cross examination revealed there was no

adequate factual basis for Saavedra's subjective opinion that appellant wrote the letter. This revelation significantly enhanced the jury's fact finding function in a way that appellant's testimony never could.

Additionally, as noted above, because the invocation of the shield law prevented the defense from fully cross examining and impeaching Saavedra on what exactly took place during his conversation with appellant, respondent's argument would require the defendant to forfeit his Fifth Amendment right to remain silent in order to preserve his Sixth and Fourteenth Amendment right to present a complete picture of the evidence and ensure a fair trial. In such a situation, it would be "intolerable that one constitutional right should have to be surrendered in order to assert another. (*Simmons v. United States* (1968) 390 U.S. 377, 394; see also *Arreola v. Municipal Court* (1983) 139 Cal.App.3d 108, 115 ["As a matter of public policy the 'courts should not participate in or encourage a procedure which obliges the accused to forfeit one constitutional right in order to retain the protection of another.' [Citations"]].) "Arriving at the truth is a fundamental goal of our legal system" (*United States v. Havens* (1980) 446 U.S. 620, 621 [64 L. Ed. 2d 559, 100 S. Ct. 1912], and no constitutionally valid purpose is served by allowing a newsperson to invoke the shield law when doing so prevents the defense from investigating or presenting materially favorable evidence.

Finally, respondent's argument that overriding the newsperson shield law in this case might imperil Saavedra's attempt to gather information in the future (respondent's brief at p. 64) is simply without merit. One might conjure up a multitude of scenarios showing that any infringement on the newsperson's shield law, no matter how meritorious the reason or how minor the imposition could

somehow affect a newsperson's ability to gather information in the future. Speculation, however is not what this court requires. In *Delaney*, this court concluded that there must be a weighing process and that the trial court must balance "the defendant's and newsperson's respective, perhaps conflicting, interests." (*Delaney, supra*, 50 Cal.3d at p. 809.) When conducting that balancing test, the trial court must consider: (a) whether the unpublished information is confidential or sensitive so that disclosure might threaten the newsperson's access to future sources; (b) **the interests protected by the shield law and whether other circumstances demonstrate no adverse consequences to disclosure, as when the defendant is the source of information**; (c) the importance of the information to the defendant; and (d) whether there is an alternative source for the unpublished information. (*Id.* at pp. 810-811 [Emphasis added].) Thus, even in *Delaney*, this court recognized that when the defendant was the source of the information, there was not likely to be an adverse consequence in the future if the newsperson was allowed to be cross examined.

More to the point, other than vague speculation about possible adverse consequences at some point in the future, respondent has not pointed to anything in the record that shows a likely or even plausible adverse consequence to Saavedra's news gathering ability had the defense been allowed to cross examine him. In fact, respondent's own argument makes appellant's point precisely. In footnote 20, at p. 64 of its brief, respondent observes that Saavedra also talked to Severino as a source. Nowhere does respondent explain how a ruling that the shield law doesn't protect Saavedra's conversations with appellant would somehow jeopardize his ability to obtain information from Severino or other sources.

Stripped to its essence, respondent's argument is simply an assertion that the shield law is an all-or-nothing proposition. It is not. Properly applied, the shield law can accommodate the public policy concern with protection of media sources without depriving a defendant of his constitutional rights.

Prejudice

In his opening brief, appellant discussed the question of prejudice extensively. (See appellant's opening brief at pp. 100-105.) Appellant pointed out that Exhibit 1 was the most significant prosecution evidence presented in both the guilt and penalty phase trials.

At the guilt phase, not only was Prosecution Exhibit 1 mentioned in opening statement, but the prosecutor read several paragraphs of the letter in his closing argument (9 R.T. 2486) and commented on how it demonstrated appellant's guilt. (9 R.T. 2488.) Moreover, here, the adoptive admission was tantamount to a confession, but without the requisite indicia of reliability. According to the letter, by setting up a plot to kill his grandfather, appellant was trying to cover up his involvement in killing the other members of his family. Thus, the letter not only evidenced a consciousness of guilt, but amounted to a virtual confession to the slayings. Moreover, it was not only the prosecution's most direct evidence of appellant's involvement in the killings, but the most powerful.

More to the point, the jury obviously thought it important. Juror number 2 wrote a note to the court right before guilt phase deliberations asking how Pincock obtained the letter. (8 R.T. 2342-2344.)

The letter was also a critical portion of the prosecution's case in the fourth penalty phase. At the close of its presentation, the prosecution read virtually the entire letter. (35 R.T. 5153- 5164.) After each section of the letter, the prosecutor

paused and explained why the statements contained in the letter were aggravating and therefore why appellant deserved to be put to death. (35 R.T. 5153-5164.)

Additionally, the jurors requested a readback of Kim Speare's testimony (5 CT 1897), including presumably her testimony that she believed appellant wrote the letter. The jury also asked for the Orange County Register article describing Saavedra's discussions with appellant about the letter. (5 CT 1897.) Although the jurors did not get the newspaper article since it was never introduced into evidence, clearly the jury was having difficulty deciding whether appellant actually wrote the letter.

Since the jury hung **twice** on penalty, even after having heard this otherwise inadmissible evidence that appellant was trying to cover up the killings by having his grandfather murdered, a death sentence was anything but a foregone conclusion. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [hung jury evidence of a close case]; *United States v. Paguio* (9th Cir. 1997) 114 F.3d 928, 935. [hung jury shows the case is close and the prosecution relied on the evidentiary error, thus reversal is required.]) Had the jury NOT heard the inadmissible evidence , there is a reasonable probability that at least one juror in the fourth penalty phase trial would have again decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537.)

Significantly omitted from respondent's brief is **ANY** discussion of the prejudice problem. The failure to even discuss the prejudice issue necessarily concedes that if the letter was improperly admitted, the error compels reversal. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession]; Indeed, "[a]s the Attorney General 'does not expand on the issue with ... citation to relevant authority,'" the Court should deem

the issue conceded.) *(People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1070 n.4 [quoting *People v. Hardy* (1992) 2 Cal.4th 86, 150]; see also *People v. Williams* (1997) 16 Cal.4th 153, 206 ["Points perfunctorily asserted without argument in support are not properly raised."].)

Conclusion

For the reasons set forth above and in appellant's opening brief, the trial court's error in allowing the jury to consider Prosecution Exhibit 1 in both the guilt and penalty phases requires reversal of the convictions and setting aside the sentence.

II.

THE PROSECUTOR COMMITTED SEVERAL ACTS OF HIGHLY PREJUDICIAL MISCONDUCT THAT REQUIRE REVERSAL OF THE CONVICTION AND SENTENCE

Summary of Appellant's Argument

In his opening brief, appellant noted that there were three egregious acts of prosecutorial misconduct in this case. Any one standing alone would be sufficient to reverse appellant's conviction. Taken together, however, they fatally undermined the reliability of the fact finding process. (Appellant's opening brief at pp. 106-143.)

The first instance of misconduct was the prosecutor's failure to investigate the very real likelihood that Prosecution Exhibit I, the letter obtained from Cezar Pincock was completely fabricated. The letter contained numerous errors of fact, and the prosecution's own investigation showed these facts to be false. Further, the letter was obtained from a known jailhouse informant whom the prosecutor did not even trust and who specifically requested favors in his own case in return for providing the letter. Finally, the only expert witness to testify in the case stated unequivocally that the document was a fake and not written by appellant.

Instead of vigorously investigating the reliability of this document, the prosecution deliberately refused to call Pincock to the stand because he was untrustworthy, and used the procedural device of the chain of custody with its inherent presumption of regularity to shield the source of the document from cross examination. Further, instead of vigorously examining the discrepancies in the letter, the prosecution did not even mention them in its direct examination of

Sgt. Royer. It left any challenge to the authenticity of the letter to the defense to challenge on cross examination and to otherwise contain the damage as best it could.

Moreover, when faced with the expert testimony that the evidence was likely fabricated, instead of taking vigorous action to assure the court and the trier of fact that the document was authentic - such as obtaining handwriting exemplars from Pincock and giving them plus the document to its own expert to examine - it called on appellant's ex-girlfriend - concededly not a handwriting expert- to authenticate the handwriting. Additionally, the prosecution relied on Tony Saavedra's opinion evidence to authenticate the document in the guilt phase which the penalty phase judge ruled was improper.

The second instance of egregious prosecutorial misconduct was telling the jury in rebuttal argument that inheritance showed financial motive to kill when no evidence of inheritance was ever presented anywhere in the trial.

Lack of motive was a primary theme of the defense in this circumstantial evidence case. Trying to overcome that major evidentiary deficit, at trial, the prosecution attempted to show that appellant was the sole beneficiary on the decedents' life insurance; a proffer that was repeatedly denied. Nevertheless, in closing argument, the prosecution suddenly urged that appellant was the sole heir to the family home and its contents; facts nowhere in evidence. Although the defense objection was sustained, the argument implied to the jury that there were facts outside the record that filled this crucial evidentiary gap in the prosecution's case. At that late stage in the proceedings, the defense had no opportunity to ameliorate the fatal damage to its case. By filling a significant evidentiary gap in its own case and improperly destroying a major defense theme, the misconduct so

severely prejudiced the defense that reversal is required.

The third act of misconduct was insulting the defense during closing argument and insinuating that the defense tried to mislead the jury. Near the end of his guilt phase closing argument, the prosecutor told the jury that he tipped his hat to the defense for "making chicken salad out of you know what." (9 R.T. 2503.) Further, "I hate to -- you know, I hate to laugh about this, but that's what it is. I mean, that's what it is." (9 R.T. 2503.)

In a capital case, there is no excuse for using such deceptive and reprehensible tactics to obtain a conviction.

Summary of Respondent's Argument

Respondent first urges that any error was harmless because none of these matters affected the verdict. (Respondent's brief at pp. 65-66.) Second respondent urges that there was no misconduct in presenting the letter. Although the letter was seized from an inmate and there were inconsistencies in the letter, those matters were disclosed to the defense during discovery. Respondent urges that while the prosecution may offer evidence that the prosecutor may personally believe is suspect, it is not misconduct for the prosecution to offer evidence that may be inconsistent with other evidence unless the prosecution actually knew or should have known the evidence was false. According to respondent, nothing in the evidence shows that. More fundamentally, in order to prevail on a misconduct claim, appellant must show by a preponderance of the evidence that the evidence was false and appellant has not made such a showing. (Respondent's brief at pp. 66-70.)

Additionally respondent urges that there was no misconduct in the prosecutor's claim that appellant was the sole heir to the family property. First,

since appellant did not specifically object that there was no evidence to support that claim, nor did appellant ask for an admonition or a mistrial, there is no basis for reversal. Second, the remark was fair rebuttal to appellant's argument that he had no motive to kill his family members. Third, even if the comment was misconduct, any error would be harmless since the evidence against appellant was overwhelming. (Respondent's brief at pp. 71-75.)

Finally, respondent urges that there was no misconduct in the prosecutor's closing remark comparing the defense theory to chicken manure. A prosecutor has wide latitude when commenting on the case during closing argument. Respondent asserts that the comment at issue here was within that discretionary latitude. Moreover, since the defense did not specifically object to the comment, respondent claims that any error is waived. (Respondent's brief at pp. 76-77.)

Errors in Respondent's Arguments

As noted above, respondent begins its analysis of the serious prosecutorial misconduct in this case with the assertion that any errors here were essentially harmless or that appellant did not make the appropriate objections so the errors are waived. (Respondent's brief at pp. 65-66.)

Before responding to each such assertion, appellant would point out that the most profound relationship between the citizen and the state is the government's right to terminate a citizen's life. The very legitimacy of government rests on the fairness by which that relationship is conducted. To preserve public confidence in that relationship, the state has the duty to ensure the most rigorous scrutiny of the death penalty process. Fundamental fairness in capital cases may not be defeated by the inadvertence of counsel or paeans to juror perspicacity. Fundamental fairness requires the court to determine whether each challenged procedure was

both just in its conception and fairly applied in each case. Without such scrutiny, the ultimate reliability of the process is never tested.

Reliability is always the hallmark of capital litigation, reliability in the conviction and reliability in the penalty. Juries are not mystically endowed with the ability to discern absolute "Truth." Therefore, our system of justice relies on process. For a trial result to be reliable the trial process must be just and fair. (*California v. Ramos* (1983) 463 U.S. 992, 998-999.)

While the doctrines of waiver and harmless error serve to preserve scarce judicial resources, the requirement for judicial economy has never superseded the requirement to ensure fundamental fairness. To avoid the arbitrary or capricious imposition of the ultimate penalty, appellate review must zealously protect the fairness and reliability of the trial process. The prosecutorial misconduct in this case went to the core of the reliability of the trial process. As such, the error corrupted the special reliability standards mandated in capital cases by due process and the Eighth Amendment, as well as the California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. at 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.) Respondent's insistence on waiver and harmless error does little to assist this court in its duty to ensure fundamental fairness.

