IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	**CAPITAL CASE**
vs.	**S058025**
RICHARD DON FOSTER, Defendant and Appellant.	

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Superior Court of California
County of San Bernardino, Superior Court No. VCR5976

THE HONORABLE STANLEY W. HODGE, JUDGE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	
vs.	)	**S058025**
	)	San Bernardino Sup. Ct.
RICHARD DON FOSTER, Defendant and Appellant.	)	No. VCR5976

NO WAIVER OR ABANDONMENT OF ASSIGNMENTS OF ERROR RAISED IN APPELLANT'S OPENING BRIEF, GENERALLY

This reply brief is intended to supplement appellant's opening brief and to reply to contentions or assertions raised in the respondent's brief where reply is deemed to be helpful or necessary to the Court's consideration of the issue or issues raised. Appellant addresses specific contentions made by respondent but does not necessarily reply to arguments that are adequately addressed in the opening brief. However, appellant continues to assert all assignments of error and arguments made in his opening brief and does not intend to concede, waive, or abandon any issue, argument, or assignment of error raised in the opening brief. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

The arguments in this reply brief are numbered in accord with the assignments of error raised in appellant's opening brief.

A. Guilt Phase Issues and Assignments of Error

I

THE COURT ERRED BY FAILING TO CONDUCT MEANINGFUL GENERAL VOIR DIRE OF THE SITTING AND ALTERNATE JURORS, THEREBY VIOLATING CODE OF CIVIL PROCEDURE § 223 AND APPELLANT'S RIGHTS TO A FAIR TRIAL, A FAIR AND IMPARTIAL JURY, DUE PROCESS OF LAW, AND TO RELIABLE GUILT AND PENALTY DETERMINATIONS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As discussed in appellant's opening brief (see AOB 45-62), all prospective jurors were required to fill out a questionnaire. After an initial screening process that eliminated prospective jurors for hardship or other reasons, the trial court conducted death qualification voir dire of each prospective juror individually and out of the presence of other prospective jurors (see *People v. Hovey* (1980) 28 Cal.3d 1, 80).[1]

After the inadequate death qualification of prospective jurors, the trial court conducted general voir dire as part of the final jury selection process. The trial court's oversight and conduct of general voir dire -- at most but a minute or two of superficial questioning by counsel of each prospective juror -- was also deficient and defective. Clearly manifest areas of juror potential bias and prejudice as revealed in questionnaire responses -- unexplored during death qualification --

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[1]/ As separately demonstrated in Argument XVI, *infra,* the death qualification of prospective jurors was constitutionally inadequate, deficient, and defective as to penalty in violation of appellant's rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

went unaddressed during general voir dire. As with the death qualification, the record strikingly reveals that the trial court utterly failed to ask during general voir dire *any* questions of the prospective jurors who were ultimately seated, even where the questionnaire responses revealed potential bias and prejudice.

Respondent argues that the general voir dire conducted by the trial court of prospective jurors was proper (RB 29) and that the jury questionnaire was sufficient "in and of itself" to determine whether prospective jurors were biased. (RB 30.)

Contrary to respondent's assertions, the procedure followed by the trial court was grossly deficient. The questionnaire alone was insufficient to ferret out juror bias or serve as the basis for seating an impartial jury in this case. (See *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424; *Morgan v. Illinois* (1992) 504 U.S. 719, 729) Respondent fundamentally overlooks that the trial court was obligated both by statute and constitutional principles to conduct meaningful voir dire. (*Morgan v. Illinois, supra,* 504 U.S. at p. 729; Code Civ. Proc. § 223.) The state was obligated to impanel an impartial jury in this case. (*Ristaino v. Ross* (1976) 424 U.S. 589, 594-595.)

This Court has previously held that questionnaire responses alone, "without the benefit of the trial court's explanation of the governing legal principles," do not provide an adequate basis for a juror's excusal for cause. (See *People v. Heard* (2003) 31 Cal.4th 946, 964.)

In *People v. Stewart* (2004) 33 Cal.4th 425, this Court reversed a capital

conviction for *Witherspoon-Witt* error because the trial court excused "five prospective jurors for cause based solely upon their checked responses and written answers on a jury questionnaire." (*Id.* at p. 441.) This Court correctly concluded in *Stewart* that the requisite determination could not be made solely on the basis of the juror questionnaires, explaining that "[b]efore granting a challenge for cause concerning a prospective juror, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties ... ." (*People v. Stewart, supra*, 33 Cal.4th at p. 445, quoting from *Wainwright v. Witt* (1985) 469 U.S. 412, 424, and from *People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

By virtue of Code of Civil Procedure section 223, the trial court had the responsibility for questioning prospective jurors. (*People v. Box* (2000) 23 Cal.4th 1153, 1178-1179; see also *People v. Wilborn* (1999) 70 Cal.App.4th 339, 347.) At the very least, the voir dire procedure contemplated by section 223 entails minimal questioning and voir dire to produce some basis for a reasonable determination of the qualifications of prospective jurors. (See *People v. Boulerice* (1992) 5 Cal.App.4th 463, 477.)

As discussed in detail in appellant's opening brief (AOB 47-62), the questionnaire answers of sitting jurors in this case manifested "an impermissible threat to the fair trial guaranteed by due process." Based on the questionnaire responses alone, the trial court did not have enough information about the

prospective jurors to determine their fitness to serve or to evaluate challenges for cause. The court was obligated to uncover or elicit the existence of bias, impartiality, or prejudice, yet the trial court utterly failed to conduct even the most rudimentary inquiry of prospective jurors. The trial court's abdication of its responsibilities in this regard cannot constitute a valid exercise of discretion, and its decisions concerning voir dire and the qualifications of jurors to serve are not entitled to deference on appeal. By any measure or standard of prejudice, the trial court's conduct of voir dire was inadequate and compels the conclusion that the resulting trial was fundamentally unfair to appellant. (*People v. Holt* (1997) 15 Cal.4th 619, 661.)

Respondent asserts that appellant has waived his claim, presumably by failing to object. (RB 29.) Respondent does not further elaborate or cite any authority in support of this assertion. Appellant's argument focuses both on the statutory and constitutional inadequacy of the voir dire conducted by the trial court, not simply on the actions of defense counsel. Respondent ignores that a trial court's discretion in the conduct of voir dire is subject to essential demands of fairness. (*Wolfe v. Brigano* (6th Cir. 2000) 232 F.3d 499, 504 [Wellford, J., concurring) (quoting *United States v. Nell* (5th Cir. 1976) 526 F.2d 1223, 1229.) The duty to examine prospective jurors and to select a fair and impartial jury is imposed on the court. (*People v. Mattson* (1990) 50 Cal.3d 826, 845.) At stake is appellant's fundamental, non-waivable right to an impartial jury guaranteed by the Sixth Amendment to the United States Constitution. (See *Hughes v. United States*

(6th Cir. 2001) 258 F.3d 453, 463 [counsel cannot waive defendant's basic Sixth Amendment right to trial by impartial jury].)

The jury questionnaire used in this case was designed to discover potential or possible bias, impartiality, or prejudice relevant to a challenge for cause or affecting the qualifications of the prospective jurors this case. The voir dire process by its very nature contemplated that the jury questionnaire used in this case initially would probe the backgrounds and attitudes of prospective jurors to be followed with follow-up questions by the trial court and counsel for both sides.

Here, however, the questionnaires revealed both potential prejudice and emotional bias against appellant. Yet, without exception, none of the questionnaire responses by any of the prospective jurors indicating potential or possible bias, impartiality, or prejudice relevant to challenges for cause was followed-up by the court with probing questions. Although the trial court certainly had great discretion and wide latitude in respect to the course and conduct of questioning prospective jurors to test their responses and possible bias or impartiality as reflected in the juror questionnaires (*People v. Robinson* (2005) 37 Cal.4th 592, 617), the total absence of trial court participation cannot be excused or justified simply on grounds of judicial efficiency. (*Id.* at p. 168.) Rather, the trial court ignored the questionnaires, ignored the answers, ignored potential bias or areas of potential impartiality, and failed to undertake any inquiry of any of the prospective jurors who were ultimately selected as sitting or alternate jurors.

Respondent further asserts that since both the prosecutor and defense counsel conducted some follow-up questioning -- which the court heard -- the court's conduct of general voir dire was therefore not inadequate. (RB 31.) Respondent misses the point. The trial court did nothing during general voir dire, not asking even a single question of prospective jurors, despite areas of bias or prejudice revealed in the jury questionnaires. Since the trial court supervised the voir dire process and was otherwise given great discretion and latitude in the selection of jurors, the focus must be on the role of the trial court. Here, the trial court "failed to conduct the most rudimentary inquiry of the potential jurors" as to areas of bias and prejudice revealed in the questionnaires. (*Hughes v. United States, supra*, 258 F.3d at pp. 458-459.) Thus, the trial court's lack of participation in the voir dire process rendered the proceedings unfair to appellant and constitutionally infirm.

Citing *People v. Holt, supra,* 15 Cal.4th at p. 705; *People v. Freeman* (1994) 8 Cal.4th 450, 487; and *People v. Fauber* (1992) 2 Cal.4th 792, 846, fn. 17, respondent offers that "mere speculation that additional questioning might have disclosed a ground for challenge is insufficient to warrant relief." First, these three cases can be distinguished since they involve ineffective assistance of counsel, not the trial court's conduct of general voir dire.

In *People v. Holt, supra*, 15 Cal.4th 619, the defendant asserted ineffectiveness of trial counsel in part on grounds that counsel failed to adequately inquire into the racial views of potential jurors during voir dire, failed to

rehabilitate potential jurors who had expressed reservations about the death penalty, and failed to elicit crucial information from another potential juror that later led to her excusal, and performed in an manner that was tantamount to abandoning the duty to ensure a bias-free jury. (*Id.* at p. 704.) Because it was not possible to assess many of the defendant's claims on an appellate record which did not reflect the reasons for the actions which the defendant claimed fell below constitutional standards of competence, the court held that claims of ineffective counsel based on that conduct must be presented by petition for writ of habeas corpus. The court also held that the defendant also failed to establish prejudice with regard to his claims. The instances of allegedly inadequate voir dire were not shown, for example, to have resulted in the seating of a trial juror harboring racial prejudice. (*Id.* at pp. 704-705.)

In *People v. Fauber, supra*, 2 Cal.4th 792, 846, the defendant complained that prosecutorial misconduct prevented defense counsel from conducting appropriate voir dire and suggested that trial counsel's failure to conduct voir dire was ineffective assistance of counsel.

In *People v. Freeman, supra*, 8 Cal.4th 450, the defendant also claimed his trial attorneys were ineffective in their voir dire of prospective jurors. Specifically, the defendant claimed the defense voir dire examination of all prospective jurors on the death penalty and capital punishment issues was superficial and lacking in perception. He also claimed his attorneys were ineffective in exercising only 15 of 26 joint defense peremptory challenges and

one of the individual challenges. (*Id.* at p. 486.) The Court rejected the defendant's ineffectiveness claim on the ground that he failed to demonstrate that the manner in which his attorneys conducted death qualification resulted from other than an informed strategic decision. The Court also concluded that nothing in the record suggested the actual jury was biased or that it was reasonably probable a different jury would have been more favorably disposed toward the defendant. (*Id.* at p. 487.)

In addition, respondent posits an erroneous standard of error. (RB 36.) Respondent offers that appellant cannot demonstrate that he suffered prejudice. According to respondent, appellant's claim must therefore be denied. (RB 36.)

The Sixth and Fourteenth Amendments to the United States Constitution require jury impartiality at the guilt phase of trial. (*People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Williams* (1997) 16 Cal.4th 635, 666.) The California Constitution contains an identical guarantee. (Cal. Const., art. I, § 16; *People v. Williams, supra*, 16 Cal.4th at p. 666; see *People v. Johnson* (1992) 3 Cal.4th 1183, 1210-1211; *People v. Gordon* (1990) 50 Cal.3d 1223, 1248, fn. 4.) Under both the United States and California Constitutions, a sentencing jury in a capital case must be impartial. (*People v. Williams, supra*, 16 Cal.4th 635, 666-667; see also *Morgan v. Illinois, supra,* 504 U.S. at pp. 726-728.) In *People v. Holt, supra,* 15 Cal.4th at p. 661, the Court ruled that constitutionally inadequate voir dire was prejudicial per se and that the *Chapman v. California* (1967) 386 U.S. 18, 24, standard of error did not apply. In *People v. Cash* (2002) 28 Cal.4th 703, the

Court held that a defendant is entitled to reversal where a biased juror served on his or her jury. (See also *People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Avena* (1996) 13 Cal.4th 394, 413.)

Even if the trial court's failure to conduct meaningful voir dire is not prejudicial per se, the error must still be deemed prejudicial under the alternatively applicable *Chapman v. California, supra*, standard of review. That prospective jurors all "assured the court and the parties that they could in fact be impartial" does not mean, as respondent asserts (RB 35), that the jurors were free from bias or relieve the court from it duty appropriately to question prospective jurors. Such assurances are not conclusive (*People v. Jennings* (1991) 53 Cal.3d 334, 361) and may be disregarded as self-serving (*DeLisle v. Rivers* (6th Cir. 1998) 161 F.3d 370, 384).

Here, for the reasons discussed in the opening brief (AOB 47-62) and below, virtually every seated juror expressed strong bias or prejudice, or manifested potential bias or prejudice in such a way as to demand close and careful questioning by the trial court. Thus, it was precisely the function of voir dire examination to expose actual bias or prejudice as revealed in questionnaire responses. Respondent fails to appreciate that the failure of the trial court to respond appropriately to the jury questionnaires or conduct meaningful voir dire created the very real risk that one or more jurors based the determination of appellant's guilt and appropriate penalty, not on the evidence at trial, but on improper motives proscribed by law.

Even under the deferential abuse of discretion standard, the trial court's conduct of general voir dire was sub par and not even minimally adequate to insure appellant a fair and impartial trial. Deference is conferred where the trial court actually engaged in a process which was calculated to elicit evidence of impermissible or other substantial impairment in a juror's ability to abide by his or her oath. Such proceedings would indeed generate evidence or information to which the reviewing court might well defer. Given expanded discretion under Code of Civil Procedure section 223, the trial court had a greater responsibility yet failed to undertake probing and searching voir dire to secure appellant's fundamental state and federal right to an impartial jury. (*In re Hitchings* (1993) 6 Cal.4th 97, 110.)

The long line of United States Supreme Court opinions which set out the principles and procedures to be used in the selection of an unbiased jury in capital cases all contemplated actual voir dire of potential jurors by the trial court. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 651-657; *Ross v. Oklahoma* (1988) 487 U.S. 81, 83; *Patton v. Yount* (1984) 467 U.S. 1025, 1027; *Boulden v. Holman* (1969) 394 U.S. 478, 482-483; *Irvin v. Dowd* (1959) 359 U.S. 394, 397; *Reynolds v. United States* (1879) 98 U.S. 145, 156-157.) There is no suggestion, direct or indirect, in any of these cases, that written questionnaire responses alone, as suggested by respondent, could ever substitute for actual voir dire conducted by the trial court. On the contrary, court opinions have consistently emphasized the importance of the prospective jurors' physical

presence in court for questioning so that the trial court can observe them and probe for bias and prejudice.

The rule of deference is predicated on assumptions that judicial determinations as to juror qualifications are made only after personal questioning of the venire through voir dire. (*See, e.g., People v. San Nicolas* (2004) 34 Cal.4th 614, 634 [trial court considered questionnaire and asked follow-up questions in voir dire that covered the range of issues necessary to establish bias]; *People v. Ghent* (1987) 43 Cal.3d 739, 768; *People v. Fields* (1983) 35 Cal.3d 329, 354-355; *People v. Eudy* (1938) 12 Cal.2d 41, 44-45; *People v. Craig* (1925) 196 Cal. 19, 25-26 [trial court's "position" is superior to that of reviewing court whose examination is limited to record].)

As emphasized by the United States Supreme Court, without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. (*Morgan v. Illinois, supra*, 504 U.S. at pp. 729-730.) By failing to conduct any meaningful general voir dire of the seated jurors in this case, the trial court's conduct of voir dire was inadequate under Code of Civil Procedure section 223 and violated the state and federal Constitutions.

The trial court's voir dire procedure used in appellant's case was out of line with well-established opinions and principles. The procedure adopted and followed by the trial court was inadequate and constitutionally deficient, because it did not sufficiently permit the exploration of potential bias and prejudice

manifested in questionnaire responses. Appellant enjoyed the fundamental right to unbiased and unprejudiced jurors. (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1075 ["Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial jurors.'"].) It was the responsibility of the court to insure that this guarantee not be reduced to a hollow form of words. (*People v. Wheeler* (1978) 22 Cal.3d 258, 272.)

At the same time, the trial court's conduct and oversight of general voir dire also violated appellant's fundamental rights to a fair trial, a fair and impartial jury, due process, equal protection of the laws, and to a reliable determination of guilt (and penalty) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. As observed by the United States Supreme Court, "[t]endencies, not matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group "undermine processes, weaken the institution of jury trial, and should be "sturdily resisted." (*Glasser v. United States* (1942) 315 U.S. 60, 86.) If not prejudicial per se as to the determination of guilt, the constitutional juror selection violations during general voir dire, including, most notably, the trial court's abject failure to participate in juror questioning or elucidate questionnaire responses, were not harmless beyond a reasonable doubt.

II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF PRIOR CRIMES; THE ERROR ALSO VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE, AND DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND RENDERED THE GUILT AND PENALTY DETERMINATIONS UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Prior 1972 and 1982 Crimes Were Fundamentally Dissimilar to the Instant Offense

Respondent asserts that the prior offenses (involving Johnnie Clark in Idaho and Cindy Makris in Apple Valley) and the current offense were "similar in several respects." (RB 40.) Respondent offers that all three crimes occurred at the same time of day between mid-morning and early afternoon; all occurred in a business office; all three victims were women working alone in an office; in each case, appellant made two visits to the offices; appellant gave "phony stories" about his reason for being there; appellant robbed his women victims of items from their purses; and the women were moved into a back room. (RB 41.)

With respect to the 1982 robbery and attack of Cindy Makris and the current crime, respondent offers that additional similarities were present. Foster told Makris to take off her clothes; in the present case, Johnson's shoe was found on the desk. In both cases a knife was used during a struggle. In both cases, Makris and Johnson were punched in the face. Makris was stabbed in the face; Johnson was stabbed in the neck. The Makris and Johnson assaults occurred in a

small rural area of Apple Valley less than a mile from each other. Makris was robbed and attacked shortly after appellant was released on parole in Idaho; Johnson was attacked a short time after being released in California from parole for the Makris crime. (RB 41.) Based on these similarities, respondent urges that they supported an inference that appellant harbored the same intent on all three occasions -- "an intent to burgle, rob, and kill." (RB 41.) Respondent further contends that the similarities between the three incidents also supported an inference that appellant was acting pursuant to a common plan or design to rob and murder [h]is victims." (RB 42.) Although respondent also concedes that there were dissimilarities between the three crimes, the common features among them, in respondent's view, were sufficient to support the admission of the prior crimes evidence to prove either identity, intent, or common scheme or plan. (See RB 42.)

Evidence Code section 1101, subdivision (b), permits the admission of other or prior crimes evidence against a defendant when relevant to prove some fact, such as motive, intent, or identity, other than his or her disposition to commit such an act. Subdivision (a) of section 1101 prohibits the admission of such evidence for the purpose of showing the defendant's bad character or criminal propensity. It recognizes, however, that there are facts other than criminal propensity to which other or prior crimes evidence may be relevant. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

In respect to identity, this Court held in *People v. Ewoldt, supra*, 7 Cal.4th at p. 403, that the greatest degree of similarity is required for evidence of prior

crimes or misconduct to be relevant to prove identity. The prior crimes and the charged crimes must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (*Id.*; see also *People v. Gray* (2005) 37 Cal.4th 168, 203.)

A lesser degree of similarity is required to establish relevance on the issue of common design or plan than is required to establish identity. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) The common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at p. 403.)

The least degree of similarity is required to establish relevance on the issue of intent. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) For this purpose, the other or prior crimes need only be "sufficiently similar" to the charged offenses to support the inference that the defendant "probably harbor[ed] the same intent in each instance." (*Ibid.*) This Court has long recognized "that if a person acts similarly in similar situations, he probably harbors the same intent in each instance" and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The intent to be drawn is not that the actor is disposed to commit such acts; instead, the inference to be drawn is that, in light of the first evidence, the actor, at the time of the subsequent event, must have had the intent attributed to him by the prosecution. (*People v. Gallego* (1990) 52 Cal.3d 115, 171.)

Here, in light of the characteristics and circumstances of the prior and current crimes, the conclusion is inescapable that the trial court abused its discretion. Contrary to the trial court's ruling and respondent's assertions, the three incidents were insufficiently similar to support an inference that appellant necessarily committed all of them, harbored the same intent in each, and acted pursuant to a common plan or design. Moreover, because appellant intended primarily to rape the 1972 and 1982 victims, the jury could not legitimately infer that he harbored a different intent with regard to Gayle Johnson or intended -- not a sex crime -- but to rob her of money or property as the People argued below.

Respondent repeatedly presumes appellant's identity while arguing common scheme or plan. (See RB 41-43.) In *Hassoldt v. Pacific Media Group, Inc.* (2000) 84 Cal.App.4th 153, 166, the Court of Appeal interpreted *Ewoldt* to mean that where the identity of the actor is in dispute and the prior misconduct fails to satisfy the stringent "so unusual and distinctive as to be like a signature" standard enunciated in *Ewoldt*, that prior conduct is not admissible on such issues as intent, motive or lack of mistake or accident -- all of which issues presume the identity of the actor is known. "Indeed, it would make no sense to admit evidence of prior acts on the issue of intent, motive or lack of mistake or accident where the identity of the actor is not yet determined. Stated otherwise, it would not be relevant to inquire into the issues of intent or motive until it is established the defendant is the person or entity whose motive or intent is at issue." (*Id.*)

In any event, both the 1972 Clark and 1982 Makris crimes were

fundamentally dissimilar to Johnson's murder. While the former crimes were indisputably committed for the purpose of sexual gratification, the Johnson killing had a different purpose. Respondent appears to overlooks that the prosecution alleged burglary and robbery as the motive for the Johnson killing, not sex. As to identity, the prior 1972 and 1982 crimes did not share common features with the Johnson killing that were sufficiently distinctive so as to support the inference that appellant necessarily committed both the prior and current crimes.

Respondent is correct in noting that the victims in all three cases were women. (RB 40-41.) Despite that similarity, the pattern and characteristics of the crimes were not unusual or distinctive as to be like a signature pointing only to appellant as the likely perpetrator. In the 1972 and 1982 incidents, appellant was motivated primarily to rape or sexually assault the victims; in the current case, there was no evidence that he harbored a similar motive, plan, or design, and none was alleged.[2] In the 1972 and 1982 incidents, appellant made repeated visits on the same day. Here, appellant legitimately entered the church once, days before the killing. There was no evidence that appellant visited the church on any other occasion, had ever entered the church office, or had previously met the victim as he had the victims of the 1972 and 1982 crimes.

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[2]/ In later arguing the sufficiency of the evidence as to burglary (Argument XI, *supra)*, respondent argues that the facts and circumstances supported the inference that appellant entered the church with the intent to steal either from either the church or Johnson. (See RB 92.) Respondent's assertions as to appellant's motive and intent in respect to Argument XI thus undermine its argument here that appellant's prior crimes were similar in motive and intent to the charged crime within the meaning of Evidence Code section 1101, subdivision (b).

Respondent offers only speculation in respect to the shoe found on the office desk near where Johnson was killed. (RB 41.) The fact that a shoe was found on a desk at the scene of the murder was hardly similar to the prior crimes where the victims were either forced or ordered to disrobe. Respondent also ignores that after the killing in the current case paramedics removed some of the victim's clothing. Thus, the location of Johnson's shoe on top of a desk did not necessarily signify that it had been removed before the killing.

Unlike the prior 1972 and 1982 crimes, there was absolutely no evidence of a sexual motive or intent in the current case other then innuendos repeatedly made by the prosecutor during trial. The victim was not unclothed; her clothing had not been disturbed or removed. There was no physical evidence inside the church to suggest that a sexual assault had been intended or that the victim had been sexually attacked before or after death.

Respondent fails to consider that unlike the current case, identity was not an issue in both the 1972 and 1982 crimes. Appellant pleaded guilty to the 1972 Clark rape in Idaho; he admitted culpability. Appellant was identified by both victims of the 1972 and 1982 crimes. Appellant made no effort before or during the prior 1972 and 1982 crimes to conceal his identity from the victims. In the current case in contrast, the perpetrator was not personally identified by any witness. Unlike the 1972 and 1982 crimes, considerable efforts were made after the killing in this case to destroy blood evidence and preclude the possibility of identification.

Unlike the current crime, the prior 1972 and 1982 offenses were primarily sexual in nature. The circumstances of those crimes thus did not display the same highly distinctive features with the current incident so that evidence of the prior crimes had substantial probative value on the issues of identity, common plan or design, or intent in the current case. That each victim was female was not a highly distinctive common mark. Since there was no sexual motive shown or alleged in the current case, the gender of the victim was purely coincidental. Other than speculation and innuendo, the absence of evidence of sexual purpose or intent in the current case precluded any inference of identity based on appellant's prior crimes.

As to intent, motive, or common scheme or plan, the prior 1972 and 1982 crimes did not constitute or amount to a distinctive pattern or signature. The prior crimes were sexually motivated. In the present case, there was no evidence of a similar motive or intent. In the prior crimes, appellant used a similar ruse to gain the confidence of his victims and put them at ease to gain advantage over them before committing or attempting to commit sex crimes. Here, other than the fact that appellant had previously visited the church and requested a prayer treatment on his mother's behalf, there was no evidence of a ruse or an unusual or distinctive pattern similar to the prior crimes. There was no evidence to show that appellant even knew the victim. There was only evidence that he previously saw and met with the Rev. Plate. Consequently, under both the higher standard to show identity and the lesser standard to show other common features, the evidence of

appellant's prior crimes should not have been admitted under Evidence Code section 1101. (*People v. Ewoldt, supra*, 7 Cal.4th at 402-403.)

B. The Evidence Should Have Been Excluded Under Evidence Code Section 352

Even assuming the Court finds the requisite relevancy, the analysis is not complete. Admission of the prior crimes evidence was also improper if its probative value was outweighed its inherent prejudicial effect. Evidence that is admissible pursuant to Evidence Code section 1101, subdivision (b) to establish some fact other than criminal disposition is excludable if the admission of the evidence would "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) In this context, prejudice refers to "evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Scheid* (1997) 16 Cal.4th 1, 19.) Evidence is "substantially more prejudicial than probative [under section 352] if . . . it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

Respondent offers that the trial court properly exercised its discretion in admitting evidence of appellant's prior crimes under Evidence Code section 352. (RB 44.) While asserting that the probative value of the prior crimes evidence was strong, respondent at the same time minimizes its prejudicial impact, since "the evidence of [appellant's] prior crimes was not stronger or more inflammatory than

the evidence relating directly to the current offenses." (RB 45.)

Respondent overlooks that evidence of prior crimes is commonly viewed as inherently prejudicial. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 380; *People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) The prejudice generally arises from the danger that the jury, relying on the prior crime, will impermissibly infer that the defendant is a person of bad character with a propensity to commit crimes. (See Evid. Code § 1101, subd. (a).) Here, the evidence of appellant's prior crimes apprised the jury that appellant had been previously convicted and sentenced to lengthy terms of imprisonment after the 1972 and 1982 crimes. Once the jury heard that evidence and learned that he had committed prior sex crimes -- that he had been convicted and paroled -- the outcome of this trial was certain (despite the court's instructions and counsel's argument). (See *United States v. Burkhart* (10th Cir. 1972) 458 F.2d 210, 204 [once prior convictions are introduced, the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality].) This is especially true here. Given the highly inflammatory nature of appellant's prior sex crimes (see *People v. Thompson* (1980) 27 Cal.3d 303, 318; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404), the evidence should have been excluded.

C. Richard Nestor's Testimony Was Inadmissible and Prejudicial

The prosecution represented in its in limine motion that evidence of the prior Makris 1982 crime would be limited and would be proved through the

testimony of a single witness and by a certified copy of the judgment of conviction. (1 Supp A CT 140.) At trial, however, the prosecutor commenced his case-in-chief by discussing the details of appellant's flight from the scene of 1982 crime and his efforts to avoid apprehension, not the details of the crime itself about which Makris would testify. (See 7 RT 1752-1755.) In opening argument, the prosecutor's discussion of the details of the 1982 crime to be recounted by Cindy Makris covers two pages of reporter's transcript. The prosecutor's discussion of details of appellant's flight and efforts to escape or avoid apprehension covers three pages of reporter's transcript. (See 7 RT 1752-1755.)

In his presentation of witnesses, the prosecutor started with Richard Nestor. Appellant objected to Nestor's testimony on the grounds that it went beyond the scope of the court's ruling on the prosecutor's in limine motion and violated the proscriptions of Evidence Code section 352. (7 RT 1828-1829.) The prosecutor argued that Nestor's testimony "was necessary to identify" appellant "as Cindy Makris' attacker" even though he previously represented that Makris alone would be testifying and even though appellant had been convicted of that crime as the documentation would show. Without discussing or ruling on the Evidence Code section 352 grounds, the trial court overruled appellant's objections and permitted Nestor's testimony. (7 RT 1830.)

Respondent now asserts that appellant's escape after his attack on Makris in 1982 was admissible specifically to show his consciousness of guilt and generally as prior crimes evidence. (RB 43.) Respondent further offers that Nestor's

testimony was not prejudicial, since "the evidence in the present case was so overwhelming that any inferences drawn from Nestor's testimony necessarily paled in comparison." (RB 43.) Respondent is wrong on all points.

Respondent ignores that only in limited circumstances may facts underlying a prior conviction be introduced into evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 818-819; *People v. Cain* (1995) 10 Cal.4th 1, 70-71.)

Here, identity was the principal issue in this case. Appellant's identity as the perpetrator and his guilt in the prior 1982 Makris crime was established by prison and court records. Makris in her testimony identified appellant as her attacker. None of the other elements of charged murder, burglary, or robbery at issue in this case was established by inferences to be drawn from appellant's efforts to flee from the scene of the 1982 Makris incident as recounted by Nestor. Nestor's testimony did not serve to establish any relationship between the prior 1982 Makris crime and the current charged crimes. Vehicular flight or escape from the 1982 Makris crime was a unique incident; appellant did not engage in similar or comparable conduct during the earlier 1972 Clark. Consciousness of guilt, as now asserted by respondent (RB 43), served no purpose and proved nothing. The evidence or details of appellant's flight in 1982 thus had nothing in common with the current charged crimes or any other prior act or crimes.

At the same time, Nestor's testimony was highly prejudicial to appellant as to both guilt and penalty. Nestor's testimony did not support any inferences relevant to the elements of the charged crimes or key issues, such as identity or

intent, that had to be proved. Nestor's testimony, however, portrayed appellant as a bad or evil person. Nestor's testimony helped secure appellant's murder conviction and affected both the jury's verdicts in this case and the penalty imposed. Consequently, Nestor's evidence cannot be deemed harmless.

The evidence of appellant's prior crimes created a "vicious circle" in this case (see *People v. Albertson* (1944) 23 Cal.2d 550, 581), where proof of the crime charged was intermingled with prior crimes in such manner that the jury necessarily concluded that because of the former appellant must necessarily committed the crimes charged. (*Id.* at pp. 580-581.) Ineluctably, appellant's jury was unduly swayed by evidence of his prior 1972 and 1982 crimes.

D. The Evidence Was Not Harmless Beyond a Reasonable Doubt; Even Under The *Watson* Standard, the Evidence Was Prejudicial

In its standard fall-back position, respondent finally asserts that any error in admitting the 1972 and 1982 prior crimes evidence, including Nestor's testimony as to the Makris incident, was harmless under the state miscarriage of justice standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 835-836.) Although arguing the applicability of *Watson*, respondent also asserts the alleged errors were not prejudicial even under the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California, supra,* 386 U.S. at p. 24. (See RB 47.)

Under both standards, appellant was prejudiced. The admission of the prior

crimes evidence undermined appellant's constitutional rights to due process, fair trial, and reliable determination of guilt and penalty. Hence, the proper standard of review is the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California, supra,* 386 U.S. at p. 24), not the harmless error standard announced in *People v. Watson, supra,* 46 Cal.2d at p. 836.

Evidence of appellant's prior crimes essentially told the jury appellant had been convicted of serious and inflammatory crimes in the past, sentenced to prison (indeed, even life in prison), yet had still been released. Respondent overlooks that the prosecutor devoted over 20 pages of trial transcript during closing argument to the details of appellant's prior crimes. (See *People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence during closing argument as strong indication of how crucial the prosecutor and so presumably the jury treated the evidence].) Once the jury learned -- and was repeatedly reminded by the prosecutor -- that appellant had been convicted of violent sexual crimes involving women in the past and had been released despite a life sentence, the outcome of this trial was not in doubt. (See *People v. Thompson, supra,* 27 Cal.3d at p. 317 & fn. 18; *People v. Bean* (1988) 46 Cal.3d 919, 938.) In light of the prior crimes evidence, no jury would ever return a verdict partially or totally absolving appellant of the crimes charged, however weak the other evidence of his guilt.

Moreover, the evidence of appellant's prior crimes was not of modest duration as in *People v. McDermott* (2002) 28 Cal.4th 946, 999. Nor, as

respondent asserts (RB 47), was the potential prejudicial impact of the evidence limited by the jury instructions as in *People v. Lewis* (2001) 25 Cal.4th 610. Unlike *Lewis,* where the trial court limited the potential prejudicial impact of prior uncharged crimes evidence by instructing the jury in the language of CALJIC No. 2.50, here the court, although giving the same general limiting instruction, referred only to the prior crimes again Clark and Makris (and implicitly their testimony alone), not to Nestor's testimony about other, uncharged crimes. (See also *People v. Gibson* (1976) 56 Cal.App.3d 119, 1229-130 ["essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect."].) While the trial court also gave CALJIC No. 2.50.1, that instruction also referred to the crimes committed against Makris and Clark and failed to mention or include the testimony given by Nestor about other prior uncharged acts or crimes or limit the use or consideration by the jury of that testimony in any way. Even with cautionary instructions, the jury was not able to compartmentalize the use of the inflammatory prior crimes evidence, leading to an unreliable verdict in this case.

Respondent asserts the error, if any, had to be harmless because the evidence of appellant's guilt was overwhelming. (RB 47.) The prejudicial effect of the prior crimes evidence in this case, however, cannot be underestimated. Respondent fails to consider that the prosecution's case-in-chief was largely based on circumstantial and indirect evidence. There were no eyewitnesses. The lead-

off prior crimes evidence at best constituted tenuous, indirect evidence of guilt. Appellant himself testified that he did not visit the church on the day the victim was killed. The blood evidence was suspect by virtue of possible contamination during collection and improper testing procedures. Cellmark Diagnostics failed to engage in proper, independent proficiency testing, undermining the strength or reliability of the blood and DNA evidence on which the prosecution heavily relied.

The other crimes testimony by Johnnie Clark and Cindy Makris did not tie appellant directly to the charged crimes. Nestor's testimony had marginal or no probative value in proving any of the essential elements or key issues of the charged crimes. By any measure, Nestor's testimony thus helped to secure appellant's convictions and affected both the jury's verdicts in this case and the penalty imposed. The prosecutor devoted far more time during the guilt trial to appellant's flight after the 1982 Makris incident, as recounted by Nestor, than he did to the testimony of Makris herself.

Under these circumstances, the evidence of appellant's prior crimes cannot be deemed harmless beyond a reasonable doubt pursuant to *Chapman v. California, supra.* The other crimes evidence introduced the prosecution's case and was repeatedly invoked by the prosecutor from the beginning of the guilt phase to rendition of the verdicts. Because of the uniquely harmful aspects of this type of evidence, it has been held that overemphasis of the evidence can constitute reversible error even when the evidence has been admitted for a proper purpose. (*United States v. Vargas* (7th Cir. 1978) 583 F.2d 380, 387.) Given the emphasis

assigned to it by the prosecutor, the evidence of appellant's prior crimes undoubtedly helped secure appellant's convictions and likely affected the jury's verdicts. Consequently, for these and the other reasons discussed above and in appellant's opening brief, even under the lesser standard of *People v. Watson, supra,* the error cannot be deemed harmless.