Inherently Suspect Evidence

Respondent concedes as it must that the knowing presentation of false testimony is misconduct. (See, e.g., *Mooney v. Holohan* (1935) 294 U.S. 103, 112; *Napue v. Illinois* (1959) 360 U.S. 264; see also *Banks v. Dretke* (2004) 540 US 668 [157 LEd2d 1166, 1193; 124 S.Ct 1256][when police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it

is ordinarily incumbent on the State to set the record straight; prosecutors are responsible for any favorable evidence known to others acting on the government's behalf in the case, including the police; prosecution's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice].)

That said, the duty of a prosecutor is broader than just avoiding the knowing use of false evidence. As appellant observed in his opening brief, the Due Process right to a fair trial is also violated by situations in which the prosecution allows a witness to give a false impression of the evidence (see, e.g., *Alcorta v. Texas* (1957) 355 U.S. 28, 31), as well as those in which testimony presented is false outright. (See, e.g., *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962.) It even applies to instances where the false testimony is unsolicited by the state or where a prosecutor recklessly, or negligently uses false evidence. (See *Giglio v. United States* (1972) 405 U.S. 150 , 154[31 L.Ed.2d 104, 92 S.Ct. 763].) Indeed, a new trial is required where false evidence is presented even when the evidence goes just to credibility matters and the prosecutor should have been aware of the falsehood. (*Giglio v. United States, supra*, 405 U.S. at p. 154 [31 L.Ed.2d 104, 92 S.Ct. 763].)

As the court of Appeal for the Ninth Circuit recently pointed out: "Few things are more repugnant to the constitutional expectation of our criminal justice system than covert perjury, **and especially perjury that flows from a concerted effort by rewarded criminals to frame a defendant**. The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law as defined by our Constitution. This important

mission is utterly derailed by unchecked lying witnesses, **and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation.**" [Emphasis added] (*Commonwealth v. Bowie* (2001) 243 F.3d 1109, 1114 [granting new trial for prosecutorial failure to investigate and bring to attention of court information that suggested perjury may have been committed].)

Respondent attempts to avoid this ethical problem by noting that even if Prosecution Exhibit 1 came from an inmate and that it contained matters inconsistent with other evidence in the case, the fact that the document may have been somewhat suspect does not elevate its use into prosecutorial misconduct. A prosecutor may rely on evidence which he or she may not personally believe but which was nevertheless provided to the defense in discovery and where the defendant has the opportunity to point out these discrepancies at trial. (See, e.g., *People v. Riel, supra*, 22 Cal.4th 1153, 1211-1212.)

Certainly it is true that the letter was provided to the defense and the defense was able to point out the inconsistencies in the letter. Nevertheless, contrary to respondent's argument, the government's duty to correct perjury is not discharged because defense counsel knows, and the jury may figure out, that the evidence is false. (*United States v. Alli* (9th Cir. 2003) 344 F.3d 1002, 1007.) "All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain the pollution of the trial." *(United States v. LaPage* (9th Cir. 2000) 231 F.3d 488, 492 [reversing conviction for prosecutorial failure to correct false testimony].) In *Commonwealth v. Bowie, supra,* 243 F.3d at p. 1118, the court observed that "A prosecutor's

'responsibility and duty to correct what he knows to be false and elicit the truth,"[citation] , requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts."

Additionally, "...it is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt, particularly when it refuses to acknowledge the error afterwards to either the trial court or to this court and instead offers far fetched explanations of its actions." (*United States v. Blueford, supra,* 312 F.3d 962, 968, quoting *United States v. Kojayan (9th Cir. 1993)* 8 F.3d 1315, 1318-1319.) Both *Blueford* and *Kojayan* reversed and remanded convictions for new trials where trial prosecutors misled jurors and courts about the true facts of a case.

Respondent counters that in order to prevail, appellant must make a showing by a preponderance of the evidence that the letter is false. Respondent urges that because there were matters in the letter consistent with the known facts and there were matters in the letter that purportedly only the killer would know, appellant has not made the proper showing that the letter was false. (Respondent's brief at pp. 66-70.) Respondent is again in error.

As appellant pointed out in his opening brief, the prosecution was on notice that the letter was likely a complete fabrication. Indeed, the prosecutor actually knew that certain parts of Prosecution Exhibit I, the letter obtained from informant Pincock were untrue. As explained in the prior issue, the letter indicates Edward Charles Sr. was hit in the back of the head several times with a hammer. As the

prosecution well knew, however, no hammer was found. (8 R.T. 2118, 2154-2155.) More importantly, the prosecution's theory was that the murder weapon was not a hammer. It was instead, a crescent wrench. (32 R.T. 4602, 4605-4606.) In that regard, the letter further indicates that Danny Charles was found in the trunk of the car and defendant's wrench was on top of him. (8 R.T. 2118-2119). However, no wrench was found on top of Danny in the trunk of the vehicle. The letter also indicates Mrs. Charles had a rusted dog choker around her neck (8 R.T. 2118), but the police found no choker. (8 R.T. 2118, 2155.) Although also mentioned in the letter, no "monkey boots" were found, nor was there evidence that gas from the tank of the Honda had been siphoned. (5 R.T. 1373-1374; 5 R.T. 1386; 8 R.T. 2127-2128.)

Additionally, the letter indicates that defendant got home at 11:30 p.m., found the bodies and started cleaning up. Nevertheless, Sgt. Royer interviewed Mr. Severino on the sequence of timing. (8 R.T. 2119.) Mr. Severino indicated that he was up around 11:30 p.m. talking to Dolores (8 R.T. 2119-2120), so she was obviously alive at that time.

In short, claims were made in Prosecution Exhibit I that could not be true and the prosecutor knew they could not be true because his own investigation proved them untrue. More importantly, if appellant was the author of the letter, respondent has provided no explanation (let alone a credible explanation) of why a self confessed murderer would get some of the most significant facts of the crimes wrong in the letter. In that regard, Sgt. Royer did not disclose these discrepancies during his direct examination by the prosecutor. Instead, they were first revealed during cross-examination by the defense. (8 R.T. 2118 -2120.)

Additionally, Cezar Pincock, from whom the letter was obtained, was a

conceded informant who used the letter to try and gain an advantage from the prosecution. Sgt. Royer admitted that it was Pincock who contacted him, not the other way around. (8 R.T. 2090, 2109.) While Sgt. Royer testified that he made no deals with Pincock (8 R.T. 2090, 2109), that circumstance is not determinative. What is significant is Pincock's motivation in offering the letter to the prosecution in the first place. Obviously he expected favors in return for the letter. (8 R.T. 2104.) Thus, the very source of the letter is highly suspect and its veracity may be fatally compromised. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 843 "[I]t is the witness' subjective expectations, not the objective bounds of prosecutorial influence, that are determinative.."; *see also People v. Phillips* (1985) 41 Cal.3d 29, 47-48 [expectation of reward may improperly color an accomplice's evidence even if the reward is not explicit].) As the court observed in *United States v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333-334: "A prosecutor who does not appreciate the perils of using [informants] as witnesses risks compromising the truth-seeking mission of our criminal justice system. Because the government decides whether and when to use such [informants], and what, if anything to give them for their service, the government stands uniquely positioned to guard against perfidy. By its actions, the government can either contribute to or eliminate the problem.") (citations omitted)"]

While the prosecution did not call Pincock to the stand, certainly it used his tainted letter. More to the point, it did not call Pincock to the stand to authenticate the letter **precisely because he was untrustworthy**. Thus, as appellant explained in the previous issue, the prosecution used the chain of custody with its theory of presumptive regularity to present to the jury a document of questionable authenticity containing conceded falsehoods in an effort to avoid exposing its

"slime ball" (9 R.T. p. 2651) informant to cross-examination.

Therefore, if the prosecution did not want to bring the source of the letter into court for examination because he was untrustworthy and the letter itself contained conceded and unexplainable falsehoods, the prosecution was certainly on notice that the veracity of the document was highly suspect.

Respondent's argument that the letter also contained matters that only the killer would know is similarly flawed. As appellant explained previously, Pincock was a conceded informant. He could have (and probably did) obtain the more detailed information about the crime scene from police reports, the press or innocent conversations with appellant. (See, e.g., 5 R.T. 1340-1341 1350-1361; 35 R.T. 5222-5224; See also, *People v. Gonzales, supra,* 51 Cal.3d 1179, 1281; *superseded on other grounds by statute.*)[9]

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[9] In *Gonzales*, this court explained how informants like the notorious Leslie White could create a wholly false confession from a defendant that had the ring of authenticity. As the court observed:

> "On October 27, 1988, a newspaper article appeared in which inmate Leslie White described how inmate-informers concocted false but convincing confessions implicating other prisoners, testified falsely against those prisoners, and in return received special benefits. As described in that article and on subsequent occasions, the inmate would arrange to be confined or transported with the suspect, so he could show he had the opportunity to hear a confession. (Sometimes the jail officials would facilitate this by deliberately housing the suspect in the portion of the facility where known informers are confined for their own protection.) The inmate informant would phone law enforcement personnel, pose as a fellow investigating officer, and learn details of the crime. Since those details were known only to law enforcement personnel (who presumably would not disclose them to a prisoner) and to the criminal himself, the

Even if the foregoing was not enough: the letter did not flow: there were odd page breaks and disjointed thoughts as if the author was writing it based on reading a series of police reports. Moreover, it was not dated or signed. (3 R.T. 1257-1258.) Most importantly, however, the defense handwriting expert asserted that the entire letter was an outright fake. (See 3 R.T. 1258.)

When presented with that evidence, the prosecution apparently never investigated. Instead, it attempted to authenticate the letter using defendant's ex-girlfriend (admittedly not a handwriting expert) and the purported admissions of authorship made to Tony Saavedra as justification for bringing the letter before the jury.

As appellant explained in his opening brief, the *Bowie* case cited above is instructive on the issue of prosecutorial misconduct here. In *Commonwealth v. Bowie, supra,* 243 F.3d 1109, the prosecutor was shown a letter apparently written by an accomplice who became a prosecution witness, suggesting a plan to lie and shift blame to the defendant. Although the letter was presented to the prosecutor, the police were not instructed to follow up on the possibility that the evidence had been fabricated. Instead, the letter was simply provided to the

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> informant, by including such details in a false confession, could give his story a spurious air of authenticity. The inmate would then report the false confession to the police and, if requested, testify to it in court. In some cases inmates bargained for specific benefits, **but this was not an essential part of the system; the inmates knew that if they regularly came forward with useful information they would be rewarded**. [Emphasis added] (*People v. Gonzales, supra,* 51 Cal.3d at p. 1281.)

defense. According to the court, it did not matter that it was the defendant himself who introduced the letter into evidence. **The court noted that there was no waiver of the issue, even though the defense made good use of the letter, because the defendant cannot waive the prosecution's duty to act ethically.** Moreover, because the prosecution failed to investigate, the defense was essentially trying to make the best of a bad situation. It should never have had to confront the problem in the first place.

Under these circumstances, the court found a denial of due process because the prosecutor did not try to expose a likely plot to offer false testimony. As the court explained, "...[his] clear duty... was to do exactly the opposite of what he did. The law... left no ... doubt that the immediate constitutional obligation to collect potentially exculpatory evidence to prevent a fraud upon the court, and to elicit the truth was promptly to investigate the letter and interrogate their witnesses about it." More importantly, the court made clear that the prosecution's failure was NOT merely a trial error, but a" fatal due process error" and the error "fatally contaminated everything that followed." (*Id.* at 1117.)

Here the prosecutor committed exactly the same error as did the prosecutor in *Bowie.* Instead of investigating Pincock and the likelihood that he produced fabricated evidence, the prosecutor turned a blind eye to the problem leaving it to the defense to counter the inferences and let the jury try to sort through the issues. Moreover, instead of being forthcoming at the outset about the possibility of fabrication, the prosecutor did not even mention the discrepancies in the letter during his direct examination of Sgt. Royer. Instead he let the defense reveal the problems during cross examination and thereafter deal with trying to control the damage as best it could. (*United States v. Alli, supra* ,344 F.3d at p. 1007.)

Even more egregiously - as appellant noted previously- the prosecution deliberately chose not to call the informant to the stand **precisely because he was untrustworthy**. As the prosecutor candidly admitted to the jury: "And I will tell you why you don't call a witness like that [Pincock]..... He is a slime ball. He is. I admit that. [Para] Okay. I can't authenticate that letter through a jail inmate. I wouldn't even dream of it. **I wouldn't believe it myself, why would I expect you to?**" (9 R.T. p. 2651 [Emphasis added.].)

Moreover, when confronted with expert testimony that the letter was likely a fake, instead of taking vigorous action to verify or dispute its authenticity- like taking handwriting exemplars from Pincock and submitting the letter to its own expert for comparison- the prosecution relied on appellant's ex-girlfriend - concededly not a handwriting expert- to authenticate the handwriting.