III

BY EXPANDING THE NATURE AND SCOPE OF CROSS-EXAMINATION TO INCLUDE DETAILS OF PRIOR CONVICTIONS AFTER APPELLANT TESTIFIED, THE TRIAL COURT ERRONEOUSLY MISLED AND INDUCED APPELLANT TO WAIVE HIS PRIVILEGE AGAINST SELF-INCRIMINATION, DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND FURTHER RENDERED THE GUILT AND PENALTY DETERMINATIONS UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Respondent states that appellant claims the trial court "induced him into pleading guilty by expanding the scope of the permissible cross-examination after he took the stand and testified." (RB 58.) Respondent is confused. Appellant did not plead guilty.

Respondent conflates what occurred at trial during the colloquy between the court and counsel before appellant testified with the court's rulings after appellant commenced his testimony and after he had already waived his privilege against self-incrimination by testifying on this own behalf. Moreover, the trial court's statements to defense counsel and its rulings were not ambiguous as respondent asserts. (RB 59.) Contrary to respondent's assertions, defense counsel elicited from the court a specific and unequivocal statement or ruling as to the permissible scope of appellant's cross-examination.

Before appellant testified and waived his privilege against self-incrimination, defense counsel sought to define the scope of permissible

impeachment with prior convictions. The trial court indicated that underlying details or evidence of the crimes would not be admissible, just the facts of conviction. It was here that the trial court first induced appellant to testify and waive his privilege against self-incrimination. The key portions of the colloquy between defense counsel and the court went as follows:

> MR. CRAIG [Defense counsel]: * * *
>
> Now, the rules are you can be asked, if you're a witness, whether you've been convicted of this offense and that's it. You can't go into evidence on it. It's just the fact of the conviction.
>
> THE COURT: Right.
>
> (12 RT 3163.)

Clearly, the court responded directly and explicitly to defense counsel's statement as to the scope of cross-examination. The court's reply was not ambiguous as respondent claims.

Subsequently, the trial court again ruled that appellant's credibility could be impeached only with the two 1973 Idaho convictions, the 1973 Idaho escape conviction, and the 1982 robbery and assault with intent to commit rape convictions. (12 RT 3167-3168.) Once again, before appellant actually took the stand, defense counsel clarified with the trial court its ruling that appellant would be questioned only "if he's convicted of a felony and what that felony was, and that's it. *There's no details, no relitigation or anything like that.*" (12 RT 3170.)

The trial court did not controvert or disagree with counsel's statements. Thus, contrary to respondent's assertions, the prosecutor was alerted and fully informed "as to how little or how much detail of the prior crimes he could ask [appellant] about." (RB 59.) The scope of appellant's cross-examination had been limited. The prosecutor was fully aware of the limitations.

Respondent's reliance on *People v. Mason* (1991) 52 Cal.3d 909, 939, fn. 7 is misplaced. (See RB 59-60.) Once again, respondent offers that the trial court's comment was ambiguous at best and did not constitute a ruling on which appellant should have relied. If deemed a ruling, respondent alternatively urges that it was nevertheless insufficient for purposes of limiting the scope of cross-examination.

The trial court's ruling was not ambiguous. The court explicitly agreed, and thereby ruled, in responding to defense counsel's clear statement articulating the scope or extent to which appellant could be questioned as to his prior convictions. Nevertheless, as in *Mason*, even if the trial court's ruling were implicit, the parties proceeded with appellant's testimony as if the court had explicitly defined the scope of appellant direct and cross-examination.

Respondent ignores that appellant specifically relied on the trial court's clarification and ruling (whether explicit or implicit) as to the scope of direct and cross-examination. At the commencement of his testimony, appellant acknowledged that he had been convicted of two counts of rape in Idaho in 1973, escape from an Idaho prison in 1973, and robbery and assault with intent to commit rape in 1982 in San Bernardino County. (12 RT 3174.) While not going

into details in conformity with his understanding of the trial court's ruling, appellant nevertheless was explicit and unequivocal in acknowledging those prior convictions. (12 RT 3174.)

The ground rules changed only when appellant was about to complete his direct examination -- after he had been induced by the trial court to waive his privilege against self-incrimination and testify on his own behalf. Fully aware that the details of appellant's prior crimes had been placed off limits by the trial court before appellant testified, the prosecutor sought permission to expand the scope of appellant's cross-examination to include previously prohibited details. (12 RT 3220.)

In response, defense counsel strenuously argued that appellant admitted the prior crimes during his direct examination, that specific evidence of the underlying prior crimes would be extremely prejudicial, that further cross-examination about the details would exceed the scope of direct examination, that the evidence would not be relevant, and such expansion would contravene the court's prior ruling precluding examination about details of the prior crimes. (12 RT 3220-3221, 3230.) Nonetheless, over appellant's repeated objections, the court revoked its prior ruling (on which appellant had relied in deciding whether or not to testify and to waive his privilege against self-incrimination) and held that since appellant denied the current charged crimes, he could additionally be cross-examined extensively about the details of his prior convictions. (12 RT 3221, 3230; see also 13 RT 3361, 3233.)

As discussed in the opening brief, the prosecutor then repeatedly questioned appellant about details of the 1972 rape and robbery of Johnnie Clark in Idaho, appellant's 1973 escape, and his 1982 assault on Cindy Makris in Victorville-Apple Valley. (AOB 115-118.) The prosecutor devoted more than *150 pages* of trial transcript to his cross-examination of appellant about the details of these prior crimes. (See 13 RT 3234-3380.)

Respondent primarily focuses on and discusses the permissible scope of cross-examination generally. Respondent thus both evades and avoids the specific issue raised by appellant. (See RB 56-59.) Appellant acknowledges that when a defendant voluntarily testifies, the prosecutor may amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them. (*People v. Cooper* (1991) 53 Cal.3d 771, 822.) The issue raised by appellant, though, is different. Here, appellant sought and obtained from the trial court a ruling defining and limiting the scope of cross-examination in respect to his prior convictions and crimes on which his decision to testify was predicated. Respondent ignores that the trial court's ruling thus constituted the basis of appellant's decision to testify on his own behalf and induced him to waive his fundamental Fifth Amendment privilege.

Respondent completely ignores the issue of waiver. As with other fundamental constitutional rights, appellant's waiver of his privilege against self-

incrimination was invalid unless it was knowing and intelligent, (that is, made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it), as well as voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. (See *People v. Collins* (2001) 26 Cal.4th 297, 305; *Colorado v. Spring* (1987) 479 U.S. 564, 573 [requirement of knowing, intelligent, and voluntary waiver of the Fifth Amendment privilege against self-incrimination].) Here, the record reveals that appellant's decision to waive his privilege against self-incrimination could not have been knowing, intelligent, and voluntary, since it was predicated on a ruling that the trial court promptly revoked after appellant surrendered his constitutional privilege and testified according to the terms of the court's original ruling.

By focusing on the permissible scope of cross-examination generally, respondent fails to respond to appellant's claims that the trial court erred by expanding the nature and scope of cross-examination without adequate or sufficient notice in violation of appellant's due process, fair trial, and trial by jury rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Because appellant was not adequately notified by the trial court before he waived his privilege against self-incrimination that its ruling might be fundamentally changed or revoked once he waived his privilege against self-incrimination and testified, the trial court violated the heightened procedural and substantive due process notice requirements in a capital case (*Beck v. Alabama*

(1980) 447 U.S. 625, 637-638) and rendered appellant's trial fundamentally unfair contrary to the Fifth and Fourteenth Amendments to the United States Constitution. (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 288.)

Appellant was not told before testifying that he would be subjecting himself to lengthy and detailed cross-examination of a sort neither contemplated by nor within the scope of the trial court's initial ruling. The trial court should not have induced appellant to waive his privilege against self-incrimination and then revoke that ruling after appellant waived his Fifth Amendment privilege and subjected himself to cross-examination at variance in purpose and scope with the trial court's initial ruling. By revoking its ruling after appellant waived his Fifth Amendment privilege, the trial court permitted the prosecutor, without constitutionally adequate notice, to surprise appellant through cross-examination beyond the scope of his direct testimony and about largely collateral matters that the court itself previously precluded. Appellant was not adequately or properly notified by the trial court of the nature, scope, or intent of its ruling on which appellant directly and explicitly relied before agreeing to waive his privilege against self-incrimination and subject himself to cross-examination to his ultimate detriment. Appellant was not on notice that the trial court could arbitrarily abandon its prior ruling, without any change in factual circumstances, and allow the sort of far-ranging and prejudicial cross-examination ultimately permitted here.

Finally, respondent fails to address appellant's claim that violation of his privilege against self-incrimination and his rights to procedural and substantive

due process and to a fair trial constituted fundamental structural defects that rendered the entire trial unfair regardless of the evidence. (See *People v. Flood* (1998) 18 Cal.4th 470, 489-490; *People v. Wims* (1995) 10 Cal.4th 293, 312-314.) A harmless error standard, asserted by respondent (RB 60-61), does not apply.

The privilege against self-incrimination is obviously a basic and fundamental protection (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282), the violation of which constitutes a structural defect. (*People v. Cahill* (1993) 5 Cal.4th 479, 493 [some federal constitutional errors not subject to harmless error analysis and require reversal notwithstanding the strength of the evidence].) Moreover, even if the violations of appellant's Fifth Amendment privilege against self-incrimination and his Fourteenth Amendment rights to substantive and procedural due process of law are not prejudicial per se, they are prejudicial under the alternatively applicable standard of review. As respondent concedes (RB 61), the standard of review (if the error is not otherwise prejudicial per se) is the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California, supra,* 386 U.S. at p. 24.

The testimony elicited during the prosecutor's cross-examination was extremely inflammatory. The purpose and impact of the prosecutor's cross-examination were not simply to impeach appellant's credibility or aid in establishing any of the elements of the charged crimes, identity, or motive, but primarily to prejudice the jury's consideration of punishment during the guilt phase and skew the jury's deliberations -- both as to guilt and penalty -- in support

of a death verdict. On learning inflammatory and irrelevant details of the prior crimes from appellant himself during cross-examination, the jury could only conclude that appellant had been deceptive on direct examination and had escaped deserved punishment following his prior crimes. (See *People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

As previously noted, the prosecutor devoted more than 150 pages of trial transcript to his "impeachment" cross-examination of appellant. Largely irrelevant to disputed issues or elements of the charges crimes, appellant's testimony did little more than show that he was a convicted sex offender who attacked women and who largely managed to evade acceptance of responsibility or severe punishment for those crimes. The prosecutor repeatedly elicited from appellant details of the 1972 Clark rape in Idaho. The prosecutor elicited testimony from appellant that he picked Clark because she was "sexually exciting" to him. The prosecutor was even permitted, over appellant's objections, graphically to illustrate the prior rape by lying on the floor and simulating the rape victim's position. The prosecutor repeatedly was permitted to elicit extraneous details of appellant's arrest, his guilty plea, and even why appellant was testifying that he had pleaded guilty to rape. Finally, although appellant admitted that he had been convicted in 1982 of robbery and assault with intent to commit rape, the prosecutor was permitted to elicit from appellant repeated denials that he attacked, stabbed, robbed Makris, or tried to rape her, further inflaming the jury.

Respondent further ignores the prejudice by omitting any reference to the

prosecutor's closing argument in which he devoted more than 20 pages to appellant's prior crimes. (See 14 RT 3622-3642.) Although there was no evidence of a sexual assault or a sexual motive, the prosecutor repeatedly urged the jury to consider the similarities between appellant's prior sex crimes, citing in this regard appellant's testimony on cross-examination, in determining appellant's guilt in this case. Contrary to respondent's assertions, the prosecutor's cross-examination of appellant and his use of that testimony during closing argument affected the jury's determination of guilt and helped skew the penalty determination toward death. The prosecutor devoted far more time during the guilt trial to cross-examining appellant about the details of his prior crimes than he did to virtually any other witness. Consequently, the trial court's error in permitting the prosecutor to cross-examine appellant about the details of his prior sex crimes could not have been harmless beyond a reasonable under the *Chapman* standard of review. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

IV

THIRD PARTY CONTACTS WITH JURORS DURING TRIAL TAINTED THE JURY AND CREATED A PRESUMPTION OF PREJUDICE IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY IMPARTIAL JURY, DUE PROCESS, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Respondent asserts that appellant has waived any claim of error with respect to third party contacts, particularly Juror No. 9 and Juror DeMaio.[3] Initially, appellant points out that even waiver or, more appropriately, forfeiture by counsel's inaction does not preclude an appellate court from reaching the issue or assignment of error raised. (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Demerdjian* (2006) 144 Cal.App.4th 10, 13-14.)

Contrary to respondent's assertion that defense counsel did not express "any concern the jurors had engaged in prejudicial misconduct" (RB 62), counsel both expressed concern about the notes received by Juror No. 9 and requested an inquiry. (13 RT 3298.) Respondent also overlooks as to Juror DeMaio that the court itself on its own motion commenced an inquiry after being apprised by the

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[3]/ Respondent concedes that it is not possible to determine Juror DeMaio's juror number. (RB 65, fn. 8.) Respondent ignores that, as a consequence, other portions of the record cannot be reviewed for prejudice, because Juror DeMaio's name cannot be associated with his redacted juror number or correlated with other information in the record, his juror questionnaire, or voir dire. For these reasons, the trial court's inquiry and Juror DeMaio's responses cannot simply be dismissed as harmless as respondent also urges (RB 68-68). (See *Morgan v. Illinois, supra,* 504 U.S. at p. 739.)

bailiff that DeMaio had overheard third party comments about this case. Appellant has thus appropriately challenged on appeal not only the inquires conducted by the trial court but also the jury instruction given by the court in respect to the Juror No. 9 incident and the trial court's failure to dismiss both jurors.

To the extent that appellant's challenge involves and encompasses the trial court's instructional response after its inquiry in respect to Juror No. 9, Penal Code section 1259 allows instructional error affecting a defendant's substantial rights to be raised on appeal regardless whether an objection was raised in the trial court.

Respondent appears to overlook that appellant was guaranteed the fundamental constitutional right to a trial by an impartial jury in this case. (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, § 16.) An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112) and every member is "'capable and willing to decide the case solely on the evidence before it'" (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217.) Surely, therefore, appellant's fundamental right to trial by jury involved or impacted a substantial right enjoyed by appellant within the meaning of Penal Code section 1259.

In asserting waiver, respondent also fails to consider that both statutory and fundamental Sixth Amendment constitutional principles are involved. Pursuant to

Penal Code section 1089, a juror may be discharged if "unable to perform his or her duty." The trial court's decision whether or not to discharge a juror under section 1089 may be reviewed for abuse of discretion and will be upheld if support by substantial evidence. Indeed, even in *People v. Holloway* (2004) 33 Cal.4th 96, ostensibly cited by respondent in support of its waiver assertion (RB 62), the Court substantively reviewed the actions of a trial court in failing to discharge a seated juror who may have been tainted with bias or prejudice during the course of trial. As explained by the Court in *Holloway*, a juror's misconduct creates a rebuttable presumption of prejudice requiring reversal if there is a substantial likelihood that one or more jurors were improperly influenced by bias. (*People v. Holloway, supra*, 33 Cal.4th at p. 124.) Here, as discussed in appellant's opening brief, third party contacts tainted both Juror No. 9 (and possibly other jurors as well) and Juror DeMaio; those contacts alone made them unable to serve. Under such circumstances, the trial court's inquiry, its rulings, and admonishing jury instructions should be reviewable even in the absence of a specific objection by appellant or request that the juror or jurors be discharged for bias or prejudice.

Moreover, in asserting waiver, respondent fails to consider that after its inquiries, the court concluded that Juror No. 9 and Juror DeMaio had not been prejudicially tainted by third party contacts. In light of the trial court's rulings finding that neither Juror No. 9 nor Juror DeMaio had been prejudicially tainted by third party contacts, any further objection by appellant or request for their dismissal or discharge would certainly have been futile. Indeed, from the record it

is apparent that any type of objection to Juror No. 9 and Juror DeMaio would have been fruitless. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649.) For these additional reasons, appellant's waiver, if any, should be excused. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Shazier* (2006) 139 Cal.App.4th 294, 301 [exception to general rule of waiver exists when objection would be futile].)

Respondent also offers that the trial court's decisions not to discharge either Juror No. 9 or Juror DeMaio are somehow immune from challenge because the trial court made some inquiry into the facts surrounding both incidents. (RB 67.) Respondent improperly seeks to distinguish *People v. McNeal* (1979) 90 Cal.App.3d 830 simply because the trial court here conducted an inquiry. (RB 66-67.) In this regard, respondent mistakenly focuses on the subjective responses and assurances of the jurors to the court's questions rather than whether the third party contacts created a "substantial likelihood" that the jurors may have been tainted. (See *People v. Pierce* (1979) 24 Cal.3d 199, 208; *People v. Holloway, supra,* 50 Cal.3d at p. 1109.) In other words, subjective assurances of impartiality by jurors or denials of prejudice are not dispositive. While the court may consider such statements, they do not of themselves resolve the issue whether the jurors were improperly tainted as respondent asserts.

This Court has previously discussed that implied bias is demonstrated if extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. (*In re Carpenter* (1995) 9 Cal.4th 634, 650-651; see also *People v. Marshall* (1990) 50 Cal.3d 907, 950-951.) As stressed by the Court

in both *Carpenter* and *Marshall*, "this prejudice analysis is 'different from, and indeed less tolerant than, "harmless-error analysis" for ordinary error at trial.'" (*In re Carpenter, supra*, 9 Cal.4th at p. 651 (quoting *People v. Marshall, supra*, 50 Cal.3d at p. 951); see also *United States v. Angulo* (9th Cir. 1993) 4 F.3d 843, 848 ["even a single partial juror violates a defendant's constitutional right to a fair trial"].)

Respondent is thus wrong in discussing the applicable burden of proof and standard in weighing the impact of third party contacts in this case. The issue is not simply one of prejudice "even if the court's inquiry of consideration of the alleged misconduct was erroneous." (RB 67.) Improper third party contacts in this case created a presumption of prejudice as a matter of law. (*In re Carpenter, supra*, 9 Cal.4th at p. 651.) The People must rebut the presumption or lose the verdict. (*People v. Marshall, supra,* 50 Cal.3d at p. 949.) The usual tests for prejudice (e.g., *Chapman v. California, supra,* 386 U.S. at pp. 23-24; *People v. Watson, supra*, 46 Cal.2d at p. 836) are inapplicable. The burden to rebut the presumption of prejudice, as previously held by this Court, is not slight but "heavy." (*In re Stankewitz* (1985) 40 Cal.3d 391, 402.)

Respondent ignores that the receipt of threatening and intimidating notes received by Juror No. 9 during trial, coupled with Juror No. 12's personal awareness of the incident by virtue of his contacts and conversations with Juror No. 9, raised a rebuttable presumption of prejudice as to both jurors. (*In re*

Carpenter, supra, 9 Cal.4th at p. 647.) In the same vein, a presumption of prejudice also arose as to Juror DeMaio who was personally singled out and identified by anonymous third parties as a juror in this case. Respondent further ignores that the presumptions of prejudice could have been rebutted only if the entire record indicated no reasonable probability of prejudice, i.e., no substantial likelihood that any of the jurors were actually biased against the defendant. (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

Based on the record in this case, there was ample evidence that Juror No. 9 and Juror DeMaio could not discharge their functions as jurors with complete impartiality after they were tainted with improper, third party contacts. There was also a strong likelihood that Juror No. 12 was equally tainted, too, because he observed the notes received by Juror No. 9 and had contacts and conversations about them with that juror. Respondent ignores that for at least three days during trial just before the commencement of deliberations, Juror No. 9 was apprehensive about his personal safety and potentially fearful or resentful of appellant after receiving threatening notes. Juror No. 9 acknowledged he had been affected. Indeed, the very fact that Juror No. 9 brought his fears and apprehension to the court's attention demonstrated beyond any doubt that he was concerned about, agitated, and affected by the third party contacts.

The transcript of the hearings conducted by the trial court and the nature of the incidents described by Jurors Nos. 9, 12, and DeMaio demonstrate the existence of a strong likelihood that they were likely to have been adversely

affected by the third party contacts. The fact that Juror No. 9 became emotionally upset and apprehensive during trial on receiving threatening notes rendered it likely that he would evaluate appellant's guilt and penalty through perspective of those threatening notes. The same can be said about Juror No. 12. It would have been objectively unlikely for any juror, in the same circumstances as Juror No. 9 or Juror No. 12, to separate perceived threats and concern about personal safety from a dispassionate analysis of appellant's intent or degree of culpability in the alleged crimes. Concerns for personally safety in turn surely would have been translated into bias against appellant regarding both his guilt and, later, the appropriate penalty.

There was also a substantial likelihood, as well, that Juror DeMaio was biased as a result of his third party contacts. By their very nature, those contacts would have induced any reasonable person to believe that the community was watching and expected a particular verdict and sentence. Having been singled out and identified as a juror in this case, Juror DeMaio was tainted by community pressure to vote for guilt and death because that is what the community would expect.

Finally, respondent failed to respond to appellant's contentions (AOB 158-159) that the error also violated appellant's rights to due process, fair trial, impartial jury, and to a reliable determination of guilt and penalty guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See RB 68.)

V

THE TRIAL COURT ERRED IN ORDERING APPELLANT TO BE PHYSICALLY RESTRAINED AT TRIAL IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, FAIR TRIAL, AND ASSISTANCE OF COUNSEL, AND THE PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Since Appellant Objected to the Use of Both Physical Restraints and a Stun Belt, the Issues Raised by Appellant Have Not Been Waived

Respondent concedes that appellant objected to the use of shackles but asserts that defense counsel acquiesced to the use of an electronic belt restraint. (RB 68.) Respondent thus does not contend that appellant waived or forfeited all claims of error with respect to the use of restraints at trial. Instead, respondent urges that appellant has waived his claim regarding the use of a stun belt and cannot now challenge the use of physical restraints in the trial court for the first time on appeal. (RB 68-69.) Respondent also asserts that because federal constitutional contentions asserted on appeal were not first raised in the trial court, those claims are waived. (RB 68.) Respondent's arguments should be rejected as to both the facts and the law.

During hearings on the prosecutor's motion to restrain appellant, the trial court indicated that restraints would include both physical leg restraints and a stun belt, not one or the other. (2 RT 552.) Counsel for appellant indicated that while the defense did not oppose the use of a stun belt alone, appellant opposed leg

restraints. (2 RT 553.) Appellant thus never consented to the use of both shackles and a stun belt; he objected to both. Respondent ignores that the trial court ordered a "package" of restraints as to which counsel objected. Had the court ordered only the use of the electronic stun belt, respondent's acquiescence argument might have merit. Since appellant at trial was restrained both by physical shackles and the stun belt, and since defense counsel objected to the use of both, appellant's claims on appeal have not been waived as respondent now asserts.

Respondent cites *People v. Tuilaepa* (1992) 4 Cal.4th 569 in support of waiver. (RB 69.) Unlike the present case where the record clearly reveals that both shackles and a stun belt were used to restrain appellant, the contemporaneous record of proceedings before and during trial in *Tuilaepa* was silent on whether the defendant in that case was actually shackled or physically restrained. (*Id.* at p. 582.) Moreover, there was absolutely no evidence in *Tuilaepa* that the defendant ever wore a stun belt as appellant was forced to do. Further, unlike the present case, defense counsel in *Tuilaepa* never objected to any restraints. Because appellant here appropriately objected in the trial court to the use of both shackles and a stun belt, the Court's waiver discussion in *Tuilaepa* hardly supports respondent's assertions of waiver in this case.

Respondent's reliance on *People v. Stankewitz* (1990) 51 Cal.3d 72 is equally misplaced. The defendant in *Stankewitz* was apparently placed in leg restraints at the beginning of jury selection. Unlike the present case, however, the

record on appeal in *Stankewitz* showed that no hearing was held on the necessity of restraints until the fourteenth day of voir dire. In addition, the record in *Stankewitz* also showed that defense counsel never objected to the restraints or requested a hearing for the first fourteen days of trial. Even under those circumstances, this Court did not conclude that the issue had been waived (as respondent asserts here). Rather, after examining the defendant's substantive claims that the trial court failed promptly to conduct a hearing on the necessity of leg restraints and in concluding there was a manifest need for such action, the Court rejected both arguments on their merits, not for reasons of waiver. (*Id* at pp. 95-97.)

Although cited by respondent in support for its waiver assertions, *People v. Duran* (1976) 16 Cal.3d 282 did not involve any issue or language pertinent to the issue. Indeed, prior to trial defense counsel in *Duran* made a motion that the defendant and his inmate witnesses be allowed to appear before the jury in civilian clothes and without wrist and ankle restraints. The motion was summarily denied. Counsel then asked if the defendant could have one hand freed in order to take notes during trial. Although counsel's request was granted, the court stated nevertheless that the defendant's wrists and ankles would be shackled when he testified. (*Id.* at p. 288.)

Citing *People v. Chacon* (1968) 69 Cal.2d 765, the Court in *Duran* -- on discussing shackling generally -- noted that "*Chacon* also emphasized the necessity of objecting to use of physical restraints and noted that not only was the

limited restraint of handcuffing justified for defendant Chacon, but also that defense counsel had voiced no objections to the restraints." (*People v. Duran, supra*, 16 Cal.3d at p. 289, quoting *People v. Chacon, supra*, 69 Cal.2d at p. 778.) In *Chacon*, unlike the present case, defense counsel did not object at trial to the use of handcuffs or other restraints. As noted by the *Chacon* Court, "apparently counsel did not think them improper, for he did not object to them." (*Ibid.*) The same cannot be said of defense counsel or appellant in the present case. Here, in a timely and appropriate manner before trial, defense counsel explicitly objected to the combined use of both physical restraints and stun belt. The court overruled appellant's objections and ordered the use of both types of restraints. Thus, notions of waiver, as discussed by the Court in both *Duran* and *Chacon*, are neither relevant nor applicable here.

Respondent also asserts, citing *People v. Kipp* (2001) 26 Cal.4th 1100, that appellant's federal constitutional rights were never raised at trial and are thus waived on appeal. (RB 69.) Respondent ignores that the analysis of federal constitutional issues pertaining to the use of restraints was necessarily subsumed within appellant's objections to the combined use of physical restraints and a stun belt. In *People v. Boyer* (2006) 38 Cal.4th 412, 441, the Court emphasized that the failure at trial to make explicit constitutional objections will not result in the forfeiture of those issues if raised later on appeal. As noted by the Court in *Boyer*, where new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act

or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the constitution, to that extent the new constitutional arguments are not forfeited on appeal. (*Id.* at p. 441, fn. 17; see also *People v. Partida* (2005) 37 Cal.4th 428, 433-439; *People v. Benavides* (2005) 35 Cal.4th 69, 96.) Respondent does not contend that anything would have changed in the trial court, factually or legally, had the constitutional objections been made at that time, or that it is in any way prejudiced by having to respond to the constitutional dimensions of the arguments advanced in this Court. Thus, pursuant to *Boyer, Partida*, and *Benavides*, the substantive constitutional arguments made by appellant in the opening brief are reviewable on the merits.

Furthermore, it is clear from the record and the evident position of the trial court permitting the use of both physical restraints and a stun belt, more pointed objections on specific federal constitutional grounds would certainly have been futile. (*People v. Hill, supra*, 17 Cal.4th at p. 820.) As stressed by this Court in *People v. Sturm* (2006) 37 Cal.4th 1218, 1237, a defendant's failure to object does not preclude review when "objecting would be futile." (See also *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567 [cited with approval in *Sturm*].) That is the case here. Any further objection by defense counsel would have been futile because the trial court had already overruled his objections to the combined use of restraints based on the same facts. Therefore, appellant has not waived his federal constitutional claims on appeal.

Finally, respondent ignores that while factual issues may be subject to the waiver rule, purely legal issues -- such as the constitutional issues raised by appellant based on undisputed facts as here -- are not necessarily subject to the waiver rule and may be addressed even when raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888; *People v. Percelle* (2005) 126 Cal.App.4th 164, 179; *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1188.) As explained recently by the Court in *In re Sheena K., supra*, 40 Cal.4th at p. 887, fn. 7, citing (among other cases) *People v. Williams, supra,* 17 Cal.4th at pp. 161-162, fn. 6, "[i]n general, forfeiture of a claim not raised in the trial court by a party has not precluded review of the claim by an appellate court in the exercise of that court's discretion." The Court further explained in *Sheena K.* that appellate courts typically have engaged in discretionary review "when an otherwise forfeited claim involves an important issue of constitutional law or a substantial right." (*In re Sheena K, supra.*)

Here, of course, the impermissible use of physical restraints or stun belt abridged and prejudicially affected appellant's fundamental constitutional rights. (*People v. Duran, supra*, 16 Cal.3d at p. 292; *People v. Mar* (2002) 28 Cal.4th 1201, 1225, fn. 7.) Consequently, even if waived, discretionary review of appellant's constitutional claims is appropriate and in conformity with the Court's jurisprudence.

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B. There Was No Manifest Need for Requiring Appellant to Wear Either or Both Leg Shackles and a Stun Belt

Respondent asserts that the trial court properly ordered appellant to be restrained during trial. (RB 69-73.) No so. Even according to respondent's summary, the trial court focused primarily on visibility and comfort, ignoring the vital issue of manifest need which must be considered first. (See *Deck v. Missouri* (2005) 544 U.S. 622, 629 [use of physical restraints visible to the jury absent a trial court determination that they are justified by a state interest specific to a particular trial, such as courtroom security or risk of escape, violates defendant's rights under the Fifth and Fourteenth Amendments].)

Manifest need has been considered in a number of cases by this Court. (See, for example, *People v. Kimball* (1936) 5 Cal.2d 608, 611 [defendant expressed present or future intent to escape, threatened to kill witnesses, secreted lead pipe in courtroom]; *People v. Burwell* (1955) 44 Cal.2d 16, 33 [in letters defendant stated that he intended to procure a weapon and escape from the courtroom with the aid of friends]; *People v. Hillery* (1967) 65 Cal.2d 795, 806 [defendant resisted being brought to court, refused to dress for court, and had to be taken bodily from prison to court]; *People v. Burnett* (1967) 251 Cal.App.2d 651, 655 [evidence of recent escape attempt]; *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-863 [defendant attempted to escape from county jail while awaiting trial on other escape charges]; *People v. Loomis* (1938) 27 Cal.App.2d 236, 239 [defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel

table, fought with the officers, and threw himself on the floor].) Common to all these cases was some evidence of current or contemporaneous escape attempts, expression of a current or planned intent to escape, or some incidents of improper or inappropriate courtroom conduct by the defendant. Nothing of the sort was shown or offered in the present case. Significantly, in asserting manifest need, respondent's brief contains no reference or mention of any of these cases.

Respondent ignores the clear rule of *People v. Duran, supra,* 16 Cal.3d at p. 291: the imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion. (*Id.*; see also *People v. Cunningham, supra,* 25 Cal.4th at p. 988.) Here, again, appellant never manifested non-conforming behavior in court or in jail for five years awaiting trial.

Respondent asserts that restraints were justified in this case because appellant's current crimes were particularly violent. (RB 72.) Respondent ignores that this Court has repeatedly ruled that current violent crimes are insufficient to justify physical restraints during trial. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944; *People v. Duran, supra*, 16 Cal.3d 282, 290-291.) Respondent further ignores that there was a total absence of any individualized suspicion in this case that appellant would engage in nonconforming conduct or attempt to escape while in custody awaiting trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 652.)

In *People v. Hawkins, supra*, (cited by respondent at RB 70), the defendant was involved in three fistfights in jail during trial, and a syringe was discovered in

his cell. Those incidents, together with the defendant's long history of criminal violence, were deemed sufficient to support the trial court's order to shackle the defendant as they demonstrated specific instances of violence or nonconforming conduct "while in custody." (*People v. Hawkins, supra,* 10 Cal.4th at p. 944.)

In *People v. Livaditis* (1992) 2 Cal.4th 759, 773 (also cited by respondent at RB 70 in support of manifest need), the defendant was ordered physically restrained on two occasions during trial after the prosecutor notified the court that the sheriff's department had received information from a confidential informant regarding a possible escape attempted by the defendant with outside help. This Court ruled that a manifest need for temporary leg restraints had been established in light of the information regarding the defendant's possible escape plans, together with his history of prior escape attempts.

Based on their facts, both *Hawkins* and *Livaditis* are clearly distinguishable from appellant's situation in the present case. In *People v. Cox* (1991) 53 Cal.3d 618, 652, the Court ruled that the record failed to show a manifest need for ordering the defendant shackled where the trial court itself had acknowledged that the defendant had never been a security problem and there were only vague, ill-defined rumors that someone was planning an escape from jail. Here, as in *Cox,* unlike both *Hawkins* and *Livaditis*, the record "does not contain a single substantiation of violence or the threat of violence" on appellant's part during the pendency of this case after his arrest. (*People v. Cox, supra*, 53 Cal.3d at p. 652.

Appellant's prior escape -- cited by the prosecutor, the trial court, and now

respondent (RB 72) -- to justify both leg shackles and the stun belt occurred over 20 years before trial in the remote past. The only other incident of flight at the of the 1982 Makris incident also occurred many years before trial. Other than stale incidents that occurred years before, there was no other evidence in this case that appellant tried to escape while awaiting trial, manifested an intent to escape, or ever behaved improperly or inappropriately during trial.

After the 1982 incident, appellant was sent to prison. There is no evidence -- and the prosecutor offered none and respondent cites none -- that appellant attempted an escape, ever posed any sort of behavioral problem after 1982, or ever manifested any desire or intent to escape. There was no testimony by bailiffs or other court personnel showing that extraordinary security measures -- the use of both shackles and a stun belt -- were required in this case. There was absolutely no current or contemporaneous evidence of improper conduct, inappropriate behavior or outbursts by appellant, or any indication of an intent or plan to escape during the time he had been in custody awaiting trial in this case. Indeed, the record in this case was completely barren of any courtroom violence, threats of violence, any announced or manifest intent to escape, any nonconforming conduct or planned nonconforming conduct, or any type of nonconforming conduct establishing a manifest need for either or both leg shackles and a stun belt as required by *Duran*, *Hill*, *Cox,* or *Mar.*

Even when the record establishes that it is appropriate to impose some restraint on a defendant as a security measure, a trial court must authorize the least

obtrusive or restrictive restraint that effectively will serve the specified security purposes. (*People v. Duran, supra,* 16 Cal.3d 282, 291; accord, *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712.) Respondent fails to address whether the use of both shackles and a stun belt constituted the least obtrusive or restrictive security measure. Instead, respondent totally avoids the issue.

Had the court first considered less intrusive methods of restraint, its decision to use both physical restraints and a stun belt might have been justified as necessary or appropriate in this case. Because the trial court failed to make findings adequate to support the combined use of both physical restraints and a stun belt, principles of due process require reversal of appellant's conviction. (*People v. Mar, supra*, 28 Cal.4th 1201, 1227-1228, citing with approval *Riggins v. Nevada* (1992) 504 U.S. 127, 129.)

C. The Error Was Not Harmless Beyond a Reasonable Doubt

Respondent's assertions of harmless error are based on the wrong standard. Since federal constitutional error occurred, the *Watson* harmless error standard, on which respondent apparently relies (RB 73-74), does not apply. Instead, *Chapman* applies. (*Deck v. Missouri, supra*, 544 U.S. at p. 635; *Holbrook v. Flynn* (1986) 475 U.S. 560, 568.)

In *People v. Mar, supra,* the Court held that other constitutional factors arise on the improper use of a stun belt, or as in this case the combined use of both a stun belt and physical shackling. The greatest danger of prejudice arises from

the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury. (*People v. Mar, supra*, 28 Cal.4th at p. 1225, fn. 7; see also *Riggins v. Nevada, supra,* 504 U.S. at p. 137 [discussing negative effects and inherent prejudice that "cannot be shown from a trial transcript."] (cited and quoted with approval in *Deck v. Missouri, supra,* 544 U.S. at p. 635).)