Assuming arguendo that girlfriend-as- handwriting-expert was an appropriate method of authentication for Prosecution Exhibit I, it is certainly curious why the prosecution never asked Jill Roberson if she could authenticate appellant's handwriting on Prosecution Exhibit I. Jill Roberson was a later girlfriend of appellant and was called by the prosecution to testify on the issue of whether appellant tried to suppress evidence. (See Issue IV *infra.*) During that testimony, she noted that while appellant was in jail awaiting trial, she and appellant wrote literally hundreds of letters to each other. (7 R.T. 1934-1935.) This voluminous written correspondence took place during the same general time frame that Prosecution Exhibit I was purportedly generated. While Kim Speare testified that she recognized appellant's handwriting (6 R.T. 1804), there is nothing in the record to indicate that she ever saw anywhere near as much of appellant's handwriting as did Jill Roberson. After all, appellant was not

incarcerated when he and Kim Speare were dating, so he saw her regularly and even lived at her house for a year and a half. (6 R.T. 1800.) Thus, letter writing was not as necessary a means of communication as it was with Jill Roberson. Despite that likely disparity in familiarity with appellant's handwriting between the prosecution's two witnesses, apparently the prosecution never approached Jill Roberson to have her authenticate appellant's handwriting on Prosecution Exhibit I.

The omission appears to be significant. At the fourth penalty phase, when Ms. Roberson was again testifying for the prosecution on the evidence suppression issue, the defense handed her Prosecution Exhibit I. She was asked to take as much time as necessary to review it and to tell the court whether she thought that it looked like appellant's handwriting. After reviewing the document, she said that it did **NOT** look like the writing in the letters she received from appellant. (33 R.T. 4791.) More importantly, she had never been shown Prosecution Exhibit I before it was handed to her on the witness stand. (33 R.T. 4791.)

As if relying on an old girlfriend to authenticate the handwriting was not bad enough, the prosecution also relied on Tony Saavedra to authenticate the letter. As explained in the previous issue, Tony Saavedra never should have been allowed to authenticate the letter. Not only did he fail to ask appellant if he wrote the letter, but in the third penalty phase, Saavedra admitted that appellant talked about the incident and the letter indiscriminately. (26 R.T. 3182-3183.) Additionally, the trial judge in the third penalty phase specifically prohibited Saavedra from offering an opinion concerning whether appellant wrote the letter. (30 R.T. 4131; see Issue I, *supra.*) Unfortunately, however, the damage had already been done in the guilt phase. As explained in the statement of facts,

during the guilt phase, Saavedra was allowed to testify that appellant admitted writing the letter. (7 R.T. 2061-2062.)

Effectively, therefore, not only did the prosecutor fail to properly investigate the distinct possibility of fabricated evidence, but continued to propound inferences that it knew to be false, or had a very strong reason to doubt. Under the circumstances, these attempts to shore up the authenticity of the letter can only be described as "far fetched." (*Cf. United States v. Blueford*, *supra* 312 F.3d at p. 968.) In that regard, the possibility that the letter might not be authentic obviously troubled the jurors. Right before deliberations, when the jurors were allowed to read the letter, juror number 2 wrote a note to the court asking how Pincock obtained the letter. (8 R.T. 2342-2344.)

For these reasons, letting evidence known to be false in significant particulars - and of highly questionable veracity as to the rest - go to the jury without a vigorous inquiry to prevent a fraud on the court is simply indefensible. (*Commonwealth v. Bowie , supra,* 243 F.3d 1109, 1117.)

Urging Jurors to Consider Evidence Outside the Record

The record reveals that one of the primary controversies in the case was the motive for the homicides, or rather, the lack of it. The facts surrounding this issue are crucial to an understanding of the matter, so appellant summarizes them here.

The defense contended that there was no motive for appellant to kill his family, hence it was less likely that he was the perpetrator. Therefore, any discussion of money or financial gain was all speculative since there was no evidence to that effect. (See 1 R.T. 102-103.)

By contrast, the prosecution contended that appellant's motive was financial gain in order to collect on the proceeds of a family insurance policy. (2 C.T. 462-

469.) It should be noted, however, that there was no financial gain special circumstance alleged in ths case.

In any event, during pretrial hearings on the matter, the trial court ruled that unless the prosecution could show that appellant knew about the insurance proceeds, the prosecution would not be allowed to discuss or present evidence on the policy. (1 R.T. 368-370.)

The prosecutor never mentioned motive during his opening argument. Instead, he began his outline by telling jurors that three very bad killings plus a cover -up equals a guilty defendant. (5 R.T. 1286.) The prosecutor then went on to outline the evidence in the case and why it showed that appellant was the killer. (5 RT 1286-1320.)

When defense counsel made his opening argument he stated:

> "... one of the things that you will not hear about from prosecution witnesses. In fact, you won't hear about it from defense witnesses. And that is that, all things considered, this killing or this alleged killing of his mother, of his father, of his brother, there is no apparent motive for it. There is no evidence of anything in any way -- not money, not greed, not anything -- that says Mr. Charles did this." (5 R.T. 1322.)

Nothing else was ever said during the trial about any financial motive for these deaths.

It was not until the prosecutor's rebuttal argument that he mentioned financial gain as a motive. The district attorney told the jurors that inheritance was the motive for the killings. As the prosecutor explained it: "Consider also the fact that by killing the family, Mr. Charles becomes the sole heir to a beautiful home in a nice neighborhood in Orange County and probable assets." (8 R.T. 2638.)

The defense immediately objected on the grounds that there was no evidence that appellant was the sole heir and the argument misstated the evidence. (8 R.T. 2638.) The court sustained the objection. (8 R.T. 2638.) Nothing further was said about the matter.

Respondent begins his argument on this matter by urging that even though the defense objection to the prosecutor's comment was sustained, since the defense did not specifically ask for an admonition or a mistrial, the issue is waived for appeal. (Respondent's brief at p. 71.) Nevertheless, as appellant pointed out in his opening brief, an objection and request for admonition is not required when the error is of a nature which could not be cured by admonition. (*People v. Kirkes* (1952) 39 Cal.2d 719 at p. 726; *People v. Johnson* (1981) 121 Cal.App.3d 94, 103-104; *People v. Taylor* (1961) 197 Cal.App.2d 372, 382.)

Here, there was an objection, but not a specific request for an admonition. Any admonition, however would not have cured the harm and most likely would have simply exacerbated the problem. The prosecutor's argument here - filling a huge gap in the evidence concerning motive - had such an impact on the fact finding process that it would have echoed in the jurors' minds like the proverbial bell which cannot be unrung. "[F]acts that have been impressed upon the minds of the jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court." (*People v. Roof* (1963) 216 Cal.App.2d 222, 225.) Indeed, such admonitions can be not just futile but counterproductive in dealing with jury prejudice: "[F]requently admonitions to a jury to disregard that which has already been implanted in their minds serve only to emphasize and underline and sometimes transform the inconsequential into indelibility." (*People v. Buchtel* (1963) 221 Cal.App.2d 397,

403; See also *People v. Massie* (1967) 66 Cal.2d 899, 917, fn. 17.)

Defense counsel's failure to ask for an admonition, therefore, must be excused as the only tactically sound way to make the best of a bad situation that the defense did not create. (*People v. Calio* (1986) 42 Cal.3d 639, 643 [no waiver where defense counsel endeavors to make the best of a bad situation for which he was not responsible].) Certainly in the absence of an express statement from counsel, the absence of a request for an admonition cannot be viewed as an expression of the defense belief that the prejudice was cured.

Moreover, as appellant pointed out in his opening brief, the trial judge instructed the jurors in accordance with CALJIC 1.02 that statements made by the attorneys were not evidence. (See 5 R.T. 1284; 9 R.T. 2662-2663.)[10] Thus, any admonition counsel purportedly should have requested was given anyway, with

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[10] The judge told the jury,

> Statements made by the attorneys during the trial are not evidence. Although, if the attorneys have stipulated or agreed to a fact, you must regard that fact as conclusively proved.
>
> "If an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection. Do not assume to be true any insinuation suggested by a question asked a witness.
>
> "A question is not evidence and may be considered only as it enables you to understand the answer. Do not consider, for any purpose, any offer of evidence that was rejected or any evidence that was stricken by the court. Treat it as though you had never heard of it."

only a slight delay. Thus counsel's failure to ask for an admonition on the spot was a technicality that did not amount to a forfeiture and should not be considered a forfeiture.

Therefore, since the admonition was, in fact, given in the jury instructions, the court must still consider whether it was sufficient to cure the effect of the prosecutor's assertion of a financial gain motive. In that regard, the prosecutor's argument here was a clear violation of the spirit, if not the letter, of the trial court's ruling excluding evidence that Charles would profit from his parents' life insurance. More important, this financial gain argument came at the very end of the case, when it was fresh in the jurors' minds as they entered deliberations.

Respondent avers that even if the objection was sufficient to preserve the issue for appeal, the prosecutor's argument was a fair comment on the evidence. The assertion that appellant was the sole heir to the family assets presented the jury with reasonable inference based on the facts presented. Moreover, the comment was within the wide latitude given to the prosecution to rebut the defense assertion that there was no motive for these deaths. (Respondent's brief at pp. 71-74.)

As appellant pointed out above, there was no evidence whatsoever about financial gain, either through insurance proceeds or inheritance. As appellant explained in his opening brief, the improper argument here was both a deliberate and a blatant attempt to circumvent the trial judge's ruling on evidence of motive. As the facts make clear, when addressing the family insurance policy, the trial judge specifically prohibited the prosecution from introducing evidence of financial gain as a motive unless it could show that appellant was aware of the source of the money and the amount of it. (1 R.T. 368-370.)

The disposition of the family residence falls into the same category as the disposition of the insurance proceeds. That is, there is no evidence that appellant was the sole heir to the house, or if so that he knew he was the sole heir to the house, or that it was in fact worth a significant amount of money (over and above any mortgage that may have been in place).

Moreover, as appellant pointed out in his opening brief, if rank speculation is appropriate as a substitute for evidence, it might be equally true that since Danny was a student at the University of Southern California, a private university, and his parents were paying his tuition (27 R.T. 3459), the house had been mortgaged heavily to pay for his education. Thus, the proceeds remaining after a sale would not have been sufficient to provide a financial incentive or motive to kill. It might also be true that Mr. Severino who lived at the house had some financial interest in the property or had some right to live there under the terms of the parents' wills. Based on the evidence in this case, the foregoing scenarios are at least as likely as the prosecutor's bald assertion that the defendant killed in order to benefit financially from inheriting the house.

Moreover, the comment here was even more egregious than the prosecution's attempt to place the family's insurance policy into evidence. In the prior instance, the prosecutor managed to obtain a copy of the policy and knew that appellant was listed as a beneficiary. Thus, he could at least claim a good faith belief that the insurance policy might be admissible on the question of financial gain.

Here, by contrast, there is no indication anywhere in the record that the prosecutor reviewed any of the family's wills or was aware of the status of any mortgage information. Thus, there is simply no basis for any purported good faith

belief in appellant's status as sole heir to the family assets. Moreover, the prosecutor never apologized or claimed ignorance that he was violating the court's prior order on financial gain as a motive for the crimes.

It is fundamentally improper to make an argument when it is neither based on the evidence nor related to a matter of common knowledge. (*People v. Bell* (1989) 49 Cal.3d 502, 539; *People v. Heishman* (1988) 45 Cal.3d 147, 195-196; *People v. Fosselman* (1983) 33 Cal.3d 572, 579-581; *People v. Kirkes*, *supra*, 39 Cal.2d 719, 724; *People v. Evans* (1952) 39 Cal.2d 242, 251.) More to the point, "[i]t is improper for a prosecutor to present potentially prejudicial "evidence" to a jury in the form of argument. [Citations.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 722.) Such comments serve to make the prosecutor his own witness not subject to cross examination and thus constitute prosecutorial misconduct. (*People v. Bolton* (1979) 23 Cal.3d 208, 213.) Further, such conduct maybe violative of the Sixth Amendment right of confrontation. (*Id.* at p. 213.) As a matter of experience, "It has been recognized that such testimony,`although worthless as a matter of law, can be `dynamite' to the jury because of the special regard the jury has for the prosecutor.'" (*Id.* at p. 213, quoting with approval Vess, Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument (1973) 64 J.Crim.L. & Criminology 22, 28.) Similarly, the United States Court of Appeal observed in *Brooks* v. *Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399[11], that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." Indeed, even a "single misstep" on the part of the

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[11] *Brooks v. Kemp,* 762 F.2d 1383, 1409 (CA11 1985) (en banc)vacated on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), judgment reinstated, 809 F.2d 700, 817 CA11) (en banc), cert. denied, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987)

prosecutor may sometimes be so destructive of the right to a fair trial that reversal is mandated. *(United States v. Solivan* (1991) 937 F.2d 1146 , 1150, citing *Pierce v. United States* (1936) 86 F.2d 949 .)

Indeed, in words that have provided guidance to prosecutors for more than half a century, this court said:

> "The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded a fair trial. The applicable rule was admirably stated in *Berger v. United States*, 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314], quoted with approval in *Viereck v. Unites States,* 318 U.S. 236, 248 [63 S.Ct. 561, 87 L.Ed. 734]: "'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" (*People v. Talle* (1952) 111 Cal.App.2d 650, 677-678.)

Respondent counters that even if the prosecutor's comment on financial gain was misconduct, appellant cannot demonstrate prejudice. The evidence was overwhelming and the jury was instructed that the comments by attorneys are not evidence. (Respondent's brief at pp. 75-76.)