Respondent ignores *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, in which the Court of Appeals for the Eleventh Circuit discussed that stun belts plainly pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways. Although stun belts are less visible than other restraining devices such as shackles, and may be less likely to interfere with a defendant's entitlement to the presumption of innocence, the use of a stun belt imposes a substantial burden on the ability of a defendant to participate in his own defense and confer with his attorney during a trial. If activated, the device also poses a serious threat to the dignity and decorum of the courtroom. The *Durham* court thus concluded that when a trial court without making adequate findings improperly requires a defendant to wear a stun belt, the error is of federal constitutional dimension requiring reversal unless the State proves the error was harmless beyond a reasonable doubt. (*Id.* at p. 1308.)

In this case, the trial court's error in ordering the use of both shackles and a stun belt and in failing to evaluate whether the restraints used constituted the least obtrusive or restrictive security measure could not have been harmless beyond a

reasonable doubt. Appellant was acutely aware at all times during trial, including during his guilt and penalty trial testimony, that the stun belt might be accidentally discharged. Such an accident had occurred in a recent case in the same courthouse while appellant was awaiting trial.

In addition, as discussed in the Statement of Facts (AOB 27), appellant himself had been forcibly subjected to electroshock in the past. (See also RB 19.) Having been subjected to electroshock therapy as a child, appellant was therefore acutely aware of a stun belt's power and effect. Surely, appellant's testimony and demeanor while testifying at trial were affected by his own past personal experiences and his present knowledge that at any time he could be shocked or stunned again.

During the entire trial, the jury observed appellant, particularly when he testified. The jury was instructed in the language of CALJIC No. 2.20 that in determining appellant's believability as a witness and the truthfulness of his testimony, it could consider appellant's demeanor, manner while testifying, his attitude toward the giving of testimony, and the character of his testimony. It is presumed that the jury followed the trial court's instructions. (*People v. Bonin* (1988) 46 Cal.3d 659, 699; *People v. Hardy* (1992) 2 Cal.4th 86, 208.) It is likely, therefore, that appellant's appearance and demeanor at trial, and the jury's evaluation of his appearance, demeanor, and believability would have been affected by the stun belt and shackles that appellant was forced to wear. If one or more jurors personally had been aware of the shackles, but not necessarily the stun

belt, appellant would have been doubly prejudiced, because he would additionally have been perceived as violent or escape-prone. Consequently, under the circumstances of this case, as in *People v. Mar, supra,* 28 Cal.4th at p. 1230, the trial court's error in ordering the use of both shackles and a stun belt to restrain appellant at trial and while testifying could not have been harmless beyond a reasonable doubt under the applicable *Chapman* standard. Appellant's convictions on all counts and the judgment of death must therefore be reversed.

VI

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY SUA SPONTE ON TRESPASS AS A LESSER INCLUDED OFFENSE OF BURGLARY; THE ERROR ALSO VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, FAIR TRIAL, AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant was charged with burglary on count 2 in violation of Penal Code section 459. The count 1 murder was alleged to have been both premeditated and deliberate and committed during the commission of a burglary. A burglary felony-murder special circumstance was alleged pursuant to Penal Code section 190.2, subdivision (a)(17)(vii). As discussed in appellant's opening brief (AOB 178-179), the trial court instructed the jury on burglary. In light of the prosecutor's opposition to any instructions on lesser included crimes of robbery or burglary (14 3565-3566), the trial court did not instruct the jury on trespass as a lesser included offense of burglary. Both appellant and respondent concur in the sua sponte obligation of trial courts, generally, as to instructions on lesser included offenses. (AOB 179-181; RB 75-76.)

Respondent disputes that the trial court was obligated to instruct the jury sua sponte on trespass, asserting that trespass is not a lesser included offense of burglary. (RB 74.) Respondent relies on dicta in *People v. Birks* (1998) 19 Cal.4th 108 in which the Court which noted "under the legal elements test"

trespass is not a lesser necessarily included offense of burglary. (*Id.* at. p. 118, fn. 8.)

In *Birks*, of courts, the Court was concerned principally with the issue whether the holding in *People v. Geiger* (1984) 35 Cal.3d 510 in respect to instructional obligations of trial courts as to lesser related offenses should be overruled. The precise question of trespass as a lesser included offense of burglary, as raised here by appellant, was not before the Court. Indeed, respondent fails to note that even in *Birks* -- and in the same footnote -- the Court explicitly cautioned, "Defendant's trial counsel in this case specifically advised the court he was not claiming trespass to be a lesser necessarily included offense of burglary, and defendant raises no such argument on appeal." (*People v. Birks, supra*, 19 Cal.4th at pp. 118, fn. 8.)

Respondent's argument thus appears to be predicated almost exclusively on nonbinding dicta found in a single footnote in *Birks*. As emphasized by this Court in *People v. Mendoza* (2000) 23 Cal.4th 896, 915, "[a] decision 'is not authority for everything said in the … opinion but only 'for the points actually involved and actually decided.' [Citation omitted.] … '[O]nly the ratio decidendi of an appellate opinion has precedential effect. [Citations omitted].' Thus, 'we must view with caution seemingly categorical directives not essential to earlier decisions and be guided by this dictum only to the extent it remains analytically persuasive. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 73).'"

For the reasons more fully discussed in appellant's opening brief (AOB 181-184), the Court should decline to apply its dicta in *Birks*. While the courts have often followed dicta, especially dicta in which courts have long acquiesced (*People v. Tuan Van Nguyen* (2000) 22 Cal.4th 872, 892), that is not the case in respect to trespass as a lesser included or related offense of burglary. Respondent fails to cite *People v. Waidla, supra,* 22 Cal.4th 690, where the Court "for purposes of discussion" accepted the defendant's assertion that under the accusatory pleading test, if not the legal elements test, trespass should be deemed a lesser included offense of the charged burglary. (*Id.* at p. 733.) The Court in *Waidla* did not cite or rely on the *Birks* dicta, as does respondent, as the basis for rejecting the defendant's claim in that case. Respondent also fails to cite or mention *Waidla's* companion case, *People v. Sakarias* (2000) 22 Cal.4th 596 where the Court explicitly declined to address respondent's identical argument in reliance on footnote 8 of *Birks* (*People v. Birks, supra*, 19 Cal.4th at p. 118), concluding, unlike here, there was no substantial evidence that the defendant's initial entry was made without the intent to steal. (*People v. Sakarias, supra*, 22 Cal.4th at p. 622, fn. 4.) Here, of course, the prosecutor at trial, and now respondent, repeatedly referred to and relied on evidence of appellant's sexual motivations, supporting the inference that, as in his prior crimes, he may have entered the church without an intent to steal.

To date, with the exception of *People v. Lopez* (1967) 249 Cal.App.2d 93 (cited and criticized at AOB 183) and *People v. Linn* (2001) 90 Cal.App.4th 1354,

1364 [relying, without discussion or analysis, on the dicta in *Birks*], there have been no reported decision directly addressing the issue or concluding based on analytical discussion that trespass invariably is not a lesser included offense of burglary as respondent here avers. Indeed, respondent neither cites, discusses, nor relies on *Lopez* and *Linn,* further indicating that not only are those decisions suspect but also the authority in support of respondent's position generally is more evanescent than real.

Even if trespass is not a lesser included crime of burglary as respondent argues, respondent totally ignores that trespass would be a lesser related offense. Respondent also ignores that when the crimes were committed in this case and at the time of appellant's trial, *People v. Geiger, supra,* 35 Cal.3d 510 required sua sponte instructions on lesser related crimes. It was not until 1998 -- after the crimes in this case and after appellant's trial -- that the Court in *People v. Birks, supra,* 19 Cal.4th 108 overruled *Geiger*.

Appellant has previously discussed why the retroactivity of *Birks* was not applicable to this case. (See AOB 187-189.) Here, too, respondent completely ignores the subject. The bar against retroactivity applies to judicial decisions whose *effect* is to increase punishment for criminal conduct after its commission. (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1707.) Because appellant was charged with a capital crime, and potentially faced increased punishment after a penalty trial based on verdicts during the guilt phase, the retrospective application of *Birks* to this case did not merely withdraw "the procedural opportunity for

conviction of a reduced offense" as in *Birks*. Because the rule of *Geiger* applied during appellant's trial, and because appellant faced both increased criminal liability and increased punishment for a crime previously committed that might have been deemed less than burglary had the jury been appropriately instructed, due process precluded the retrospective application of *Birks* to this case. (*People v. Cuevas* (1995) 12 Cal.4th 252, 275; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-354.) For the reasons discussed in detail in appellant's opening brief (AOB 190-193) and, once again, completely ignored by respondent, the trial court's error in failing to instruct the jury on trespass could not have been harmless beyond a reasonable doubt under the federal standard of *Chapman v. California, supra*, 386 U.S. at p. 24.

VII

BY EXPLICITLY ELIMINATING THE BURDEN OF PROOF AS TO IDENTITY, THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL BY JURY, DUE PROCESS OF LAW, AND TO RELIABLE GUILT AND PENALTY DETERMINATIONS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Identity was certainly a contested issue in this case. Because appellant denied that he committed the charged crimes and there was no direct evidence, a significant portion of the prosecution's case pertained to identity. The prior 1972 and 1982 crimes and criminal conduct evidence was justified as necessary to prove identity. Blood and DNA evidence were also admitted to identify appellant as the perpetrator. The testimony of other witnesses, including that of Rev. Irma Plate during the prosecution's case-in-chief and Nina Pittsford during rebuttal, also pertained exclusively to the key issue of identity.

At the conclusion of trial, the court instructed the jury in the language of CALJIC No. 2.50 (1994 Revision) that the evidence of prior crimes had been admitted to establish identity. However, in its only instruction relating specifically to identity (CALJIC No. 2.72), the court told the jury that identity was not an element of the crime.[4]

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[4]/ CALJIC No. 2.72 (1989 Revision), given only at the conclusion of the trial, provided as follows:

"No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made by him outside of this trial.

Respondent first asserts that since the jury sat through the trial and heard all of the evidence, it must necessarily have devined that identity was at issue. (RB 78.) Respondent ignores that the jury was explicitly told otherwise -- that identity was not at issue. Since it is presumed that jurors comprehend and generally follow instructions (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury.'"]; *People v. Holt, supra,* 15 Cal.4th at p. 662 ["Jurors are presumed to understand and follow the court's instructions."]), it must be assumed, contrary to respondent's assertions, that the jury followed the court's instruction that the key element of the prosecution's case did not have to be established or resolved beyond a reasonable doubt.

In essence, respondent asserts that there was no instructional obligation as to identity. Respondent ignores fundamental rules in our system of criminal law. The prosecution bears the burden of proving all elements of the offense, including identity when at issue, and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of those elements. (*In re Winship* (1970) 397 U.S. 358, 364; *Cool v. United States* (1972) 409 U.S. 100, 104.) The beyond-a-reasonable-doubt requirement applies in all state and federal criminal

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"The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. Such identity or degree of the crime may be established by an admission."
(CT 462; 14 RT 3619 [italics added].)

proceedings. (*In re Winship, supra*; *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278.) Since it was most certainly contested at trial, there was no reason for the court to instruct the jury that there was no burden of proof at all as to identity. (*People v. Flood, supra,* 18 Cal.4th at pp. 479-480 [instructional error relieving prosecution of burden to prove every element of the crime charged violates defendant's rights under both United States and California Constitutions].)

Respondent alternatively relies on *People v. Frye* (1998) 18 Cal.4th 894 in which the Court concluded that there was no "reasonable likelihood" in that case that the jury would have understood that the prosecution had no obligation to prove the defendant was the person who committed the offenses. (*Id.* at p. 960.) In addition to overlooking its own rule that "on appeal, '[w]e must, of course, presume that the jury followed [the trial court's instructions]'" (*People v. Chavez* (1958) Cal.2d 778, 790), for the other reasons discussed in appellant's opening brief (AOB 199-201), the Court's decision in *Frye* is unsound and should be reexamined. While offering *Frye* as authority (RB 78-79), respondent ignores and fails to address the reasons its continued viability is questionable.

First, CALJIC No. 2.72 unambiguously told the jury that identity was not an element and did not have to be proved. The Court's conclusion in *Frye* that the jury must have considered and resolved the issue of identity in accord with the governing burden of proof thus defies common sense and the presumption that juries generally follow the instructions given. Even this Court has repeatedly stressed that when given a specific instruction on point, it is more probable than

not that the jury closely adhered to the trial court's direction. (*People v. Harper* (1986) 186 Cal.App.3d 1420, 1429-1430.)

Respondent ignores that the presumption that an official duty has been performed is a presumption affecting the burden of proof. (Evid. Code § 669.) "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code § 606.) Hence, respondent's suggestion, based on *Frye* -- that appellant has somehow failed to offer how the jury was affected by the instructional error (RB 78) -- turns the burden of proof on its head and is patently wrong. (See *People v. Cruz* (2001) 93 Cal.App.4th 69, 74.) By virtue of the presumption, the burden is on respondent -- not appellant.

Second, the Court in *Frye* applied a "reasonable likelihood" standard in evaluating the impact of the instructional error involved. (*People v. Frye, supra*, 18 Cal.4th at p. 960.) Because CALJIC No. 2.72 eliminated the burden of proof as to identity, the "reasonable likelihood" standard did not apply. Of fundamental constitutional dimensions, the error was prejudicial per se and not subject to any type of prejudice or harmless error analysis as employed by the Court in *Frye*. CALJIC No. 2.72 totally relieved the prosecution from its burden of proof as to identity. Consequently, neither *Watson* (*People v. Watson, supra,* 46 Cal.2d at p. 836, *Chapman* (*Chapman v. California, supra,* 386 U.S. 18), nor the Court's "reasonable likelihood" standard stated in as *Frye* would apply.

The United States Supreme Court emphasized in *Sullivan v. Louisiana,*

supra, 508 U.S. at pp. 277-278 that "[i]t is self-evident, we think, that the [Fourteenth] Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury find that the defendant is *probably* guilty, … . [A]n instruction [misdefining the burden of proof beyond a reasonable doubt by effectively lowering its threshold] … does not produce such a verdict." In addition to the Sixth and Fourteenth Amendment violations, the instructional error also deprived appellant of his constitutional right to a reliable jury verdict under the Eighth Amendment to the United States Constitution. (*Edmund v. Florida* (1982) 458 U.S. 782, 784.) Therefore, contrary to respondent's assertions and this Court's conclusion in *Frye*, the trial court's instructional error compels reversal of the judgment of conviction on all counts, enhancements, special circumstances findings, and penalty.

VIII

THE USE OF CALJIC NOS. 2.50, 2.50.1, AND 2.50.2 VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY JURY GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY GUARANTEED BY THE EIGHTH AMENDMENT, WHERE THE BASIC FACTS PERMITTED TO BE FOUND BY A PREPONDERANCE OF THE EVIDENCE ALSO CONSTITUTED ULTIMATE FACTS OF THE CRIMES CHARGED IN COUNTS 1, 2, AND 3

As discussed in appellant's opening brief, the trial court erred on instructing the jury in the language of CALJIC Nos. 2.50 (1994 Revision), 2.50.1 and 2.50.2. (AOB 205-210.) Although offering seemingly a general waiver argument (RB 79), respondent appears in actuality to claim only that appellant "waived any federal constitutional claim because he failed to object on those grounds at trial." (RB 81.) Of course, these instructional errors are reviewable on appeal to the extent they affect the defendant's "substantial rights." (Pen. Code §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247.) Decisional law equates "substantial rights" with reversible error. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) Penal Code sections 1259 and 1469 have thus been used to excuse objections to substantive instructions, including those involving the burden of proof and the permissible and impermissible uses of evidence. (*People v. Abbaszadeh, supra,* 106 Cal.App.4th at p. 650.)

Virtually an identical waiver argument was asserted by respondent and rejected by the Court in *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7:

"Defendant's claim, however, is that the instruction is not "correct in law," and that it violated his right to due process of law; the claim therefore is not of the type that must be preserved by objection." Moreover, in *People v. Boyer, supra,* 38 Cal.4th at p. 441, the Court emphasized that the failure at trial to make explicit constitutional objections will not result in the forfeiture of those issues if raised later on appeal. As noted in *Boyer*, where new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the constitution, to that extent the new constitutional arguments are not forfeited on appeal. (*Id.* at p. 441, fn. 17; see also *People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Benavides, supra,* 35 Cal.4th at p. 96.) Respondent does not contend that anything would have changed in the trial court, factually or legally, had the constitutional objections been made at that time, or that it is in any way prejudiced by having to respond to the constitutional dimensions of the arguments advanced in this Court. Accordingly, the merits of appellant's claim of instructional error by the trial court may appropriately be addressed on appeal.

Respondent further overlooks that the fact that a party, by failing to raise an issue in the trial court, may waive or forfeit the right to raise the issue on appeal does not mean that this Court invariably is precluded from considering the issue. As previously held by the Court, whether or not the lack of a trial court objection should be excused is entrusted to its discretion. (*People v. Williams, supra,* 17

Cal.4th at pp. 161-162, fn. 6.)

In respect to the substance of appellant's claims of error, respondent asserts that the "essence" of appellant's contention was rejected by this Court in *People v. Medina* (1995) 11 Cal.4th 694 and *People v. Carpenter, supra,* 15 Cal.4th 312.

It is true, as respondent correctly notes, the Court in *Medina* discussed the distinction between the use of other crimes evidence to prove basic or evidentiary facts as opposed to elemental facts. Facts tending to prove a defendant's other crimes for purposes of establishing his or her criminal knowledge or intent are deemed mere "evidentiary facts" that need not be proved beyond a reasonable doubt as long as the jury is convinced, beyond such doubt, of the truth of the "ultimate fact" of the defendant's knowledge or intent. It is also true that in *People v. Carpenter, supra,* 15 Cal.4th at p. 382, the Court "adhered" to the preponderance of the evidence standard in respect to evidence of other crimes.

However, respondent overlooks that neither *Medina* nor *Carpenter* involved the use of prior crimes evidence to prove both basic or evidentiary facts and elemental or ultimate facts as in this case. Here, the evidence of appellant's prior crimes was used to establish identity and intent. As this Court has elsewhere ruled, both identity of the perpetrator and the elements of the charged crime are ultimate facts in a criminal case. (See, for example, *People v. Thompson, supra,* 27 Cal.3d at p. 314, fn. 13.)