Respondent's argument that inheritance is a reasonable - or at least permissible - inference from the evidence essentially concedes the defense

argument for prejudice on the critically important issue of motive. That is, despite the fact that there was absolutely **NO** evidence on the matter of financial gain from inheritance, lay jurors - uneducated in the finer aspects of wills and estates - would find inheritance to be the most logical and easily understood motive for the killings. Thus, as the prosecutor probably intended, the jurors undoubtedly agreed that appellant was the obvious logical heir and that therefore financial gain was the heretofore inexplicable motive for the slayings.

Moreover, without any evidence on the point, the jurors could not even make an appropriate inference that appellant would inherit the property. As appellant noted above, the house might have been so heavily mortgaged that there would not be sufficient proceeds from its sale to support a motive for the homicides. Further, even if there was, there is no evidence to support an inference that Danny and/or appellant would inherit the property through the death of the parents or that Mr. Severino did not have a legal or financial interest in the property. Thus, when there is no evidence on the point, jurors simply cannot be allowed to indulge in unguided inferences concerning what the evidence might have shown.

Unquestionably, attorneys are allowed to argue permissible inferences based on the evidence of record. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Nevertheless, the Due Process Clause of the Fourteenth Amendment requires that inferences must "be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) No case asserts that a prosecutor is allowed to argue inferences that are not based on either common knowledge or matters in evidence. Thus, the prosecutor's argument urging improper inferences of motive without the slightest support in the evidence

is a federal due process violation.

While intentional conduct is not necessary in order to constitute prosecutorial misconduct (*Smith v. Phillips* (1989) 455 U.S. 209, 219 ; *People* v. *Bolton, supra,* 23 Cal.3d at p. 214) , there is no question that deliberate, deceptive and reprehensible activities do so. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215, see also *Gore v. State* (Fla. 1998) 719 So.2d 1197 [death penalty reversed because prosecutor deliberately questioned witness about a matter the trial court previously ruled inadmissible] .) The prosecutor's argument – made in the face of trial court rulings which made it clear that the issue of financial gain was not to be raised without evidence to back it up – was a calculated move. That it was both deliberate and deceptive is clear from the record.

Moreover , although it is true that the jury was instructed that the comments of attorneys are not evidence (see, e.g., 9 R.T. 2662), that argument is apropos of nothing. Even respondent does not argue that there was any **evidence** of financial gain. Instead, it argues that financial gain through inheritance was the logical **inference** to be drawn from the deaths of all of appellant's close relatives. Thus, nothing in the instruction would prevent the jury from inferring an improper motive for the killings. As noted previously, however, motive was a critical issue for the defense. The prosecutor's improper argument undoubtedly filled a huge hole in the prosecution's case and demolished one of the principal themes of the defense. Moreover, as appellant noted above, this argument came at the close of the case where jurors would be likely to remember it as they deliberated appellant's fate. Given these circumstances, the prejudice is manifest.

III.

THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

Summary of Appellant's Argument

CALJIC 2.51 is constitutionally infirm because it places a burden on the defense to show absence of motive in order to demonstrate innocence. Further, it is defective because it does not clearly tell the jury that motive alone is insufficient to prove guilt. (Appellant's opening brief at pp. 144-149.)

Summary of Respondent's Argument

Respondent urges that this court has already decided that CALJIC 2.51 survives constitutional attack and that appellant has not given this court any reason to revisit the issue. Moreover the other instructions given in this case, particularly CALJIC 2.90 (presumption of innocence) and CALJIC 8.81.1 (People must prove special circumstance) place the burden of proof on the prosecution such that a jury would not believe that CALJIC 2.51 shifted that burden to the defense. (Respondent's brief at pp. 78-82.)

Errors in Respondent's Argument

As explained in the prior issue, one of the most important aspects of the defense presentation was motive to commit these offenses - or more properly, the lack of motive to do so. The prosecution overcame that major evidentiary deficit by improperly arguing financial gain as a motive – that appellant was the sole heir to the family home and its contents. As also explained previously, the facts supporting that argument were nowhere in evidence.

CALJIC 2.51 goes right to the heart of this key question of motive. The

instruction provides in pertinent part: " Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence." Undoubtedly, at trial, the defense was relying on that instruction when crafting its case to show that appellant had no motive to commit these offenses. Once the prosecution improperly introduced evidence of a purported financial gain motive in closing argument, however, CALJIC 2.51 fatally prejudiced the defense.

The instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of a motive in order to establish innocence. Nowhere in respondent's brief is there even a mention of the highly prejudicial aspect of this instruction. More to the point, respondent's discussion of the burden of proof requirements contained in CALJIC 2.90 and 8.81.1 actually support appellant's arguments here. Those instructions reinforced the prejudice to appellant because they focused the jury on using the purported evidence of financial gain to establish proof of the offenses beyond a reasonable doubt. Thus, in the situation presented here, CALJIC 2.51 reinforces those instructions to the prejudice of appellant by specifically encouraging the jury to focus on motive as tending to prove guilt.

Even if, as respondent argues, CALJIC 2.51 was an accurate statement of the law (which appellant does NOT concede for the reasons set forth in his opening brief at pp.145-148), that factor alone does not dispel the prejudice here. "Even an accurate statement of the law may be erroneous as an instruction if it is likely to mislead or misdirect a jury upon an issue vital to the defense..." (*People v. Cole* (1988) 202 Cal.App.3d 1439, 1446; disapproved on other grounds in *People v. Mastia* (2001) 25 Cal.4th 1180, 1191.) Since lack of motive was a crucial issue to the defense in this case, CALJIC 2.51 should not have been given.

For the foregoing reasons and those set forth in appellant's opening brief, CALJIC 2.51 precisely and improperly focused the jury's attention on the purported evidence of motive based on financial gain and used that evidence as support for the beyond-a-reasonable-doubt standard for conviction. The instruction was thus ineluctably prejudicial, and reversal is required.

IV.

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

Summary of Appellant's Argument

The consciousness of guilt instructions given at appellant's trial, CALJIC 2.04, 2.05 and 2.06 were constitutionally infirm for two reasons. First, they created permissive inferences that were overbroad. That is, they allowed the inference of guilty mental state from conduct unrelated to the mental state; they permitted an inference of guilt of three homicides from a single untoward act or statement. Second the instructions are impermissibly argumentative. They highlight particular evidence for the specific purpose of inferring consciousness of guilt. Effectively, they focused the attention of the jury on evidence favorable to the prosecution, thus lightening the prosecution's burden of proof. Compounding the problem, they placed the trial judge's imprimatur on the prosecution's evidence. (Appellant's opening brief at pp. 150-163.)

Summary of Respondent's Argument

Respondent first urges that the defense waived any issue regarding CALJICs 2.04 and 2.05 because it failed to object to those instructions. Moreover, the defense at least implicitly acknowledged that the instructions were correctly given, thus the defense invited any error. Further, these instructions are correct statements of the law because they create permissive inferences rather than mandatory ones.

Additionally, CALJIC 2.04 was properly given because the telephone call to Mr. Severino asking him to take the blame for the deaths was an attempt to conceal evidence. Further CALJIC 2.05 was properly given because the multipage

letter written to Pincock was also an attempt to get someone else to take the blame. Additionally, appellant tried to persuade Jill Roberson to create an alibi for him. Finally, even if these two instructions were improper, appellant suffered no prejudice. They are "common sense" instructions that admonish the jury to be circumspect about relying on seemingly inculpatory evidence.

CALJIC 2.06 was properly given because the evidence supporting it included the wrench found in the dumpster with Daniel's blood on it and the defendant's statement to Deputy Hyatt that he washed the blood off Mr. Severino as well as cleaned it off of various spots around the house and that he burned the bodies. Finally, the multipage letter to Pincock discussing the disposition of the evidence supported the instruction. (Respondent's brief at pp. 82-96.)

Errors in Respondent's Arguments

No invited error or waiver

With regard to CALJIC 2.04 and 2.05, respondent's argument on invited error will not withstand scrutiny. Respondent asserts that the defense concurred with giving CALJIC 2.04 and 2.05. Further, the evidence supporting these instructions was the letter obtained from informant Pincock and Roberson 's testimony that she was going to provide appellant with an alibi.

As appellant explained in the prior issue, however, the letter from Pincock should have been suppressed. Moreover, as appellant explained in his opening brief, the problem with these two instructions predicated on Roberson's testimony is that Ms. Roberson repeatedly admitted that she came up with the idea for an alibi and appellant told her not to lie. Further, the defense never called her to the stand to testify about an alibi. Thus, there was no solid factual basis for the jury to find that appellant authorized any alibi. (Appellant's opening brief at pp. 153-

155.)

Additionally, nowhere in the conference on instructions did the prosecution ever indicate that it was relying on Roberson's testimony. It seems apparent from the record that both sides were contemplating that the letter obtained from Pincock was the primary basis for all three instructions [CALJIC 2.04, 2.05,and 2.06]. (8 R.T. 2432,-2433.)

Aside from the foregoing, "invited error" must be predicated upon counsel's express, deliberate tactical decisions. The doctrine of invited error stems from *People v. Graham* (1969) 71 Cal.2d 303, and ordinarily revolves around counsel's failure to object to instructions. In *Graham*, the trial court formulated a combination of several instructions which entirely omitted an involuntary manslaughter instruction and contained a patently erroneous voluntary manslaughter instruction. After the court read this combination of instructions in open court, all three defense counsel interrupted and stated, "That's agreeable." (*Id.* at p. 317.) Thus, the *Graham* Court had to consider the effect of an express acquiescence to giving an erroneous instruction and omitting an essential included-offense instruction.

Graham highlighted the competing considerations and underlying policies relevant to the problem: On the one hand, the attorney should exercise control over his case and bear responsibility for tactical decisions reached in the course of his representation. On the other hand, the Legislature has indicated that instructions which affect the substantial rights of a defendant should be subject to review, even though his counsel, through neglect or mistake, has failed to object to them.

A defendant has a fundamental due process right to have the trier of fact

consider every material issue reasonably raised by the evidence, including defenses. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, 721 [overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685].)

Graham resolved these competing considerations by strictly limiting the operation of the invited error doctrine to "the narrow situation of counsel's deliberate tactical decision." (*Id.* at p. 319.) Reiterating its ruling in *People v. Phillips* (1966) 64 Cal.2d 574, 581 [reversed on a different ground in *People v. Flood* (1998) 18 Cal.4th 470, 490], the Court again held that: "the court's responsibility [to instruct on general principles of law] could be negated only in that special situation in which the defense counsel deliberately and expressly, as a matter of trial tactics, objected to the rendition of an instruction." (*Id.* at p. 318.)

In the absence of a clear tactical purpose, expressed by counsel, both courts and commentators eschew invoking the "invited error" rule which excuses the trial court from performing one its most basic duties and which operates to deprive a defendant of the opportunity to have his case fairly heard. (*Graham, supra*, at p. 319.) Further, the concept of invited error cannot negate the court's *sua sponte* duty to properly instruct where counsel's failure to object results from inadvertence, inattention, or ignorance of the applicable law. *(People v. Cooper, supra,* 53 Cal.3d 771, 830-831 [doctrine applies only where the record affirmatively shows that counsel acted for tactical reasons and not out of ignorance or mistake]; *People v. Avalos* (1984) 37 Cal.3d 216, 229, fn. 6 [trial court's duty to instruct on basic principles of law is so important it cannot be nullified by defense counsel's neglect or mistaken failure to request appropriate instruction].)

The essence of the invited error doctrine is that a party is estopped from

asserting on appeal an error when that party's own conduct has induced its commission. (*People v. Lang* (1989) 49 Cal.3d 991, 1032.) This record does not reflect that counsel made an informed tactical decision in failing to specifically object to these two instructions. Appellant could gain nothing by allowing the jury to consider these critical instructions. It is evident that trial counsel's failure to pursue the issue was not a tactical choice. Counsel was simply acknowledging the reality that if the letter was to be admitted over defense objection, these two instructions would inevitably be given. Indeed, as respondent pointed out, these are standard instructions and have been upheld on numerous occasions against challenges. By the weight of authority, giving those instructions was not error, and there was no evidence in the record to suggest that defense counsel believed it would be error. In essence, therefore, trial defense counsel was simply making the best of a bad situation brought on by the trial judge's erroneous ruling. (Cf. *People v. Coleman* (1988) 46 Cal.3d 749, 781[12], fn 26; *People v. Calio* (1986) 42

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[12] In *People v. Coleman, supra*, 46 Cal.3d 749, this Court stated:

> "On this record, we find defense counsel did not waive or invite error. There is no indication of an express waiver, and in fact the more contemporaneous record indicates that defense counsel objected to the instruction but agreed to the supplemental instruction once it became clear that the *Briggs* instruction would be given. In addition, there was no clear tactical reason for defense counsel to agree to the giving of the *Briggs* instruction, and in the absence of such a purpose, we are reluctant to find invited error. [Citations] Defense counsel's decision to accept the supplementary instruction with the Briggs instruction does not abrogate his original objection to the instruction or constitute invited error. (*Id.*, at p. 781 fn 26.)