Respondent further ignores such decisions as *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 142 [where appellate court discussed that an instruction

permitting the jury to draw an inference of guilt from basic facts violated due process if it undermines the jury's responsibility to find the ultimate facts beyond a reasonable doubt] and *People v. James* (2000) 81 Cal.App.4th 1343, 1353 [holding that when other crimes evidence serves as proof of ultimate fact that the defendant committed the charged offense, burden of proof is substantially eroded by instructions suggesting that a defendant's prior offenses may be sufficient to convict him of the charged crime].)

Respondent ignores *Ulster County Court v. Allen* (1979) 442 U.S. 140 where the United States Supreme Court discussed the distinction between basic or evidentiary facts and elemental or ultimate facts, as well as the distinct burdens of proof that apply to each. The High Court explained that ultimate or elemental facts prove the elements of the crime. By contrast, evidentiary or basic facts do not necessarily prove the elements of the crime. While evidentiary or basic facts may be found by a lesser standard, as that adopted by this Court in *Medina* and *Carpenter*, this lesser standard of proof remains inconsistent with constitutional due process principles when applied to elemental or ultimate facts. As to these latter facts, they must still be found beyond a reasonable doubt, not by a preponderance of the evidence. (*Ulster County Court v. Allen, supra*, 442 U.S. at pp. 156-157.)

Here, the preponderance-of-the-evidence standard articulated by the trial court in CALJIC No. 2.50, 2.50.1, and 2.50.2 was constitutionally defective. The instructions failed to require elemental or ultimate facts to be proved beyond a

reasonable doubt as required by *Ulster County* as well as *Sullivan v. Louisiana, supra,* 508 U.S. 275. Key elements of the crimes charged, such as appellant's intent to steal and identity, were both basic and ultimate facts in counts 1, 2, and 3, yet were allowed to be established by a preponderance of the evidence.

All of the constitutional defects mentioned by the High Court in *Ulster County* and *Sullivan v. Louisiana* were present in the trial court's preponderance of the evidence instructions in this case. As permitted by CALJIC Nos. 2.50, 2.50.1, and 2.50.2, the jury reasonably could have believed that certain key elemental or ultimate facts and issues might be based simply on a preponderance of the evidence, not by proof beyond a reasonable doubt. Hence, the instructions violated due process of law and appellant's rights to a fair jury trial guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Respondent additionally claims that none of the instructional errors, in any case, implicated appellant's constitutional rights and that error, if any, was consequently harmless under the *People v. Watson, supra*, 46 Cal.2d at p. 836 standard. (RB 83-84.) Curiously, however, the cases that respondent cites -- *People v. Maury* (2003) 30 Cal.4th 342; *People v. Riel* (2000) 22 Cal.4th 1153; *People v. Noguera* (1992) 4 Cal.4th 599; and *People v. Wilson* (1992) 3 Cal.4th 926; *People v. Jennings, supra,* 53 Cal.3d 334 -- do not involve the instructions at issue here or instructions on the burden of proof. Indeed, respondent fails to advance any relevant authority to counter appellant's claim that error in relieving the prosecution of the burden of proving each element of the charge offense

beyond a reasonable doubt violates a defendant's fundamental rights under both the California and United States Constitution. (*People v. Flood, supra,* 18 Cal.4th at pp. 479-480.)

The basic principle of criminal law requiring proof of all elements of a charged crime beyond a reasonable doubt is rooted in the United States Constitution, including the Fifth, Sixth, and Fourteenth Amendments. (See also Pen. Code § 1096.) Instructional misdirection involving the burden of proof requires automatic reversal. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320, fn. 14; *Sullivan v. Louisiana, supra*, 508 U.S. at p. 277; *Cage v. Louisiana* (1990) 498 U.S. 39, 41.)

Even if not reversible per se, the error certainly contributed to the jury's verdicts on counts 1, 2, and 3 under the alternative *Chapman v. California, supra*, 386 U.S. 18, standard. The basic facts established by evidence of crimes constituted elemental or ultimate facts as to all three counts. The basic fact of appellant's intent constituted an ultimate fact. Appellant's identity was also proved by a lesser burden of proof through evidence of other crimes.

Apart from appellant's prior crimes, there was no solid or credible evidence that established the ultimate intent elements on counts 1, 2, or 3. There were no eyewitnesses to the charged crimes. The evidence of appellant's prior crimes did not tie appellant directly to the charged crimes. The evidence of prior crimes, and the elemental or ultimate facts derived from that evidence by a preponderance of the evidence, were crucial to the prosecution's case. The prior crimes evidence

was presented first at trial. Almost 200 pages of trial transcript, to say nothing of appellant's cross-examination by the prosecutor as to the details of his prior crimes, were devoted to this evidence. (See 7 RT 1794-8 RT 1974.) The prosecutor also devoted more than 20 pages of closing argument to the details of appellant's prior crimes. (See 14 RT 3622-3542.) Therefore, under the circumstances of this case, the instructional error permitting elemental or ultimate facts to be established by a preponderance of the evidence could not have been unimportant in relation to everything else the jury considered and must have contributed to the verdicts on all counts. Consequently, even under the lesser *Chapman* standard, the use of CALJIC Nos. 2.50, 2.50.1, and 2.50.2 could not have been harmless beyond a reasonable doubt.

IX

THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT APPELLANT'S CONVICTION OF SECOND DEGREE ROBBERY ON COUNT 3 (§ 211) AND FIRST DEGREE FELONY-MURDER ON COUNT 1 (§ 187) TO THE EXTENT THAT THE FELONY-MURDER MAY HAVE BEEN PREDICATED ON THE COMMISSION OF A ROBBERY; THE INSUFFICIENCY OF THE EVIDENCE OF ROBBERY ALSO RENDERED THE DETERMINATION OF APPELLANT'S GUILT UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellant was convicted on count 1 of first degree murder and on count 3 of second degree robbery. The jury was not required to specify its theory of first degree murder or to agree unanimously whether the first degree murder was deliberate and premeditated or whether the murder was committed during the commission or attempted commission of a robbery.

As demonstrated in appellant's opening brief, the evidence contained in the record on appeal is not sufficiently persuasive to permit the conclusion that any rational trier of fact could have found either the requisite specific intent or concurrence of intent and act before the killing occurred. There was no solid or substantial direct or circumstantial evidence that appellant formed an intent to commit robbery or deprive the victim of her purse or any other property by force or fear before the killing in this case. The physical evidence showed rather a killing independent of any other motive or crime, or theft of property after the victim had been killed. (See AOB 216-221.)

Respondent cites a number of isolated facts in arguing that substantial evidence was adduced at trial of appellant's intent to rob Gayle Johnson at the time he entered the church or during the fatal attack. When seriously considered, however, these facts do not support respondent's position. Respondent notes that appellant went to the church on Monday (8 RT 2002) and states, without citation to the record, that it was not a typically busy day for the church. There was no evidence in the record, however, when that Church of Scientology would have been busy or when parishioners, if any, would likely have actually attended services. Contrary to respondent's assertions (RB 86), appellant thus could not have known that either no one was at the church and that he could take church property or that only one person was there who could be easily overcome. (RB 86-87.) From appellant's prior visit, he was aware that several people were actually present. Under these circumstances, the inferences drawn by respondent of an intent to commit robbery based on the day of the murder are both questionable and factually unsupportable.

Respondent also offers that appellant needed money because he lived in a small trailer and his only source of income came from collecting recyclables with Arthur Jennings. (RB 86.) While appellant certainly lived modestly, he had few expenses. Everyone of modest income does not necessarily harbor the intent to commit robbery as respondent seems to imply. (RB 86.)

Appellant did not arm himself with a knife before going to the church. (RB 87.) On the day Johnson was killed, appellant helped Jennings collect cans for

recycling. Appellant used a knife for this purpose, as he explained at trial. (See 12 RT 3202-2110.) Thus, respondent's assertions that appellant's possession of a knife was somehow nefarious and in preparation for robbery (RB 87) are not supported by the evidence adduced at trial.

In arguing sufficiency of the evidence, respondent ignores that the manner of the killing was totally inconsistent with robbery. Gayle Johnson's wounds and the blood deposited around the church indicated that the killing occurred during a violent outburst of rage, not during a preplanned incident conceived to take personal or church property. The depth and number of wounds on the victim's body, the existence of defensive wounds, and the position of the body after death were not, as respondent otherwise argues (RB 87), consistent with an intent to rob. All of the victim's wounds occurred at the same brief period of time and most likely while the victim was lying on the floor. The brutality of the killing was far more consistent with a sudden, random explosion of violence than a calculated murder during the commission or attempted commission of a robbery.

Respondent also overlooks that there was no evidence the victim's personal property been touched or moved before the killing consistent with a robbery theory. The blood found on the victim's purse could only have been deposited after, not before, the killing.

In respect to felony-murder, the evidence in this case only supports a conclusion that the taking of property was incidental to the killing under the rule of *People v. Green* (1980) 27 Cal.3d 1. Respondent seeks to distinguish *Green* on

the ground that the two cases are factually distinct. (RB 88.) Obviously, it is rare that two cases will seldom have the same precise set of facts. Thus, to distinguish this case from *Green* on this basis alone ignores the meaning and significance of *Green* and how it may apply in other situations and circumstances. Here, based on the principles stated in *Green*, the evidence was insufficient to establish that the killing was committed during the commission of a robbery. The property taken rather showed, based on *Green* principles, that robbery was merely incidental to the murder.

Citing *People v. Bolden* (2002) 29 Cal.4th 515, respondent argues that the evidence of robbery is not rendered insufficient simply because an alternative interpretation of the evidence might exist. (RB 87.) Respondent overlooks that while the defendant in *Bolden* met the victim in a gay bar, there was no substantial evidence of any motive for the murder apart from accomplishing robbery. Unlike the facts and circumstances of the present case, there were no signs of a struggle in the victim's apartment in *Bolden*. Considering, as well, the nature and amount of property taken from the victim, including his binoculars, wallet, bracelet, cuff links, camera, and wristwatch, the Court concluded that the jury in *Bolden* reasonably could infer that the defendant killed the victim primarily, and perhaps solely, to facilitate the robbery by preventing him from resisting or from alarming neighbors or others. (*Id.* at p. 554.) Here, in contrast, the overwhelming evidence showed an incidental theft or robbery as in *Green*, and a sudden, violent, murderous outburst that resulted in the victim's death.

The facts in *People v. Webb* (1993) 6 Cal.4th 494, on which respondent also relies (RB 88), reveal vastly more evidence of both an intent to commit robbery and the commission of robbery than in the present case. Unlike the present case, several key facts in *Webb* -- all missing here -- indicated that the defendant planned to rob the victims at the time he was seen entering their apartment and then carried out his intent after entry. The defendant knew the victims managed an apartment complex. He knew they collected rent from other tenants. The defendant committed his crimes soon after the first of the month, a time when rent is commonly due. A few hours before the crimes, the defendant obtained a gun and duct tape that were used to subdue the victims. Finally, other evidence established that there was no legitimate purpose for the defendant to be at the victims' apartment at the time they were killed. In view of other evidence in *Webb*, such as the fact the defendant hours after the murders had a large and unexplained amount of cash in his possession, the existence of competing inferences or alternative scenarios that no money was actually taken from the victims did not alone render the jury's verdicts of two counts of murder and one count of robbery insufficient. (*Id.* at p. 530.)

In *People v. Kraft* (2000) 23 Cal.4th 978, also cited by respondent (RB 88), the defendant, convicted of multiple, fetish-sex murders, killed all his male victims by ligature strangulation, and then dumped their bodies near a freeway. Virtually the same modus operandi was involved in every murder. (See *id.* at pp. 1053-1057.) Unlike the present case, however, neither robbery nor robbery felony-

murder was alleged in *Kraft*. Hence, respondent's reliance on *Kraft* for support as to the sufficiency of the evidence of robbery and felony-murder is misplaced.

Unlike *Bolden* or *Webb*, there was no evidence that appellant knew the victim or had ever met her. There was no evidence that appellant knew the victim would be alone in the church. Unlike *Webb*, there was no evidence that appellant was aware of the church schedule or that money or property would be found in the church office at the time of the killing. Unlike *Bolden* or *Webb*, there was no strong or credible evidence of any sort, direct or circumstantial, that appellant planned or prepared to commit a robbery or entered the church with the intent to rob. Unlike *Kraft*, neither does the record support the conclusion that any rational trier of fact could have found concurrence of intent and act before the killing occurred. The physical evidence showed a killing independent of theft or robbery. The blood evidence was inconsistent with the formation of an intent to rob or a robbery before the killing. The blood found on the victim's purse was shown not to have been deposited by the victim and could only have dropped on her purse *after*, not before, the killing. Consequently, the record does not support the conclusion that any rational trier of fact could have found concurrence of intent and act before the killing occurred, a necessary element of felony-murder. Based on the totality of the evidence at trial, no rational trier of fact could have found beyond a reasonable doubt that appellant formed the intent to commit or attempt to commit robbery before entering the church or took, or attempted to take, any property from the victim by force or fear while the victim was alive.

X

THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT THE SPECIAL CIRCUMSTANCE FINDING IN COUNT 3 OF ROBBERY-MURDER PURSUANT TO § 190.2, SUBDIVISION (a)(17)(i); INSUFFICIENCY OF THE EVIDENCE ALSO RENDERED THE SPECIAL CIRCUMSTANCE FINDING UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The jury found that the murder was committed while appellant was engaged in the commission or attempted commission of robbery within the meaning of 190.2, subdivision (a)(17)(i). For the reasons discussed in appellant's opening brief (AOB 227-229), the record does not contain substantial evidence that appellant murdered Gayle Johnson while engaged in the commission or attempted commission of a robbery. There is no indication in the entire record that the perpetrator formed an intent to steal from the victim before attacking and killing her.

Respondent offers that appellant's contention must be rejected because the evidence showed that appellant killed Johnson while he was robbing her of her property. (RB 89.) Respondent arrives at this conclusion by reasoning that there was no evidence that appellant took the victim's property to remind his of the killing (as in *People v. Marshall* (1997) 15 Cal.4th 1), to conceal his actual motive for the killing, or to facilitate or conceal the killing as in *People v. Zapien* (1993) 4 Cal.4th 929.

Respondent fundamentally ignores the burden of proof in respect to special circumstances. To prove a felony-murder special circumstance, the prosecution must show that the defendant had an independent purpose for the commission of the felony. (*People v. Mendoza* (2000) 24 Cal.4th 130.) When an underlying felony is merely incidental to the murder, the felony-murder special circumstance does not apply. (*People v. Raley* (1992) 2 Cal.4th 870, 903.)

Here, there was virtually no evidence of an intent to steal before the killing. There was strong evidence that the victim's property was taken only after the killing, not before. The method and manner of the killing were inconsistent with a murder during the commission or attempted commission of a robbery. Thus, contrary to respondent's assertions (RB 89-90), under the facts and circumstances of this case, the evidence was not sufficient to permit the jury to conclude that the killing was motivated by robbery, to facilitate a robbery, or to prevent identification of the robber required to support the robbery-murder special circumstance.

XI

THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT APPELLANT'S CONVICTION OF SECOND DEGREE BURGLARY ON COUNT 2 (§ 459) AND FIRST DEGREE FELONY-MURDER ON COUNT 1 (§ 187) PREDICATED ON THE COMMISSION OR ATTEMPTED COMMISSION OF A BURGLARY

Appellant was convicted on count 1 of first degree murder and on count 2 of second degree burglary. The jury was not required to specify its theory of first degree murder or to agree unanimously whether the first degree murder was deliberate and premeditated or whether the murder was committed during the commission or attempted commission of a burglary or robbery.

As demonstrated in appellant's opening brief (AOB 232-236), the evidence contained in the record was insufficient to support both the count 2 burglary and the count 1 murder to the extent that it was predicated in whole or in part on a burglary felony-murder theory alternatively submitted to the jury.

Respondent asserts that the evidence supports both a "free-standing" burglary and felony-murder predicated on a burglary conviction. (RB 90-91.) Respondent argues that the jury "must have found a larcenous intent to convict [appellant] of each burglary charge." (RB 91.) In this regard, respondent points to the jury instructions which limited the intent requirement to "the specific intent to steal, take and carry away the personal property of another of any value and with the further specific intent to deprive the owner permanently of such property."

(RB 91.)

Respondent focuses on the wrong subject. Sufficiency of the evidence as to burglary does not involve or turn on the question whether the jury found a larcenous intent or the propriety of the jury instructions. When a conviction is challenged on grounds of insufficient evidence, the entire record must be reviewed for reasonable and credible evidence of solid value. (*People v. Ramirez* (2006) 39 Cal.4th 398, 463.)

A person who enters a dwelling "with intent to commit grand or petit larceny or any felony is guilty of burglary." (Pen. Code § 459.) Contrary to respondent's assertions, the facts and circumstances adduced at trial do not "unquestionably support the inference" that appellant entered the church with the intent to steal from either the church or Gayle Johnson. Respondent ignores that the church was open to the public. The general public, including appellant, had been invited to enter. There was no forced entry that would obviously have indicated a larcenous motive. Further, none of appellant's prior crimes manifested a pre-existing intent to steal before or at the time of entry. All of appellant's prior crimes were motivated by sexual desire, not larceny as asserted in this case.

Moreover, as with the charged robbery, appellant did not commit the crime because he lived in a small trailer on Arthur Jennings property or collected cans for recycling as respondent appears to assert. (RB 92.) Likewise, there was no evidence that appellant intentionally armed himself with a knife for the purpose of committing theft or larceny as respondent also asserts. (RB 92.) On the day

Johnson was killed, appellant collected cans, using a knife for this purpose. (See 12 3202-2110.) Respondent's assertions that appellant's possessed a knife for a larcenous purpose or in preparation for robbery are not supported by the evidence at trial. While appellant may have needed money (as does most of the population at large), there was no evidence that appellant was seeking money on the day of the murder (as in *People v. Navarette* (2003) 30 Cal.4th 458, 499) or subsequently manifested newly-acquired wealth after the murder. (See *People v. Wilson, supra,* 3 Cal.4th at p. 939 [discussing inadmissibility of evidence of a defendant's poverty to establish motive to commit robbery or theft]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024.)