Cal.3d 639, 643.[13])

It has long been the law in California that the trial court has a duty to instruct the jury on principles of law which are not only closely and openly connected with the evidence, but which are necessary to the jury's understanding of the case. (*People v. Kimble* (1988) 44 Cal.3d 480, 503, cert. den. 488 U.S. 871.) Moreover, regardless of a request for specific instructions, the trial court must act as a "neutral arbiter" between the contesting parties to guide the jury on the law. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323.) As this Court phrased it:

> "The fulfillment of this obligation ensures the jury will consider the full range of possible verdicts -- not limited by the strategy, ignorance, or mistakes of the parties. The jury should not be constrained by the fact that the prosecution and defense have chosen to focus on certain theories." (*Id.* at p. 324.)

In this regard, the trial judge is a "judicial officer entrusted with the grave task of determining where justice lies under the law and the facts..." *(People v. Curlicue* (1979) 23 Cal.3d 249, 256) and thus it is incumbent upon him to "see that a case is not defeated by 'mere inadvertence.'[Citation]" (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457.) Therefore, the trial court must insure that the instructions adequately state the law and adequately assist the jury in resolving the issues the instructions address. (*People v. Key* (1984) 153 Cal.App.3d 888, 898.)

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[13] In *People v. Calio, supra,* 42 Cal.3d 639 this Court observed:

> " '[a]n attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' [Citation.]" (*Id.* at p. 643.)

To this end, a trial court must tailor an instruction to the facts of the case if necessary to avoid misleading the jury. (Cf. *People v. Cole, supra,* 202 Cal.App.3d 1439, 1446.)

Additionally, as appellant pointed out in footnote 29 of his opening brief (at p. 151),there was no waiver. A trial counsel's failure to object to an error in jury instructions does not preclude a defendant from raising the issue on appeal if the defendant's substantial rights are affected. (Penal Code, section 1259; *People v. Harris* (1981) 28 Cal.3d 935, 956; see also *People v. Hannan* (1977) 19 Cal.3d 588, 600.) Moreover, in criminal actions, a claim of constitutional error can almost always be raised initially on appeal. (*People v. Allen* (1974) 41 Cal.App.3d 196, 201, an 1; criticized on another ground in *People v. Williams* (1975) 51 Cal.App.3d 65, 67; see also *People v. Anderson* (1990) 52 Cal.3d 453, 468 [appellate court may consider error involving instructions even if there was no objection below if the error affects the defendant's substantial Due Process rights].)

CALJIC 2.06 is improper under the facts of this case.

The essence of respondent's arguments is that any facts showing that appellant attempted to destroy evidence will support CALJIC 2.06. A jury could infer that the disposition of incriminating evidence shows consciousness of guilt of a murder. (Respondent's brief at p. 95.)

Omitted from respondent's argument is any acknowledgment that when the trial judge refused to allow the prosecution to present gruesome photos of the burned bodies, he did so under the rationale that the family was already dead when the bodies were burned. Therefore, those photos were irrelevant to appellant's *mens rea* **before** the homicides took place. (8 R.T. 2183- 2184, 2193-2194.) The

same holds true of the purported disposal of other evidence in this case.

As respondent candidly notes, appellant told deputy Hyatt that he cleaned up the residence to protect his grandfather. (Respondent's brief at pp. 94-95.) Nothing in the cleaning up of the residence to protect a family member demonstrates that appellant had a particular *mens rea* before the homicides.

Indeed, while it is true that fear of apprehension may be relevant on the question of whether a criminal homicide was committed, it does not establish that the homicide was committed with malice aforethought or premeditation and deliberation. (See, *People v. Anderson* (1968) 70 Cal.2d 15, 32-33; *Commonwealth v. Anderson* (Mass. 1985) 486 NE2d 19, 23, fn 12; see also, LaFave (1972) Criminal Law, § 33 at 565; *Solomon v. Commissioner* (E.D.N.Y. 1992) 786 F.Supp 218, 225 [acts subsequent to victim's death cannot show killing was committed with "depraved indifference."]; see also *People v. Crandell* (1988) 46 Cal.3d 833, 871["A reasonable juror would understand 'consciousness of guilt' to mean 'conscious of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'"].)

More to the point, the jury first had to decide that appellant was the perpetrator before deciding whether he had the requisite *mens rea*. As appellant pointed out in his opening brief, CALJIC 2.06 permits the jury to infer that he was the perpetrator simply by virtue of an attempt to dispose of evidence rather than focusing on the evidence concerning the indentification of the perpetrator before deciding whether he possessed the requisite *mens rea*. That is, under CALJIC 2.06 as it was read to the jurors, if the jury found that appellant cleaned up the scene and disposed of evidence related to the homicide, **those facts alone** would allow the jury to infer that he was a first degree murderer. That is not the law. While

disposing of evidence would permit a logical inference that appellant was an accessory after the fact, it does not permit an inference that he was the actual perpetrator. Thus, as phrased in this case, CALJIC 2.06 was an incorrect statement of the law.

Accordingly, these "facts" did not provide the basis for a logical and rational inference that appellant was conscious of his guilt of first degree murder. Thus, because the alleged suppressed evidence did not necessarily relate to the charged crimes or provide a solid basis for inferring the requisite *mens rea*, the instruction was inappropriate. (See, e.g., *People v. Rankin* (1992) 9 Cal.App.4th 430, 435-436.)

Prejudice

Respondent urges that any error in giving these instructions was harmless. The instructions highlight the evidence which the jury might find inculpatory, but also tell the jury that the evidence is not sufficient to prove guilt but it can assign whatever weight it chooses to that evidence. (Respondent's brief at pp 90.)

However, the consciousness of guilt instructions are improper precisely because they do not limit the jury's use of evidence to a single permissible inference. Instead, they advise the jurors that they can attach whatever weight and significance to the evidence that they choose. That is, they permit the jury to infer from any actions allegedly taken by appellant that he is guilty of *all* the offenses with which he has been charged. As explained above, the evidence here simply will not support such broad inferences. (But see *People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1140.)

Because these instructions permitted the jury to draw irrational and sweeping inferences of guilt against appellant, their use violated the standards for

acceptable permissive inference instructions set forth by the U.S. Supreme Court in *County Court of Ulster County, New York* v. *Allen* (1979) 442 U.S. 140. Accordingly, the use of the instructions undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15.) The instructions also deprived him of his right to a properly instructed jury and to reliable capital guilt and sentencing determinations in violation of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and article I, section 1,7, 15,16, and 17 of the California Constitution.

V.

THE TRIAL COURT ERRED IN GIVING CALJIC 2.71.5 [ADOPTIVE ADMISSIONS] OVER DEFENSE OBJECTION

Summary of Appellant's Argument

CALJIC 2.71.5 , the adoptive admission instruction, was given in this case over vigorous defense objection. Giving the instruction was error for two reasons. First, as explained in Argument I, *supra*, Prosecution Exhibit I was improperly admitted, and thus there was no basis for the instruction. Second, even if the exhibit was properly admitted, the instruction should not have been given over defense objection. CALJIC 2.71.5 is a cautionary instruction; thus it may be waived by the defense.

The defense was severely prejudiced by the instruction because it focused the jury's attention on Prosecution Exhibit I, the prosecution's highly improper yet highly influential letter from the informant.

Summary of Respondent's Argument

Respondent urges that CALJIC 2.71.5 was properly given because the evidence supported the instruction. Further, even though it is a cautionary instruction, the judge has the discretion to give the instruction even over defense objection. Finally, appellant was not prejudiced by the instruction. There was other evidence supporting the guilty findings aside from the letter. (Respondent's brief at pp. 96-107.)

Errors in Respondent's Arguments

The evidence did not support the instruction

Contrary to respondent's argument, the evidence in this case did not support the instruction. As appellant explained at length in issues I and II (and those

explanations are fully incorporated by reference here), appellant's response to Saavedra's questions about the letter did NOT constitute an adoptive admission of the contents of the letter. Appellant never acknowledged writing the letter. The chain of custody was faulty. Appellant was never shown the entire letter, and thus there is no showing he knew of or adopted its entire contents. Moreover, although appellant responded to the newspaper reporter's questions about the letter, the evidence shows that the reporter's questions dealt with the offenses and the letter indiscriminately. Thus, appellant's responses are at best ambiguous with regard to the letter. It is not clear whether appellant understood that the reporter was asking about the contents of the letter or whether he was asking questions about the offenses themselves. Finally, appellant specifically **denied** killing anyone and denied a plot to have his grandfather killed. As a matter of law, a specific denial of the very matters for which the prosecution wanted the letter admitted cannot be construed as an adoptive admission. (See *People v. Davis, supra*, 48 Cal.2d at p. 249.)

Cautionary instructions should not be given over defense objection.

Respondent concedes, as it must, that there is no *sua sponte* duty to give CALJIC 2.71.5 even though the instruction purportedly benefits the defense. (See, e.g, *People v. Carter* (2003) 30 Cal.4th 1166, 1198.) More important, as this court recognized in *Carter*, although the cautionary instruction purportedly benefits the defense, "[i]n a given case, it may be far from clear whether the defendant would wish the court to give CALJIC No. 2.71.5. The instruction is largely a matter of common sense-silence in the face of an accusation is meaningful, and hence may be considered, only when the defendant has heard and understood the accusation and had an opportunity to reply. **Giving the instruction might cause the jury to**

place undue significance on bits of testimony that the defendant would prefer it not examine so closely. (Cf. *People v. Phillips, supra,* 41 Cal.3d 29, 73, fn. 25 [for similar reasons, a court has no *sua sponte* duty to instruct on the elements of other crimes at the penalty phase of a capital trial].)" (*Ibid.* (Emphasis added).) [14] Thus, the clear implication in *Carter* is that a defendant may choose to waive the protection of the instruction.

Nevertheless, respondent urges that a close reading of both *Carter* and *People v. Richardson* (2008) 43 Cal.4th 959 compel the conclusion that the trial court retains the discretion to give CALJIC 2.71.5 even over defense objection. (Respondent's brief at pp. 101-104.) A fair reading of those cases, however, does not support respondent's claim.

In *Richardson,* this Court found that the evidence certainly supported the instruction since the defendant's response to an accusation was "false, evasive and contradictory." While the defense objected to the instruction, this court simply concluded in a brief paragraph that since there was an evidentiary foundation for the instruction and because the instruction caused no harm, there was no constitutional violation in giving it. (*Richardson* at p. 1020.)

The most important distinction between *Richardson* and this case, however, is that here, the evidence will not support the instruction. In this case, appellant flatly denied the actual accusations of criminality made against him in the letter. Further, for the reasons set forth above and in issues I & II, the letter itself was inadmissible.

For these reasons, the two factors this court found persuasive in *Richardson*

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[14] Indeed, other courts have noted that CALJIC No. 2.71.5 is not particularly favorable to the defense *(See People v. Lynn* (1984) 159 Cal.App.3d 715, 738.)

are NOT present in this case. Further, the *Carter* case does not materially assist respondent's argument either. Because CALJIC No. 2.71.5 is not particularly favorable to the defense *(People v. Lynn, supra,* 159 Cal.App.3d at p. 738) the defense might not want the instruction to be given. In *Carter* this court concurred that a defendant certainly may not wish to have the jury instructed on this matter. For that reason, this court held that the trial court must give the instruction only when the defense requests it. (*People v. Carter, supra,* 30 Cal.4th at p. 1198.)

Although in *Carter* this court did not specifically prohibit a trial court from giving the instruction over defense objection, nothing in the above quoted language from the *Carter* opinion suggests that giving the instruction over defense objection would be appropriate. Further, as appellant pointed out in his opening brief, in *People v. Frye* (1998) 18 Cal.4th 894, this court noted that a similar instruction, CALJIC 2.71[oral admissions should be viewed with caution] is a cautionary instruction, the effect of which is to benefit the defendant. (*Id.* at pp. 988-989.) Nevertheless, cautionary instructions may be waived as long as no major public policy prohibits it. Indeed, "an accused may waive **any** rights in which the public does not have an interest and if waiver of the right is not against public policy." (*People v. Trejo* (1990) 217 Cal.App.3d 1026, 1032.[Emphasis added].)

Therefore, should the defense wish to avoid such an instruction for strategic reasons (e.g., the instruction could encourage the jury to conclude that the defendant's statements admitted or confessed guilt), the defense should be able to resist the instruction under the theory that a beneficial cautionary instruction may be waived at the discretion of the defendant. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371 ["Permitting waiver.... is consistent with the solicitude

shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights." (*People v. Robertson* (1989) 48 Cal.3d 18, 61; see also Civil Code section 3513 [party may waive right that exists for the party's benefit].) Hence, when the defense specifically objects to an instruction that is designed for the defendant's benefit, it should not be given. (See, e.g., *People v. Towey* (2001) 92 Cal.App.4th 880, 884 [whether or not CALJIC 2.60 and CALJIC 2.61 should be given is a matter of trial tactics on the part of the defense].) Further, "A reasonable attorney may . . . tactically conclude[] that the risk of a limiting instruction ... outweigh[s] the questionable benefits such instruction would provide." (*People v. Maury* (2003) 30 Cal.4th 342, 394; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1053 ["defense counsel might reasonably have concluded it best if the court did not explain how the evidence could be used"].)

For these reasons, *Carter* does not truly support respondent's argument, either alone or in conjunction with the *Richardson* opinion. CALJIC 2.71.5 is a cautionary instruction that is not particularly favorable to the defense. If, as a tactical matter, the defense wished to waive any benefit that the instruction might theoretically provide, there is no public policy reason that prevented it from doing so.

Finally, under the circumstances of this case, the instruction was also a bad fit and confusing. If the purported adoptive admission was the letter, most of CALJIC 2.71.5 makes no sense in this case. As an "accusatory statement" the letter would not be admissible for its truth, but only as it supplied content to appellant's's responses to it. However, appellant was NOT silent in the face of questioning on the contents of the letter. Moreover, appellant's responses did not always endorse what was said in the letter. Indeed, as appellant has repeatedly pointed out, on the specific accusations of criminality that the letter purportedly

conveyed - that appellant killed his family and attempted to have his grandfather killed to cover up the crimes - appellant specifically DENIED the accusations. A denial is NOT an admission, adoptive or or otherwise. Under these circumstances, the trial court's insistence on giving the instruction over defense objection was clear error.

Prejudice

Respondent urges that appellant suffered no prejudice as a result of the instruction. Even if the instruction improperly emphasized the confessional nature of the letter, there was other evidence that supported the convictions. (Respondent brief at pp. 106-107.)

The primary error in respondent's prejudice argument is the failure to address the standard of prejudice. As appellant explained in his opening brief, jury reliance upon an unreliable or untruthful admission or confession implicates the defendant's state (Art. I, § 15 and § 16) and federal constitutional rights (5th, 6th and 14th Amendments) against self-incrimination, to trial by jury and to due process. Thus the instructional error would be of federal Constitutional dimension. Here, therefore, appellant's convictions and judgment of death must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. That is, the State must show that the erroneous instruction did not contribute in any way to appellant's convictions for murder. (*People v. Guzman* (2000) 80 Cal.App.4th 1282, 1290, citing *Chapman v. California* (1967) 386 U.S. 18 at p. 24.)

Respondent does not make that showing and certainly could not. The letter obtained from the informant was the absolute crux of the prosecution's case. Clearly it was not mere coincidence that the letter was introduced as Prosecution Exhibit I. Moreover, not only was the letter mentioned in opening statement, but

the prosecutor read several paragraphs of the letter in his closing argument (9 R.T. 2486) and commented on how it demonstrated appellant's guilt. (9 R.T. 2488.) More to the point, the jury obviously thought it important. Juror number 2 wrote a note to the court right before deliberations asking how Pincock obtained the letter. (8 R.T. 2342-2344.)

Rather than challenge the *Chapman* standard of prejudice, respondent relies upon the *Watson*[15] standard and urges this court to simply reweigh the evidence. Under either standard, however, reversal is compelled. Here, the adoptive admission was tantamount to a confession, but without the requisite indicia of reliability. According to the letter, by setting up a plot to kill his grandfather, appellant was trying to cover up his involvement in killing the other members of his family. Thus, the letter not only evidenced a consciousness of guilt, but amounted to a virtual confession to the slayings. Moreover, it was not only the prosecution's most direct evidence of the killings, but the most powerful. As the Supreme Court pointed out 'A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.' (*Arizona v. Fulminate* (1991) 499 U.S. 279, 296 [111 S.Ct. 1246, 113 L.Ed.2d 302.])

Additionally, as appellant explained in his opening brief, the instruction was highly prejudicial. Adoptive admissions are highly incriminating because they reflect consciousness of guilt. (*People v. Edelbacher* (1989) 47 Cal.3d 983 at p. 1012.) More to the point, consciousness of guilt evidence is **highly prejudicial** if it is not fully substantiated. (Cf. *People v. Warren* (1988) 45 Cal.3d 471, 481.) It destroys the defense and emasculates whatever doubt the jurors may have

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[15] *People v. Watson* (1956) 46 Cal.2d 818, 836.

entertained about the defendant's guilt. (Cf. *People v. Hannon, supra*, 19 Cal.3d at pp. 602-603.)

While CALCIC 2.71.5 was at least ostensibly a cautionary instruction, it certainly was not a magic talisman. Facts given to jurors that materially influence their view of the case " cannot be forgotten or dismissed at the mere direction of a court." (*People v. Roof, supra,* 216 Cal.App.2d at p, 225.)

More importantly, the instruction merely highlighted this inappropriate adoptive admission and suggested the conclusion of guilt. Even in circumstances where a cautionary instruction might be appropriate, unless the instruction is sharply worded, it may only exacerbate the problem by calling the jurors' attention to the evidence. As appellant previously observed, however, CALJIC No. 2.71.5 is not an instruction favorable to the defense. *(People v. Lynn, supra,* 159 Cal. App. 3d 715, 738.) It is not sharply worded and focuses the jury on the adoptive admission itself.

Finally, even if *Watson* was the only appropriate standard of review, a reweighing of the evidence will not support respondent's claim. Here, the jury hung **twice** on penalty, even after having heard this otherwise inadmissible evidence that appellant was trying to cover up the killings by having his grandfather murdered. Thus, even considering **all** the evidence presented in this case, a death sentence was anything but a foregone conclusion. (*People v. Brooks, supra,* 88 Cal.App.3d at p. 188 [hung jury evidence of a close case]; *United States v. Paguio, supra*, 114 F.3d at p. 935. [hung jury shows the case is close and the prosecution relied on the evidentiary error, thus reversal is required].) Had the jury NOT heard the inadmissible evidence, there is a reasonable probability that at least one juror would have again decided that death was not the appropriate

penalty. (*Wiggins v. Smith, supra,* 539 U.S. at p. 537.)

For these reasons, giving CALJIC 2.71.5 over defense objection severely prejudiced the defense.

PENALTY PHASE ISSUES

VI.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION A FOURTH PENALTY PHASE TRIAL.

Summary of Appellant's Argument

Granting the prosecution a fourth penalty phase trial was error. There was no justification for a fourth penalty phase trial such as the introduction of new evidence. The fourth penalty phase trial here violated appellant's state and federal due process right to be free of undue harassment. More importantly, since the prosecution failed to persuade prior juries to impose death, even when it had no burden of proof at all, a fourth penalty phase was simply an exercise in forum shopping to find a jury that would find the prosecution's case persuasive. Forum shopping is itself a due process violation.

Summary of Respondent's Argument

Respondent urges that the trial court's decision concerning whether or not to allow multiple penalty phase trials is a discretionary one. Here, the trial court exercised its discretion and set forth the factors that it considered when making the determination to allow a fourth penalty phase trial. Further, the trial court weighed the interest of the defendant against the interest of society and concluded that since a majority of the jurors voted for death in the prior penalty phase trials, there was no legal impediment to allowing a fourth penalty phase trial. Finally, respondent argues that the prosecution was not forum shopping because it was not seeking a new judge. (Respondent's brief at pp. 102-118.)

Errors in Respondent's Arguments

The most significant problem with respondent's argument is the failure to

adequately address the problem of forum shopping. While respondent repeatedly notes that appellant had been convicted of three homicides, that the majority of jurors in the hung juries voted for death and that the defendant would not be released in any event, nowhere does respondent explain why a fourth penalty phase trial was necessary after the prosecution's multiple previous attempts to obtain a death sentence failed.

That is, nowhere does respondent articulate a rationale that would validate a discretionary decision to allow more than one penalty phase trial. This lack of an appropriate rationale allowing the trial court to be able to properly discriminate between situations where another penalty phase trial is appropriate from situations where it is not is particularly important here. As appellant pointed out in his opening brief, the evidence was exactly the same in the fourth penalty phase trial as it was in prior penalty phase trials where the jury hung. Simply repeating the same penalty phase evidence in multiple attempts to find a receptive jury smacks of nothing more than a prohibited effort at forum shopping.

Forum Shopping

Respondent is certainly correct that the trial court recognized that in order to determine whether it should dismiss further prosecution in the interest of justice under Penal Code section 1385,[16] it was required to engage in a balancing contest between the rights of the individual and the interest of the state. The trial judge noted that he had to weigh the nature of the offenses against possible undue harassment of the defendant and the likelihood of additional evidence being

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[16] Section 1385, subdivision (a) provides in pertinent part, "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

presented at a retrial. (29 R.T. 3923.) The court discounted any economic consequences but noted that an additional consideration was how the jurors voted. Because the majority of the jurors here voted for death, the court considered that to be a factor well worthy of consideration. (29 R.T. 3924.) Moreover, although there was **no** representation that the prosecution's evidence would change upon a retrial, nevertheless, there was substantial evidence upon which a jury could vote for death. (29 R.T. 3925.) Finally, and perhaps most importantly, the trial court found no harm to the defendant through a retrial, "beyond the obvious." Therefore, there was no legal justification to deny the People's request for a fourth penalty phase. (29 R.T. 3925.)

As appellant explained in his opening brief, however, while a trial court has broad discretion under Penal Code section 1385, that discretion is not absolute. "[W]hen a dismissal occurs after trial, the court must consider the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, **the possible harassment and burdens imposed on the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented on a retrial**." [citations omitted] (*Casey v. Superior Court* (1989) 207 Cal.App.3d 837, 843-844 (emphasis added).) However, unarticulated reasons and personal views of what is in the interest or furtherance of justice are insufficient to justify dismissal under the statute. (*People v. Andrade* (1978) 86 Cal.App.3d 963, 976.)

Significantly, in determining whether to dismiss a criminal action in furtherance of justice, if a trial judge is convinced that the only purpose to be served by a trial or a retrial would be harassment of the accused, the judge may

dismiss the action notwithstanding sufficient evidence of guilt to sustain a conviction on appeal; his discretion to dismiss is not limited to where such evidence is insufficient as a matter of law. *(People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505.)

Here, the trial court certainly considered those factors favoring a retrial to carry great weight. It did not, however, give similar weight to the factors pertaining to the defendant's constitutional right to be free from undue harassment resulting from repeated or vexatious litigation. The right to be free of undue harassment and vexatious litigation certainly applies under the due process guarantees of both the state and federal constitutions. (See *In re Krieger* (1969) 272 Cal.App. 2d 886, 890.)

More important, the trial court's minimal concern for appellant's interest in preventing repeated penalty phase trials "beyond the obvious" considerably understates the gravity of both appellant's and society's interests in the proper application of the death penalty. The death penalty embodies the most basic relationship between the citizen and the state: the government's right to terminate a citizen's life.

An overwhelming majority of the jurisdictions that allow the death penalty to be imposed do not permit the penalty phase to be retried after a jury has been unable to reach a unanimous verdict as to the penalty.[17] As one of the few

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[17] The death penalty is prohibited in fifteen states: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

Of the 35 other states and federal jurisdiction with the death penalty, 25 states and the federal government (18 USCA§848(a) West Supp. 1995) prohibit retrial upon a hung jury: Ark. Stat Ann. § 5-4-603

remaining jurisdictions whose death penalty scheme permits a penalty retrial following a hung jury, California's Penal Code section 190.4(b) is contrary to the "evolving standards of decency that mark the progress of a maturing society." *(Trop v. Dulles* (1958) 356 U.S. 86, 101; *Woodson v. North Carolina* (1976) 428 U.S. 280, 301.)

Although this court has rejected the argument that multiple penalty trials constitute a per se violation of the 8th Amendment, (see, e.g. ,*People v. Taylor* (2010) 48 Cal.4th 574, 634 rejecting the argument that subjecting a defendant to a penalty retrial after the first jury deadlocked violates the Eighth Amendment's

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(c)(1993); Col. Rev. Stat. §18.lJ-1201(2)(b) (II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); Id. Code § 19-2512(7)(c) (2003); Ill. Ann. Stat. ch. 720, § 5/9-1 (Smith-Hurd 1993); Kan. Stat. Ann. § 21-4624(e) (Supp 1994); La. Code Crim. Proc.Ann. art. 905.8 (West Supp. 1995); Md. Ann. Code art. 27, §§ 413(k)(2), 413(k)(7) (Supp. 1994); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995); Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001); Pa. Stat. Ann. tit. 42, § 9711(c)(1)(v) (Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp.1995); SD Codified Laws Ann. §23A-27A-4 (1988); Tenn.Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. artJ7.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990); Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994). Only 4 states, Alabama, Arizona, Indiana and Nevada explicitly authorize penalty retrials (Ala. Code § 13-A-5-46(g) (2002); Ariz. Crim. Code § 13703.01L (2002); Ind. Code § 35-50-2-9(f) (2002); Nev. Rev. Stat. 175.556 (2003)), and two states apparently authorize retrial (Connecticut and Kentucky) by judicial decision. (*State v. Daniels* (Conn. 1988) 542 A.2d 306,317; *State v. Ross* (Conn. 2004) 849 A.2d 648, 726, fn. 68; *Skaggs v. Common.* (Ky. 1985) 694 S.W.2d 672,682; *Dillard v. Common.* (Ky. 1999) 995 S.W.2d 366, 374.

proscription against cruel and usual punishment), this nationwide consensus is nevertheless relevant to the issues presented here. This consensus expresses a recognition that concern for fundamental fairness and human dignity requires that a capital defendant only be "forced to run the gauntlet once" on death. *(Green v. United States* (1957) 355 U.S. 184, 190.) Certainly "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause" (*Richardson v. United States* (1984) 486 U.S. 317, 324) even in capital penalty proceedings. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108-110.) Nevertheless, no capital defendant should be subjected to repeated attempts by the State to sentence him to death, "thereby subjecting him to embarrassment, expenses and ordeal, and compelling him to live in a continuing state of anxiety and insecurity." *(United States v. Scott* (1978) 437 U.S. 82,95.)