A charge of first degree murder based on a felony-murder theory requires proof of an independent felonious intent separate from the intent to commit homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.) There must be an independent intent to commit another felony (e.g., theft) underlying the burglary for it to serve as the basis for a felony-murder conviction. (See *People v. Sears* (1970) 2 Cal.3d 180, 188; *People v. Sanders* (1990) 51 Cal.3d 471, 509.)

Here, the evidence was also insufficient to support appellant's conviction of burglary felony-murder. As discussed in Arguments IX and X, *supra*, the evidence rather shows that any taking was merely incidental the killing. There was no evidence that appellant was aware of the church schedule or that any money or property would be found in the church office or in possession of someone at the church at the time of the killing. There was no evidence that

appellant ever met Johnson or even knew of her existence. There was no evidence that from his prior visit to the church appellant was aware or had been told that Johnson would be alone, thus permitting appellant to enter the church on the day of the killing without fear of being discovered by others as in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 88. There was no evidence of any sort, direct or circumstantial, that appellant planned or prepared to commit a burglary or other theft crime or entered the church with the intent to burglarize the premises.

Respondent overlooks that no property was taken before the killing. There was no evidence that any personal property belonging to Gayle Johnson had been touched or moved before the murder. The blood evidence was totally inconsistent with an intent to commit theft before the killing. Blood found on Johnson's purse could only have been deposited after, not before, the killing. Thus, when considered as a whole (*People v. Carter* (2005) 36 Cal.4th 1114, 1157 [intent may be inferred from all of the facts and circumstances disclosed by the evidence]), the evidence of burglary and felony-murder predicated on the commission of a burglary is neither strong nor substantial. Consequently, appellant's count 2 burglary conviction and his count 1 first degree felony-murder conviction predicated on the commission or attempted commission of a burglary cannot be sustained.

XII

THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT THE SPECIAL CIRCUMSTANCE FINDING IN COUNT 1 OF BURGLARY-MURDER PURSUANT TO § 190.2, SUBDIVISION (a)(17)(vii)

The jury convicted appellant on count 2 of second degree burglary in violation of Penal Code section 459. The jury also found that the murder was committed while appellant was engaged in the commission or attempted commission of burglary within the meaning of 190.2, subdivision (a)(17)(vii). For the same reasons respondent advanced in Argument XI, *supra*, respondent also asserts the evidence was sufficient to support the burglary special circumstance finding. (RB 92.)

For the same reasons appellant advanced above and in the opening brief in Argument XI, *supra*, the evidence was also insufficient to support the burglary-murder special circumstance within the meaning of Penal Code section 190.2, subdivision (a)(17)(vii). If the evidence is insufficient as to an underlying burglary and first degree felony-murder conviction, as asserted in Argument XI, *supra*, the felony-murder special circumstance must automatically be set aside. (*People v. Green, supra,* 27 Cal.3d at p. 52.)

XIII

THE EVIDENCE OF PREMEDITATION AND DELIBERATION WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF FIRST DEGREE MURDER ON A PREMEDITATION THEORY UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14)

As discussed in appellant's opening brief (AOB 240-242), appellant was charged in count 1 with deliberate and premeditated murder in violation of Penal Code section 187, subdivision (a). The case was submitted to the jury on both premeditated and felony-murder theories. The jury was not required to agree unanimously on the count 1 theory of murder. In convicting appellant of first degree murder, the jury did not specify whether the murder was premeditated and deliberate or felony-murder.

Because the killer was armed with a knife at the time of the killing and the victim's wounds indicated at the very least that a struggle occurred, respondent argues that "the manner of Johnson's killing demonstrates premeditation." (RB 95.) Respondent also cites evidence that Johnson was punched in the face at least twice, stabbed in the neck, and then further stabbed at least seven times while lying on the floor as evidence of premeditation and deliberation. (RB 95.)

Although paying lip service to the categories of evidence set forth by the Court in *People v. Anderson* (1968) 70 Cal.2d 15, respondent actually ignores the dearth of evidence in this case supporting premeditation and deliberation. In *Anderson*, the Court discussed that facts about how and what a defendant did prior

to an actual killing may show the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as planning activity. Second, facts about a defendant's prior relationship with the victim may permit the jury reasonably to infer a motive to kill the victim. Third, facts about the nature of the killing may permit the jury to infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design to take the victim's life in a particular way. (*Id.* at pp. 26-27.)

While *Anderson* does not require that the three factors be present in some special combination or that they be accorded a particular weight (*People v. Manriquez* (2005) 37 Cal.4th 547, 577), first degree murder convictions have typically been sustained when there is evidence of planning, motive, and method -- evidence of all three categories articulated by the Court. (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) However, when all three types or categories of evidence are not present, either very strong evidence of planning, or some evidence of motive in conjunction with planning, or evidence that the killing was committed in a deliberate manner is required. (*People v. Edwards* (1991) 54 Cal.3d 787, 813-814.)

Here, none of the three types of evidence identified in *Anderson* was present in any degree. There was no evidence of planning or any statements or admissions by appellant made to third parties or to the police after his arrest that he planned to kill the victim in this case. There was no evidence that appellant

sought out or obtained a weapon to be used in the killing. (See, in contrast, *People v. Poindexter* (2006) 144 Cal.App.4th 572, 588 [after telling victim to stay where he was, defendant went and retrieved loaded shotgun, and then shot victim after exchanging brief remarks].) While a knife was used in the killing in this case, appellant was shown only to have regularly carried a knife for use in his recycling work. There was no evidence that appellant intentionally chose to arm himself before or on the day of the murder for the purpose of entering the church and committing robbery or sexual assault. (See, in contrast, *People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082 [where defendant intentionally armed himself with two concealed, loaded handguns]; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [where defendant had previously stabbed another woman to death, fact that defendant carried knife into victim's home permitted inference that he considered possibility of homicide from the outset and possessed knife for same purpose]; *People v. Young* (2005) 34 Cal.4th 1149 [where defendant crashed through living room window with loaded gun in hand permitted inference that defendant considered possibility of murder in advance and intended to kill].)

There was no evidence of a planned motive to kill. There was no evidence that appellant knew the victim or had previously met her. Since there was no evidence that appellant took any property belonging to the victim or the church before the killing, the desire to prevent the victim from identifying him or later from testifying against him could not have motivated the killing in this case.

Contrary to respondent's assertions (RB 93), the manner of killing was

inconsistent with deliberate and premeditated murder. While a violent and bloody killing may be consistent with premeditation (*People v. Pride* (1992) 3 Cal.4th 195, 247), here, the victim's wounds and the wide scattering of blood inside the church indicate that the killing was not thoughtful but occurred rather during an unplanned, violent outburst. (See, in contrast, *People v. Stitely, supra*, 35 Cal.4th at p. 544 [lethal pressure applied to victim's neck for a "long time," suggesting thereby defendant had ample opportunity to consider deadly consequences of his action]; *People v. Davis* (1995) 10 Cal.4th 463, 510 [strangulation of victim for up to five minutes suggested deliberate plan to kill her]; *People v. Steele, supra*, 27 Cal.4th at p. 1250 [killing the same way twice -- victims strangled and stabbed multiple times -- supported inference of calculated design to ensure death, rather than "unconsidered explosion of violence"].

The depth and number of wounds, including the presence of defensive wounds on the victim's hands and arms, as well as the position of the body, also show that the victim was not fending off an attack motivated by robbery. The fact that the perpetrator punched Johnson in the face at least twice and stabbed her in the neck do not, as respondent otherwise insists (RB 95), indicate an inherently deliberate act with intent to kill. The initial blows were not mortal wounds manifesting a manner of killing indicative of a deliberate intent to kill. (See *People v. Koontz, supra,* 27 Cal.4th at p. 1082.) Respondent's assertions that appellant thus "had sufficient time to decide" and premeditate during the killing (RB 95) appear to be at variance with the evidence. Johnson's wounds occurred in quick

succession; non-fatal blows and wounds were first inflicted, evidence at odds with a deliberate and premeditated killing. (See, in contrast, *People v. Hughes* (2002) 27 Cal.4th 287, 371 [defendant stabbed victim 11 times over period of time; wounds were inflicted from a variety of positions and angles; trail of blood indicated struggle throughout apartment; none of the stab wounds rapidly fatal].)

The use of lotion after the murder to dilute the blood evidence does not signify that the killing was pre-planned or pre-conceived. The lotion was obtained fortuitously from the church bathroom. Respondent ignores this evidence. The hurried use of lotion obtained by chance again suggests an absence of planning inconsistent with deliberation and premeditation.

Although, as respondent correctly notes (RB 93), the *Anderson* guidelines are descriptive (RB 93; see also *People v. Elliot* (2005) 37 Cal.4th 453, 470-471), the record in this case fails to offer strong or credible evidence that the killing amounted to a deliberate and premeditated murder. Because, as elsewhere demonstrated by appellant (see Arguments IX through XII, *supra*), the evidence was also insufficient to support felony-murder predicated on theories of robbery and burglary, appellant's count 1 murder conviction based on the theory of deliberation and premeditation cannot simply be dismissed as harmless as respondent asserts. (RB 95.)

XIV

THE PROSECUTOR REPEATEDLY COMMITTED MISCONDUCT DURING THE GUILT TRIAL; THE PROSECUTOR'S MISCONDUCT DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL, IMPARTIAL JURY, AND DUE PROCESS, AND RENDERED THE GUILT AND PENALTY DETERMINATIONS UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant discussed and analyzed in the opening brief the various types of misconduct committed by the prosecutor during trial and in argument to the jury. (See AOB 252-256 [prosecutor committed misconduct by referring to and eliciting inadmissible testimony]; 256-260 [prosecutor committed misconduct by arguing penalty during the guilty trial]; 260-263 [prosecutor committed misconduct by arguing appellant's guilt of other, uncharged crimes]; 263-267 [prosecutor committed misconduct by improperly insinuating that appellant was guilty because he changed his appearance at trial]; 267-269 [prosecutor committed misconduct by insinuating appellant was concealing evidence].)

It is misconduct for a prosecutor to elicit inadmissible testimony. (*People v. Smithey, supra,* 20 Cal.4th at p. 960.) It is also misconduct for the prosecutor to elicit or attempt to elicit inadmissible evidence in violation of a court order. (*People v. Price* (1991) 1 Cal.4th 324, 451.) Such misconduct is compounded if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected. (*People v. Bell* (1989) 49 Cal.3d 502, 532.) Here, as fully discussed in appellant's opening brief (AOB 254-256), the prosecutor sought rulings on the

admissibility of evidence or testimony and then ignored or circumvented the court's rulings. (See *People v. Crew* (2003) 31 Cal.4th 822, 839 [misconduct for a prosecution to violate court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order]; *People v. Silva* (2001) 25 Cal.4th 345, 373 [same].) Repeatedly, over appellant's objections, the prosecutor also referred to and tried to admit otherwise inadmissible evidence -- even in the face of explicit trial court rulings to the contrary. During the guilt trial, the prosecutor repeatedly referred to evidence or testimony that the court had ruled inadmissible. (See AOB 254-256.)

Penalty should not be injected into the guilt phase of a capital trial. (See *People v. Carrera* (1989) 49 Cal.3d 291, 318-319 & fn. 21.) Here, the prosecutor repeatedly referred to punishment and life imprisonment during the guilt phase opening argument and continued with those references throughout trial. The prosecutor's remarks were part of a pernicious strategy to encourage the jury to consider death as the only option in this case. By repeatedly injecting improper considerations of penalty into the guilt trial, the prosecutor committed serious misconduct and infected the guilt trial with fundamental unfairness.

The prosecutor used his opening statement repeatedly to suggest that appellant was guilty of uncharged sex crimes. (See AOB 260-261.) These remarks were inaccurate and lacked factual support. A prosecutor's comments must be reasonably warranted by the evidence (*People v. Terry* (1962) 57 Cal.2d 538, 561) and not unduly inflammatory or principally aimed at arousing the passions or

prejudice of the jury. (*People v. Sanders* (1995) 11 Cal.4th 475, 527.) The prosecutor's statements were deceptive and reprehensible. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 948 [referring to matters outside the record clearly is prosecutorial misconduct]; *People v. Earp, supra*, 20 Cal.4th at p. 858.)

The prosecutor also committed misconduct by seeking to elicit testimony from appellant that he changed his appearance before or during trial. Well aware that appellant appeared disheveled and unkempt only days before the murder, yet far better groomed at the time of trial, the prosecutor sought to gain unfair advantage in respect to key issues of identity and consciousness of guilt. Appellant's appearance before the murder strongly indicated mental illness rather than consciousness of guilt. Thus, suggestions that appellant changed his appearance insinuated a far more evil motive than simply the benign reality of jail grooming requirements of which the prosecutor was certainly aware.

Lastly, it is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist. (*People v. Warren* (1988) 45 Cal.3d 471, 480.) Through his examination of both David Stockwell and DNA expert Dr. Mueller, the prosecutor repeatedly suggested that the defense had intentionally kept adverse blood testing results from the jury. The prosecutor improperly imputed to appellant a nonexistent duty or burden to offer evidence of innocence in order to gain acquittal. The prosecutor was well aware that appellant had no such burden, yet that was the import of his conduct. (See *In re Winship, supra*, 397 U.S. at p. 364; *People v. Osuna* (1969) 70

Cal.2d 759, 767-768.) Respondent does not address this issue.

In questioning Dr. Mueller, the prosecutor was not simply suggesting, as respondent asserts (RB 112), that the jury should believe the prosecution evidence and reject defense theories. (See (*People v. Huggins* (2006) 38 Cal.4th 175, 207 [not misconduct to ask jury to believe prosecution's version of events *as drawn from the evidence*].) While the defense certainly raised questions about the manner in which the blood was tested, the prosecutor was fully aware that Dr. Mueller had no expertise in the area of blood testing. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 755 [argumentative question is designed to engage witness in argument rather than elicit facts with the witness's knowledge].) The prosecutor's repeated use of argumentative questions on cross-examining Dr. Mueller about his testing or analysis of the blood samples collected in this case unfairly undermined his credibility as to those particular areas of his expertise which focused on the interpretation of DNA results, not the propriety of blood analysis.

In respect the improper references to, and elicitation of, inadmissible evidence, respondent asserts that appellant waived the misconduct by failing to object at trial and for failing to ask for a curative admonition. As to some instances of misconduct, appellant objected and asserted a continuing objection. (See 13 RT 3379-3380.) When the prosecutor ignored the trial court's ruling as to the scope of appellant's cross-examination, defense counsel also objected. (See 13 RT 3221, 3361) While appellant did not object to other instances of

misconduct when the prosecutor elicited inadmissible testimony or evidence, or request a jury admonition, respondent overlooks that the failure to object at trial does not necessarily preclude a reviewing court from considering the issue. Here, as in *People v. Hill, supra*, 17 Cal.4th at p.821, appellant was subjected to a barrage of misconduct. With but a few exceptions, the misconduct occurred in front of the jury. Repeated objections by defense counsel ran the risk of alienating the jury and prejudicing appellant in the eyes of the jury. Under these circumstances and in the exercise of the Court's discretion (*People v. Williams, supra,* 17 Cal.4th at pp. 161-162, fn. 6), all of the asserted grounds for misconduct should be considered preserved for appellate review. (*People v. Hill, supra*, 17 Cal.4th at p. 822.)

In respect to the prosecutor's improper references to penalty, even if appellant did not object or request a jury admonition to disregard the impropriety (see *People v. Fierro* (1991) 1 Cal.4th 173, 207), appellant should not be precluded from raising the misconduct on appeal as asserted by respondent. (RB 103.) The prosecutor's repeated references to penalty during the guilt trial manifested an improper pattern of behavior that infected the entire trial with fundamental unfairness. (See *People v. Hill, supra,* 17 Cal.4th at p. 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Neither an objection nor admonition would have cured the harm, particularly when the misconduct occurred at various times during trial. (See *People v. Sapp* (2003) 31 Cal.4th 240, 279 [discussing prosecutorial misconduct claim reviewable if admonition would not have cured the

harm].) Here, contemporaneous objections would have served only to highlight the acts of misconduct and further inject improper considerations of penalty into the guilt trial to appellant's detriment. (See *People v. Fierro, supra*, 1 Cal.4th at p. 207; see also *People v. Miller* (1990) 50 Cal.3d 954, 996.)

For the same reasons, appellant's claim that the prosecutor's committed misconduct by arguing that appellant was guilty of other uncharged crimes should not be deemed waived or forfeited as respondent asserts. (RB 106,) As with the other prosecutorial acts of misconduct in this case, neither an objection nor admonition would have remedied the harm. Had they been raised, repeated objections again would have compounded the prejudicial insinuations that appellant committed other, uncharged crimes, rendering him even more culpable and deserving of death than the prosecution evidence showed.

As to the misconduct involving insinuations that appellant demonstrated a consciousness of guilt by changing his appearance at trial, respondent again offers that the issue has been waived because appellant did not object at trial or seek a court admonition. (RB 108.) Appellant's defense counsel objected to the prosecutor's cross-examination of appellant as to changes in his appearance. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1125 [defense counsel objected to prosecutor's cross-examination of defendant on several occasions; issue of prosecutorial misconduct decided on merits].) The trial court even initially sustained defense counsel's objection. (7 RT 1876.) However, contrary to appellant's objections and court rulings, the prosecutor repeatedly revisited the

same subject, eliciting additional testimony from appellant about changes in his appearance before and after the 1982 incident as well. There is no indication in the record, that further defense objections would have served any purpose, as the prosecutor anyway already evaded or ignored the court's rulings on the subject. Based on the court's refusal to enforce its rulings, not only would further objections by defense counsel have been futile, they would have reinforced the misconduct and would have further focused the jury on improper matter beyond the scope of otherwise admissible evidence. For these reasons as well, appellant's failure to object should be excused. (*People v. Shazier, supra,* 139 Cal.App.4th at p. 301 [exception to general rule of waiver exists when objection would be futile].)

When the prosecutor's insinuated that appellant was concealing evidence, defense counsel objected on relevance grounds, on Evidence Code section 352, and on the ground that the prosecutor was violating the confidentiality of defense trial preparation. (See 9 RT 2437-2438.) As to the prosecutor's improper remarks while examining Dr. Mueller, appellant also objected and stated he would "like to be able to express that outside the jury." (12 RT 3091.) The court sustained appellant's objection. (12 RT 3091.)