The United States Supreme Court has often based its analysis of the meaning of the "cruel and unusual punishment" component of the Eighth Amendment on whether a practice is consistent with the "evolving standards of decency" discussed in *Trop v. Dulles, supra.* As explained in footnote 12, California is one of only seven jurisdictions out of 53 (the 50 states, the federal government, the District of Columbia and Puerto Rico) which permit a penalty retrial following a hung jury in a capital case. That means that even if one considers only the 50 states, 43 of them do not allow a penalty retrial after a hung jury. That is far more than the 30 states found to mark a "national consensus" by the United States Supreme Court in *Atkins v. Virginia* (2002) 535 U.S. 304, and *Roper v. Simmons* (2005) 543 U.S. 551, where the Court found the use of the death penalty against the mentally retarded and juveniles unconstitutional under the "cruel and unusual" clause of the Eighth Amendment.

Because this national consensus implicates the Eighth Amendment, it is a another factor that this court must weigh in evaluating the propriety of a fourth penalty phase trial here. Indeed, the reasons behind this consensus are particularly important when analyzing the trial court's ruling. Here, there were no new factors benefitting any of society's legitimate penological[18] interests that were not present in prior multiple penalty phase trials that hung. Significantly, the fact that more jurors voted for death than life is apropos of nothing. As appellant explained in his opening brief, juror voting patterns do not provide a principled method for a trial court to exercise its discretion concerning whether to allow additional penalty phase trials. That is, if the prosecutor could persuade more jurors to vote for death than life imprisonment no matter how many times the jury actually hung, potentially, it could force the defendant to endure penalty trials ad infinitum. Even the trial judge here conceded that a fourth penalty phase retrial might be the last. (29 R.T. 3925.) On what principled basis, however, could the trial court make a distinction between whether three, four, nine or twenty seven penalty phase retrials was enough? Certainly, a trial judge's personal views of what is in the interest or furtherance of justice are insufficient to justify dismissal under Penal Code section 1385. (*People v. Andrade*, *supra*, 86 Cal.App.3d at p. 976.)

Nothing in respondent's argument actually addresses this seminal question. That is, "[a]t what point do we decide we are not going to try this case forever?" (29 R.T. 3916.)

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[18] In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia* (1976) 428 U.S. 153, 183.)

The appropriate response is that unless the prosecution can find some extraordinary reason to ask for a fourth penalty phase trial, two mistrials is enough. Indeed, if the national consensus is that there can only be one penalty phase trial without violating the cruel and unusual clause of the Eighth Amendment, certainly multiple penalty phase trials require significantly more compelling justification than the reasons proffered by the trial court here.

By way of analogy, under California Penal Code section 1387,[19] an entire criminal prosecution must be dismissed if the jury hangs twice. Although respondent argues that this "two-dismissal rule" set forth in Penal Code section 1387 does not strictly apply to penalty phase trials (respondent's brief at pp. 117-118), the Legislative justification for the rule is hard to ignore in the penalty phase context. A appellant pointed out in his opening brief, the purpose for the "two dismissal" rule **is to prevent the prosecution from harassing defendants or forum shopping for a judge who would rule in favor of the prosecution.**

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[19] Penal Code section 1387 provides in pertinent part:
(a) An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995, or if it is a misdemeanor not charged together with a felony, except in those felony cases, or those cases where a misdemeanor is charged with a felony, where subsequent to the dismissal of the felony or misdemeanor the judge or magistrate finds any of the following:

(1) That substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at, or prior to, the time of termination of the action.

(*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 14.) The remedy for violating Penal Code section 1387 is of course to release the defendant. (See *In re Krieger, supra,* 272 Cal. App. 2d at p. 890 ["We agree with the municipal court judge that release of the petitioner may not be in the immediate best interests of society, but in light of *In re Bevill* (1968) 68 Cal.2d 854 and section 1387 of the Penal Code, denial of the writ [asking to prohibit further prosecution] would violate due process of law guaranteed by the Fourteenth Amendment of the federal Constitution and article I, section 13, of the state Constitution."].)

Therefore, since the Legislature indicated in Penal Code section 1387 that it was in the best interest of society to release a criminal defendant from any further prosecution at all rather than subject him to repeated harassment or forum shopping, it is hard to make a plausible argument that sentencing appellant to life without parole would somehow violate society's legitimate penological interests. Dismissal of an entire prosecution for wrongdoing has a far more drastic impact on society as a whole than simply reducing a potential sentence from death to life without parole.

Here, however, the prosecution did not offer an extraordinary reason for yet another penalty phase trial. As appellant explained in his opening brief, when asking for a fourth penalty phase trial, the prosecution made no representation that there would be new or additional evidence presented. (See Penal Code section 1385). Further, the prosecutor admitted that the hung juries were likely his fault because he did not know how to properly pick a jury and perhaps he could remedy that when selecting new jurors. (29 R.T. 3922.) A more clear expression of prosecutorial forum shopping could scarcely be imagined. More to the point, "the law will not permit harassment of a defendant through repeated prosecutions for the same offense by presenting the same facts over again in different proceedings."

(*People v. Podesto* (1976) 62 Cal.App.3d 708, 721.)

Even if it could be persuasively argued that forum shopping was a perfectly acceptable reason for the trial court to allow a fourth penalty phase trial [which it cannot] the record reveals that the trial court simply did not understand the scope of its discretion. When announcing its decision, the trial court asserted that because of the factors it cited, legally, it could not deny the prosecution's request for a fourth penalty phase. (29 R.T. 3925.)

As appellant explained in his opening brief, this assertion betrays a fundamental misunderstanding of the scope of the trial court's discretion on this issue. While the trial court has to treat the parties equally (*People v. Andrade, supra*, 86 Cal App 3d at p. 976), it certainly had the discretion to rule in favor of the defense, particularly on the factors present here. The trial court could have denied the request for a fourth penalty phase despite its belief that there was evidence to support a death verdict. (See *People v. Superior Court (Howard), supra,* 69 Cal.2d at p. 505.)

There was nothing in the factors presented by the prosecution or in respondent's argument that legally bound the trial court to rule that a fourth penalty phase was required. It is almost hornbook law that a trial court's misunderstanding of its discretionary power is not a true exercise of discretion. (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247; *People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) Moreover, as the United States Supreme Court observed in an analogous situation; "It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law. [Citations]" (*Schlup v. Delo* (1995) 513 U.S. 298, 333 [115 S.Ct. 851, 130 L.Ed.2d 808] (Conc. opn of O'Connor J.) More important, where a court is misinformed as to the extent of its discretion in sentencing matters, the sentence must be reversed. *(People v.*

Meloney (2003) 30 Cal.4th 1145, 1165; *People v. Fritz* (1985) 40 Cal.3d 227, 229; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.)

Therefore, because the trial court did not understand the extent of its discretion; because it did not properly exercise its discretion in balancing the factors favoring dismissal in any event, and because the record reveals that the primary purpose behind the prosecution's request for yet another penalty phase trial was simply forum shopping in violation of appellant's state and federal due process rights, the trial court erred in allowing a fourth penalty phase trial. This court must set aside appellant's death verdict and, at the very least, reduce the penalty to life without parole.

VII.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT'S FAMILY TO COMMENT ON HOW A DEATH VERDICT WOULD AFFECT THEM

Summary of Appellant's Argument

This case presents the somewhat unusual situation where the decedents' family was also the defendant's family. Here the defendant's family did not want him put to death. Nevertheless, during the penalty phase portion of the trial when the defendant tried to present testimony that these family members loved appellant and did not want to see him executed, the trial court refused. The trial court reasoned that under state law, the decedents' family was precluded from offering an opinion on the ultimate punishment or how the defendant's death would affect them.

Such testimony was admissible for two reasons. First, it was proper mitigation evidence because it was indirect evidence bearing on appellant's character. Second it was admissible as "execution-impact" evidence to counter the state's "victim-impact" evidence.

Moreover, since the previous penalty phase jury heard similar evidence and deadlocked, death was anything but a foregone conclusion on the facts of this case. Had this jury been allowed to hear that the decedents' family wanted it to spare appellant's life, the result likely would have been different.

Summary of Respondent's Argument

Respondent urges that since it is the background and character of the defendant that is in issue, whether or not the decedent's family wants the death penalty is immaterial. Therefore, jurors may not consider the impact of an

execution on the defendant's family as a mitigating factor. Further, even if error, the refusal to allow Charles' family members from testifying that appellant should not be executed was harmless. The family members were allowed to testify that they loved appellant and wanted to maintain their relationship with him, presently and in the future. (Respondent's brief at pp. 119-126.)

Errors in Respondent's Argument

The primary error in respondent's argument is the failure to explain why family members who wanted to testify that they loved appellant and that they wanted him to live is somehow prohibited evidence . A defendant must be allowed to offer evidence of his family members' love, since such evidence constitutes indirect evidence of the defendant's character and is thus perfectly permissible as mitigating evidence under Penal Code section 190.3. (*People v. Ochoa* (1998) 19 Cal.4th 353, 456.)

Similarly, the opinions of family members that the defendant should not be executed are admissible when they illuminate some positive quality of the defendant's background or character. (*Ibid.*; see also *People v. Smith* (2005) 35 Cal.4th 334, 367 [opinion of defendant's former tutor that he should not be executed was admissible as evidence of defendant's character].) Indeed, this court has held that testimony from somebody "with whom defendant assertedly had a significant relationship, that defendant deserves to live, is proper mitigating evidence as 'indirect evidence of the defendant's character. '" (*People v. Ervin* (2000) 22 Ca1.4th 48, 102; *People v. Heishman, supra,* 45 Cal.3d 147, 194 [the defense should have been allowed to ask the defendant's ex-wife whether she thought he should get the death penalty]; see also *People v. Mickle* (1991) 54 Ca1.3d 140, 194 [court should have allowed friend who viewed the defendant as a grandson to testify that he thought the defendant should live].)

The excluded evidence would have illuminated Mr. Charles' character, and also would have provided facts from which the jury was entitled to find sympathy and pity for him. As set forth in appellant's opening brief, the Eighth Amendment requires that jurors in penalty phase must be allowed to consider this kind of evidence. Nothing in the defense request here overstepped the boundary of acceptable mitigation evidence.

Additionally, however, respondent did not respond to appellant's argument that under the unique circumstances of this case, the proffered evidence was really victim-impact evidence. Here, since the close family members of the decedents and the defendant were the same, the impact was the same: grief, loss, and impact on surviving family members would clearly be admissible under controlling precedent if offered by the state. (*Payne v. Tennessee* (1991) 501 U.S. 808 at pp 814-15 (evidence of how 3-year-old child missed his murdered mother and sister and cried for them admissible); *State v. Gentry* (Wash. 1995) 888 P.2d 1105, 1134-35 (impact on victim's father of "effects of his young daughter's murder on his work, his emotions and his family" admissible under *Payne*).) This court has concurred noting that "the jury could consider evidence of the characteristics of the victim and the impact of the crime on the victim's family." (*People v. Jones* (1997) 15 Cal. 4th 119, 188. [overruled on a different ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1].)

Admissibility, however, cannot turn on the identity of the party offering the evidence. If grief and loss is relevant to the reasoned moral decision about whether the defendant should live or die when offered by the state – and it is under *Payne* (*Ibid.* at pp 838-839) – then those same victims' grief and loss must be relevant to the reasoned moral decision about whether the defendant should live or die when offered by the defense. It is "reasoned moral response," (*id.*), evidence

no matter who offers it. It defies common sense to admit it when it weighs towards death, but not life.

Indeed, "[S]tate trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate a defendant's due process rights under the Fourteenth Amendment. (*Wardius v. Oregon* (1973) 412 U.S. 470, 473; see also *Washington v. Texas* (1967) 388 U.S. 14, 19 [due process violation where state rule allowed accomplice to testify for the state but not for the defendant]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295-298 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

Prejudice

Respondent urges that even if the trial court erred, appellant suffered no prejudice. Both Ms. Prindiville and Ms. Irene testified that despite the family deaths, they wanted to maintain a relationship with appellant into the future. (Respondent's brief at p. 122.) In context, respondent argues the jury must have understood that they and their family members did not want to see appellant executed. (Respondent's brief at p. 125.)

Respondent's argument misses the mark. As defense counsel explained to the judge, without the request for life imprisonment instead of death, the jurors would think that while the family members might have good things to say about appellant, nevertheless, they might well agree with the prosecution's view that death is the appropriate punishment. Certainly that was not the situation here. (12 R.T. 261-262.) Moreover, whether Charles' relatives thought he should get the death penalty would be something the jurors would be waiting and expecting to hear, and their silence on the point could easily have been interpreted as meaning that there was good reason why the defense didn't ask them that question.

Certainly the testimony from Charles' relatives about wanting to have a relationship in the future falls far short of a clear statement that they thought he deserved to live.

More to the point, however, respondent fails to come to grips with the clear expression of prejudice based on the actual facts of this case. Here, when the defense testimony concerning family impact was not as limited in the third penalty phase as it was in the fourth - **the jury hung**. As appellant pointed out in his opening brief, the comparison between the testimony in the third and fourth penalty phase trials is instructive.

In the third penalty phase, Mrs. Prindiville testified not only that she wanted to maintain a relationship with appellant, but that killing appellant would not bring the rest of her family back and that she had no need for vengeance. (27 R.T. at p. 3585.) Further, on cross examination by the prosecution, she told the jurors that she did not believe capital punishment served as a deterrent. (27 R.T. 3587-3588.) On redirect, she testified that the family had suffered so much already that losing appellant would make things even worse. (27 R.T. 3588-3589.)

Ms. Irene testified that she fully supported appellant. Moreover, given all the horror the family had gone through with the deaths of Daniel, Delores and Edward senior, appellant's death would not help. (27 R.T. 3598.)

This testimony was much broader than the testimony of the fourth penalty phase where both women were permitted to testify only that they wished to maintain a relationship with appellant. Moreover, since the restriction on the testimony of Mrs. Prindiville and Mrs. Irene in the fourth penalty phase was one of the few substantive differences between the third and fourth penalty phase trials, that improper restriction was clearly one of the significant factors contributing to

the death sentence in the final penalty phase trial.

For these reasons, and those set forth in appellant's opening brief, the improper restriction on the defense testimony in the fourth penalty phase affected the outcome and thus appellant's death sentence must be set aside.

VIII.

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION, AND THE NATURE OF ITS DELIBERATIVE PROCESS, PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Summary of Appellant's Argument

CALJIC 8.88, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in that crucial instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

Appellant conceded in his opening brief that this court has held that CALJIC 8.88 is an appropriate instruction. (See, e.g., *People v. Duncan* (1991) 53 Cal.3d 955.) Nevertheless, appellant urged the court to reconsider its prior decisions. Reconsideration is necessary for several reasons. First, the critical phrase in the instruction, "so substantial" is far too amorphous to guide a jury in deciding whether to impose a death sentence. Second, the instruction does not tell the jury that the central determination it must make is whether the death penalty is appropriate, not merely authorized, and third, the instruction failed to inform jurors that appellant did not have to persuade them that the death penalty was inappropriate. Finally, although the defense did not specifically object to the

instruction at trial on the grounds asserted above, the issue is not waived. A defective instruction can always be litigated on appeal.

Summary of Respondent's Argument

Respondent first urges that the issue is waived because there was no specific objection. Second, the standard of review in CALJIC 8.88 is, on the whole, adequate to inform the jury that it could return a death verdict only if the aggravating circumstances predominate and that death is the appropriate verdict. Third, CALJIC 8.88 properly informed the jury that the defendant had no burden to prove that death was an inappropriate punishment. (Respondent's brief at pp. 126-133.)

Errors in Respondent's Arguments

No Waiver

Respondent concedes, as it must, that this court has held that defense counsel's failure to object to CALJIC 8.88 does not waive the issue on appeal. (See, e.g, *People v. Watson* (2008) 43 Cal.4th 652, 702 citing Penal Code section 1259.) Respondent argues, however, that the failure to object precluded it from making a record concerning why the instruction was appropriate. (Respondent's brief at p. 128.)

Nowhere in respondent's argument, however does it explain what facts or other circumstances would have precluded appellate review of this issue. Appellant's challenge to CALJIC 8.88 is a legal challenge, not a factual one. For that reason, respondent's waiver argument must fail.

Failure to explain that death must be appropriate not just authorized

Respondent recites the holding of several cases where this court has determined that the language of CALJIC 8.88 is not vague and fully explains to the jury that it must determine that death is the appropriate punishment. (See, e.g.,

People v. Page (2008) 44 Cal.4th 1, 56.)

Respondent makes no mention of appellant's argument that empirical jury research indicates otherwise. (See Bentele & Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 Brook. L.Rev. 1011,1031-1041 (2001); Bowers, Steiner & Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Acker, Bohm, Lanier edits., 2003 (2nd Edit)) p. 440.) Rather than simply repeat those arguments here, appellant invites the court's attention to his opening brief at pp. 213-215.)

Failure to explain that the defense has no burden to prove death is inappropriate

Respondent again urges that because this court has rejected similar claims before (see, e.g., *People v. Watson*, *supra,* 43 Cal.4th at p. 702) it should reject appellant's argument here. (Respondent's brief at p. 132.)

As appellant explained in his opening brief, one of the problems with CALJIC 8.88 is that because there is no burden of proof in a capital sentencing proceeding, the instruction must tell jurors that they may not arbitrarily assign a burden of proof to the defense. The standard instruction given here does not do that. Thus the jury is left without any guidance as to who, if anyone, bears the burden of persuasion. Without such guidance, the sentencing scheme becomes arbitrary and capricious in violation of the Eighth Amendment.

For these reasons and those set forth in appellant's opening brief, CALJIC 8.88 is fatally defective and its use here requires that the death penalty be set aside.

IX.

THE UNCONSTITUTIONAL USE OF LETHAL INJECTION RENDERS APPELLANT'S DEATH SENTENCE ILLEGAL

Summary of Appellant's Argument

Appellant's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition against cruel and unusual punishment. That is, as applied in California, the lethal injection process is be so fraught with problems that its application here violates the Eighth Amendment.

Summary of Respondent's Argument

Respondent urges that the issue is premature and that appellant's arguments have previously been rejected by this court and appellant. Respondent then addresses appellant's arguments by generally setting forth this court's position on the thrust of appellant's argument. (Respondent's brief at pp. 133-134.)

Errors in Respondent's Argument

As appellant explained in his opening brief, it is necessary to raise this issue now in order to preserve it for federal habeas purposes. (See, e.g., *Cooper v. Rimmer* (9th Cir. 2004) 379 F.3d 1029, 1033. [claim waived because not raised until the 11th hour] .)

More important, however, the many problems with California's lethal injection procedure have not been resolved and are still being litigated in court. (*Morales v. Tilton* (ND. Cal. 2006) 465 F. Supp. 2d 972, 979-981. [as currently applied, state protocol for administering lethal injection does not meet Eighth

Amendment standards] ; see also *Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal. App. 4th 729, 741. [superseding execution protocol does not comply with the California Administrative Procedures Act.) Moreover, since respondent has chosen not to address the merits of any of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

X.

BECAUSE DEATH SERVES NO LEGITIMATE PENOLOGICAL OR SOCIETAL PURPOSE AFTER THE EXTRAORDINARY DELAY BETWEEN SENTENCE AND EXECUTION, AND BECAUSE OF THE RESULTING EXTENSIVE SUFFERING OF THE INMATE, INTERNATIONALLY RECOGNIZED AS THE "DEATH ROW PHENOMENON," BOTH LARGELY THE RESULT OF INADEQUATE RESOURCES PROVIDED BY THE STATE TO REVIEW DEATH VERDICTS AND THE COMPLEXITY OF REVIEW MANDATED BY PAST ABUSES, IMPOSITION OF THE DEATH PENALTY IS A VIOLATION OF THE NORMS OF A CIVILIZED SOCIETY AND THUS OF THE EIGHTH AND FOURTEENTH AMENDMENT

Summary of Appellant's Argument

The extraordinary delay between sentence and execution in this and other cases renders the imposition of the death penalty cruel and unusual within the meaning of the Eighth Amendment to the United States Constitution, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments as well as International Law. (*See Lackey v. Texas* (1995) 514 U.S. 1045 (Stevens, J., memorandum). The delays in petitioner's appeal have been caused by factors over which he has exercised no discretion or control whatsoever, and which are overwhelmingly attributable to the system that is in place, established by state and federal law, which necessitates extremely time-consuming and exhaustive litigation. The delays have nothing to do with the exercise of any discretion on petitioner's part. The delays here have been caused by "negligence or deliberate

action by the State." (*Lackey v. Texas, supra*, 514 U.S. 1045 , (Stevens, J., memorandum).) The condemned prisoner's non-waivable right to prosecute the automatic appeal remedy provided by law in this state does not negate the cruel and degrading character of long-term confinement under judgment of death.

Further, even if retribution and deterrence are generally accepted arguments in support of the death penalty, neither of these arguments retains much validity for a prisoner who will spend an average of more than 17 years under a sentence of death.

Summary of Respondent's Argument

Respondent urges that all of appellant's arguments have previously been rejected by this court and appellant does not present any compelling reasons for a new review of those issues. Respondent then addresses appellant's arguments by generally setting forth this court's position on the thrust of appellant's argument. (Respondent's brief at p. 134.)

Errors in Respondent's Argument

In his opening brief, appellant acknowledged that this court has found no constitutional violation but explained in detail why this court should revisit those previous decisions. Since respondent has chosen not to address the merits of any of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

XI.

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

Summary of Appellant's Argument

In his opening brief, appellant argued that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presented these arguments in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the

imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few defendants for the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

Summary of Respondent's Argument

Respondent urges that all of appellant's arguments have previously been rejected by this court and appellant does not present any compelling reasons for a new review of those issues. Respondent then addresses appellant's arguments by generally setting forth this court's position on the thrust of appellant's argument. (Respondent's brief at pp. 135-145.)

Errors in Respondent's Argument

In his opening brief, appellant acknowledged that this court has approved these statutes generally but explained in detail why the application of these

statutes was not appropriate here and why this court should revisit those previous decisions. Since respondent has chosen not to address the merits of any of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

XII.

THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE REQUIRE THAT APPELLANT'S CONVICTIONS AND DEATH SENTENCE BE REVERSED

Summary of Appellant's Argument

Even if the errors in appellant's case standing alone do not warrant reversal, the court should assess the combined effect of all the errors. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.)

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of his right to trial by a fair and impartial jury and to a unanimous jury verdict and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence; but even if that were not the case, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

Summary of Respondent's Argument

Respondent urges that there were no errors in this case, thus there could be no cumulative error or prejudice flowing therefrom. (Respondent's brief at pp. 145-146.)

Error in Respondent's Argument

Respondent does not address the situation where this court might disagree

and find one or more errors in the guilt or penalty phases of appellant's trial. Implicitly, therefore, respondent appears to concede that such errors may be cumulatively prejudicial.

Regardless of any such concession, however, there is a more fundamental problem with respondent's argument. Heightened reliability is required in capital litigation. Reliability, however, is not the primary focus of respondent's answer. Nowhere in respondent's answer does it explain how the challenged procedures in this case contributed to the overall reliability of the penalty phase fact finding process. Instead, respondent's insistence on waiver and harmless error provide little assistance to this court in its duty to ensure fundamental fairness.

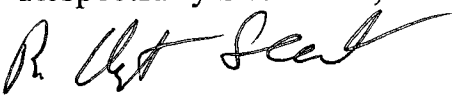
The errors in this case are overwhelmingly prejudicial, both individually and cumulatively. More important, individually and cumulatively, these errors undermined the reliability of the death verdict. Our system of justice relies on process. If the trial process is just and fair, then the result will be reliable. (*California v. Ramos*, *supra*, 463 U.S. 992, 998-999.) If the process is fundamentally flawed, however, it cannot be redeemed by resort to waiver or harmless error analysis. As appellant explained in both his opening and reply briefs, the death penalty process in California is fatally flawed in statute and it was flawed in its application to this case. Therefore, appellant's conviction and his death judgment must be set aside.

CONCLUSION

For the reasons set forth herein and in appellant's opening brief, the multiple guilt phase errors involving the improper admission of the primary prosecution evidence, the multiple instances of prosecutorial misconduct and the improper jury instructions all compel reversal of appellant's convictions.

The penalty phase errors, including multiple penalty phase retrials that amounted to nothing more than forum shopping, improper jury instructions and the constitutional infirmities of the death penalty statue itself combined to undermine confidence that the sentence of death was appropriate. Therefore, the sentence, as well as the convictions must be set aside.

Respectfully Submitted,



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CERTIFICATE OF WORD COUNT

I am the attorney for appellant Edward Charles III. Based upon the word-count of the Word Perfect 12.0 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 30,189 words. (California Rules of Court, rule 8.630 (b)(1)(C).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: September 30, 2010

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PROOF OF SERVICE BY MAIL

STATE OF ARIZONA, COUNTY OF YAVAPAI

I, Nancy D. Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 12008 Prescott, AZ 86304. On September 30, 2010 , I served the within

APPELLANT'S REPLY BRIEF

printed on re-cycled paper, on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Prescott, AZ addressed as follows:

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I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on September 30, 2010 at Prescott, AZ.

Nancy D Seaman

Nancy D. Seaman