Finally, the various instances of misconduct were not harmless as respondent asserts. (RB 113.) Arguing only that the independent evidence of appellant's guilt was overwhelming (RB 113), the prosecutor fails to articulate the applicable standard of review. Because the prosecutor's repeated acts and pattern of misconduct impacted appellant rights to due process, the assistance of counsel,

fair trial, and to a reliable determination of guilt and penalty guaranteed by the Fifth, Sixth, Eighth, Fourteenth Amendments to the United States Constitution, the *Chapman v. California, supra,* 386 U.S. 18, test should apply. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1129 [applicability of harmless beyond a reasonable doubt standard as "the test we apply, when, as here, a defendant establishes (prosecutorial) misconduct or error implicating rights under our federal constitution"].)

In light of the entire record in this case, the several acts of prosecutorial misconduct could not have been harmless beyond a reasonable doubt. (See *People v. Woods* (2006) 146 Cal.App.4th 106, 118 [in assessing prejudice from prosecutorial misconduct, court may consider cumulative effect; aggregate prejudicial effect may be greater than sum of the prejudice of each error standing alone].) Here, the various acts of misconduct affected both guilt and the penalty determination. The misconduct was neither fleeting nor sporadic; it was rather relentless and systematic. The prosecutor repeatedly asked improper questions, repeatedly elicited inadmissible evidence and testimony, repeatedly argued penalty during the guilt trial, repeatedly insinuated that appellant's was guilty of other, uncharged crimes, and repeatedly accused appellant of concealing evidence.

The decision whether to impose the death penalty is a "normative" one assigned to the jury under California's death penalty law. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.) The extraneous and inflammatory evidence provided the jury through the prosecutor's several acts of misconduct doubtless made the

church murder involved in this case appear significantly more base and vile. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1060.) As the last resort in this state against prosecutorial misconduct, the Court has rightfully been careful in ensuring that the harmless error rule, as asserted by respondent (RB 113), does not swallow the principle that a defendant is entitled to a fair trial. When viewed separately or cumulatively, the prosecutor's various acts of misconduct undermined appellant's defense, the burden of proof, and inevitably led the jury unfairly to conclude that appellant was deceptive and evil, thereby fully deserving of death. Under the circumstances of this case, there was a reasonable likelihood that the jury's guilt and penalty deliberations were thereby affected. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1240; *People v. Cain, supra*, 10 Cal.4th 1, 79.) Consequently, the misconduct cannot be considered harmless beyond a reasonable doubt under the governing *Chapman* standard of review.

B. Penalty Phase Issues and Assignments of Error

XV

THE TRIAL COURT'S PREINSTRUCTION TO ALL JURORS ENCOURAGED THE JURY TO IMPOSE THE DEATH PENALTY, REDUCED THEIR PERSONAL RESPONSIBILITY TO DETERMINE PENALTY, AND UNDERMINED APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND RENDERED THE PENALTY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTEH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Respondent concedes that all of the prospective jurors were preinstructed as set forth in appellant's opening brief. (See AOB 276-277; RB 114-116 [court's preinstruction].) Contrary to the implications of respondent's brief, the court did not read its preinstruction to all prospective jurors simultaneously. (See RB 113-114, citing only 3 RT 642-645.) As discussed in appellant's opening brief (AOB 275-276), the court preinstructed prospective jurors in groups. Ultimately, the preinstruction was read to every seated and alternate juror who sat on this case. (See AOB 275-276.)

Respondent argues once again that since appellant did not object to the trial court's preinstruction, the *constitutional* claims were waived on appeal. (RB 113.) In so arguing, respondent thus effectively concedes at the very least that the preinstruction may properly be challenged by appellant for the first time on appeal. Instructional errors are reviewable on appeal if they affect a defendant's "substantial rights." (Pen. Code §§ 1259, 1469; *People v. Prieto, supra,* 30 Cal.4th

at p. 247.)

In *People v. Dunkle* (2005) 36 Cal.4th 861, the trial court distributed to prospective capital-case jurors a printed preinstruction regarding the penalty phase of trial. The defendant challenged the court's preinstruction for the first time on appeal, asserting it was prejudicially inaccurate under the Eighth and Fourteenth Amendments to the United States Constitution. Although observing that the defendant did not object to the preinstruction or request clarification, the Court nevertheless addressed his substantive claims of error, ruling "we do not deem forfeited any claim of instructional error affecting a defendant's substantial rights." (*Id.* at p. 929.) Respondent overlooks or ignores *Dunkle.*

Respondent also overlooks that while factual issues may be subject to the waiver rule, purely legal issues -- such as the constitutional issues raised by appellant based on undisputed facts as here -- are not necessarily subject to the waiver rule and may be addressed even when raised for the first time on appeal. (*In re Sheena K., supra,* 40 Cal.4th at pp. 887-888; *People v. Percelle, supra,* 126 Cal.App.4th at p. 179; *Rosa S. v. Superior Court, supra,* 100 Cal.App.4th at p. 1188.) As explained recently by the Court in *In re Sheena K., supra*, 40 Cal.4th at p. 887, fn. 7, citing (among other cases) *People v. Williams, supra,* 17 Cal.4th at pp. 161-162, fn. 6, "[i]n general, forfeiture of a claim not raised in the trial court by a party has not precluded review of the claim by an appellate court in the exercise of that court's discretion." The Court further explained in *Sheena K.* that appellate courts typically have engaged in discretionary review "when an

otherwise forfeited claim involves an important issue of constitutional law or substantial rights." (*In re Sheena K, supra.*) Accordingly, the merits of appellant's claim of instructional error may appropriately be addressed on appeal.

As discussed in appellant's opening brief, the trial court's preinstruction was erroneous for several different constitutional reasons. The preinstruction undermined the prosecution's burden of proof, permitted the jury improperly to speculate on penalty during both the guilt and penalty phases of trial, encouraged the jury to find appellant guilty and impose the death penalty, diminished the jury's decision-making responsibilities, and prejudiced the jury against appellant through improper and inflammatory references to other convicted criminals in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See AOB 280-292.)

Respondent addresses only a single defect, asserting that the trial court "clearly" informed the jury that "*if it convicted [appellant] of life without the possibility of parole* it meant that [he] would 'never be released from prison.'" (RB 113-114 [italics added].) Respondent's analysis falls short because the jury was not asked, nor was it obligated by the court's instructions during the guilt trial, to "convict" appellant of life without the possibility of parole as respondent mistakenly asserts. During the guilt trial, the jury was asked to convict appellant of murder, not a penalty.

Respondent's analysis of this one error is wrong for other reasons as well. Respondent repeatedly offers in conclusionary terms that the jury was accurately

informed about the meaning of life without the possibility of parole. (See, e.g., RB 114 ["court's statements to the jury clearly explained that life without the possibility of parole meant just that."].) Yet the trial court's preinstruction did not simply explain the meaning of life without the possibility of parole. The instruction further informed the jury about the nature and propriety of the penalty imposed in other death penalty cases. The instruction also referred to other, well-known criminals who were given life sentences after their death sentences had been overturned, thereby rendering them parole eligible. In addition to being improper gratuitous advice about other cases (*People v. Roberts* (1992) 2 Cal.4th 271, 336, fn. 18), by the language used, the preinstruction also created doubt that life in prison did not really mean or might not mean in the future life without the possibility of parole and that appellant would never be released.

In *People v. Roybal* (1999) 19 Cal.4th 481, 525, this Court stressed that "[a] court may not give an instruction that is incorrect." Here, the instructional references to life without parole simply did not address the common misunderstanding in society that were appellant sentenced to life without the possibility of parole, he would not be eligible for release from prison for the rest of his life. Indeed, the court's comments as to parole eligibility in the same instruction as the reference to other criminals who had also been sentenced to death directly misled the jury by creating a false notion that appellant, as the other notorious criminals, might some day be eligible for parole. Further, by emphasizing parole eligibility, the court in essence invited the jury to consider

matters that were totally speculative and, at the same time, improper as criteria for determining penalty in this case. (See *People v. Ramos* (1984) 37 Cal.3d 136, 155; *People v. Griffin* (1988) 46 Cal.3d 1011, 1033; *People v. Hill, supra,* 3 Cal.4th at p. 1009.) By obvious implication as well, the instruction encouraged the jury to conclude that only the death penalty would foreclose the possibility of parole then enjoyed by the other notorious criminals and potentially appellant were he to receive a life sentence. Contrary to respondent's assertions (RB 116-117), therefore, the trial court's preinstruction was both impermissibly inaccurate and failed to explain the sentence of life without parole, contrary to the teachings of *Simmons v. South Carolina* (1994) 512 U.S. 514; *Shafer v. South Carolina* (2001) 532 U.S. 36; and *Kelly v. South Carolina* (2002) 534 U.S. 246.

In *Kelly*, even though the prosecutor argued that a sentence of death would actually be carried out and stressed the defendant would be in prison for the rest of his life, other references to life imprisonment without proper explanation were found inadequate to explain the defendant's ineligibility for parole for the rest of his life. (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 257.) Again in *Shafer*, the United States Supreme Court found constitutionally infirm other similar instructional remarks that "life imprisonment means until death." (*Shafer v. South Carolina*, *supra*, 532 U.S. at p. 52.) Such statements were also found inadequate to convey to the jury the nature of the penalty less than death. (*Id.* at pp. 52-54.)

By virtue of its references to the current parole eligibility of other criminals whose death sentences had been overturned on appeal and the inadequate

definition of the meaning of life without possibility of parole, the court here in effect informed the jury about two quite different choices: death and a limited period of incarceration. (See *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 170.) In turn, the latter, illusory choice reduced the gravity and importance of the jury's sentencing responsibility and guaranteed a death sentence because the court's preinstruction could not fail but to convey to the jury that only a death sentence would preclude any possibility that appellant in the future might become parole eligible as Manson or Sirhan Sirhan to whom the preinstruction explicitly referred.

Respondent further ignores that by its repeated references to the parole eligibility of other criminals formerly sentenced to death and whose sentences were later reduced to life imprisonment, the non-death option inevitably would be deemed insufficiently severe, further compelling the jury in this case to chose a death sentence because of the fear that appellant -- like Charles Manson or Sirhan Sirhan -- would either have his sentence commuted some day in the future, gain parole eligibility by future court action, or might somehow be considered for parole if any sentence other than death were imposed. Respondent addresses none of these defects and infirmities.

Respondent additionally fails to address appellant's claim that the repeated references in the court's preinstruction to judicial review of death sentences told the jury the that appellant's sentence, as well, if imposed, had to be reviewed and approved by appellate courts before being carried out. Respondent does not refer

either to *People v. Milner* (1988) 45 Cal.3d 227 or *People v. Farmer (*1989) 47 Cal.3d 888 or respond in any way to appellant's claim that, by virtue of those decisions, appellant's sentence must be reversed under the Eighth Amendment principles articulated in *Caldwell v. Mississippi* (1985) 472 U.S. 320. In the same vein, respondent also ignores *Caldwell.*

A death sentence may not rest on a determination made by a sentencer who has been affirmatively misled to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere. (*Caldwell v. Mississippi, supra*, 472 U.S. at pp. 328-329.) In *Milner,* this Court held that *Caldwell* error is committed when jurors are repeatedly told that that they did not have to "shoulder the burden of personal responsibility," the law "protects" them from deciding what is "just and right," and even encourages them to "hide" behind the law. (*Id.* at p. 257.) In *Farmer,* the prosecutor told the jury that whether the defendant would live or die had been decided "by the voters of this state when they passed this [death penalty] law, when they set the criteria. They decided who lives and who dies." The Court concluded that such statements were constitutionally impermissible, requiring reversal of the death sentence imposed in that case. (*People v. Farmer, supra*, 47 Cal.3d at pp. 924-931.)

Contrary to *Milner, Farmer*, and *Caldwell*, the trial court's preinstruction here diffused the jury's sense of responsibility for its verdict and permitted the jury in this case to shift responsibility for the death sentence to the appellate courts that would necessarily review and must approve appellant's death sentence. The

trial court did not simply refer to appellate review in the abstract. Its instruction emphasized the certainty of appellate review. Consequently, by virtue of the court's preinstruction, it is highly unlikely that all jurors truly believed they were actually responsible for the verdict or the imposition and execution of the death penalty if imposed.

Respondent also ignores that in its preinstruction the court anticipated many executions, thus implying at the beginning of the *guilt* phase that a sentence of death in this case would not be unanticipated or unexpected. By telling the jury its own expectations, the court actually gave its imprimatur on appellant's conviction for murder and the imposition of the death penalty generally and in this case. Just as a prosecutor may not vouch for the appropriateness of a verdict (*People v. Benson* (1990) 52 Cal.3d 754, 795), it is equally impermissible for the court at the outset of a capital case to endorse the propriety of death and to indicate in any manner its anticipation other death verdicts. By such preinstructional statements, any reasonable juror would invariably conclude that the court was indicating that a murder conviction and death verdict were also anticipated in this case.

Finally, "[e]ven assuming some error by the trial court in its initial admonishment to the jury, respondent asserts that the error was harmless. (RB 117.) Respondent fails to address the appropriate of standard for assessing the instructional error in this case as previously discussed by appellant. (See AOB 290-292.) As appellant demonstrated (AOB 290), the harm must be measured under *Chapman v. California, supra*, 386 U.S. at p. 24, not the *Watson* harmless.

Focusing only on one aspect of the error, respondent justifies harmlessness asserting only that uncontradicted evidence during the penalty phase as well as closing argument informed the jury of appellant's "parole ineligibility under a sentence of life without the possibility of parole." (RB 117.)

Just as respondent ignores substantive defects with the trial court's preinstruction, respondent also ignores reasons -- other than merely the meaning of life imprisonment without the possibility of parole -- why the instruction could not have been harmless as elsewhere discussed in appellant's opening brief. (AOB 290-292.)

In *People v. Pena* (1972) 25 Cal.App.3d 414, 429, error in the use of trial court preinstructions to the jury was deemed to have been cured by subsequent correct jury instructions given at the conclusion of trial and, more importantly, by a court admonition at the time of the preinstruction that the final instructions would govern in case of inconsistencies between the preinstructions and final instructions. Unlike *Pena*, the trial court here did not so advise the jury. The trial court did not inform the jury that its final instructions would govern; for all the jury knew, the court's preinstruction constituted the governing law which anticipated, according to the court, more death sentences. Respondent does not address this aspect of harm or offer any reasons, let alone beyond a reasonable doubt as required by *Chapman*, why the court's preinstruction did not predispose the jury to impose death in this case.

XVI

THE TRIAL COURT ABDICATED ITS RESPONSIBILITY TO CONDUCT MEANINGFUL DEATH QUALIFICATION OF THE JURY IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR PENALTY TRIAL, A FAIR AND IMPARTIAL PENALTY JURY, DUE PROCESS OF LAW, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FORUTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; THE ERROR WAS PREJUDICIAL PER SE

In addition to the statutorily and constitutionally defective general voir dire of prospective jurors demonstrated in Argument I, *supra,* the death qualification of prospective jurors was equally inadequate, deficient, and defective. As during general voir dire, the trial court did not ask even a single question of any seated juror. By its disengagement and passivity in the voir dire process, the trial court abdicated its statutory and constitutional responsibilities and failed to participate in any meaningful manner in the death qualification process. The court's failure to participate in voir dire effectively undermined the basic trial process and rendered appellant's trial fundamentally unfair. (See AOB 293-204.)

Relying on *People v. Stitely, supra,* 35 Cal.4th 515, respondent asserts that because defense counsel did not object to the trial court's nonparticipation and failure to ask any questions during voir dire, he was waived the issue on appeal. (RB 123.). Respondent omits any reference to or discussion of the actual situation in *Stitely* which, if offered, would make it immediately apparent that that decision is distinguishable from the situation here.

In addition to the use of a lengthy jury questionnaire, the trial court in

Stitely made preparatory notes on every single questionnaire. Unlike the trial court here, the court in *Stitely* then actively participated in voir dire by personally questioning prospective jurors on their views and attitudes about the death penalty. Unlike the trial court here, in *Stitely*, depending on answers given either orally or in writing, the trial court often asked additional follow-up questions. The court, as well, permitted counsel to ask questions.

On appeal, the defendant in *Stitely* did not claim that the trial court failed to participate in voir dire or failed to question prospective jurors during death qualification. Rather, defense counsel claimed only that the trial court's conduct of group voir dire coupled with limited sequestration procedures violated the defendant's federal constitutional rights to due process and an impartial jury. As to this purely procedural issue, the Court ruled it had been forfeited by the defendant's failure to raise any such complaint below. (*Id.* at p. 538.)

Respondent overlooks that the substantive process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system. (See *Press-Enterprise v. Superior Court* (1984) 464 U.S. 501, 505.) Respondent ignores that as a matter of federal and state constitutional law, the trial court did not have the power in a capital case to dispense with the voir dire and questioning of prospective jurors where a heightened degree of due process was necessary. Trial counsel could not have waived or forfeited the issue or invited the error, because no act or statement of trial counsel could confer on the trial court the discretion which it did not legally have under the Sixth and Eighth

Amendments to the United States Constitution. (See, for example, *Hughes v. United States, supra*, 258 F.3d at p. 463 [counsel cannot waive defendant's basic Sixth Amendment right to trial by impartial jury].) Hence, the withdrawal of the trial court from the voir dire process, its exclusive reliance on jury questionnaires, and its failure to engage in questioning of any prospective or seated jurors during voir dire are all cognizable on appeal regardless of whether appellant objected at trial.

At appellant's trial, the trial court personally withdrew from voir dire and abdicated its jury selection responsibilities by failing to engage any of the prospective jurors during death qualification. The purpose of voir dire is "to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process ... ." (*Press-Enterprise Co. v. Superior Court, supra,* 464 U.S. at p. 511, fn. 9.) Here, the trial court did not do so.

Respondent repeatedly offers that the trial court did not have to participate in voir dire or question prospective jurors during death qualification. (RB 118, 123, 124.) Respondent tries to distinguish both *People v. Stewart, supra,* 33 Cal.4th 425 and *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1239 which severely criticized the exclusive use and reliance on jury questionnaires as the basis for determining juror views on capital punishment and substantial impairment under *Wainwright v. Witt, supra,* 469 U.S. at p. 424. According to respondent, these cases are distinguishable because the questionnaire here used was sufficiently comprehensive in and of itself to provide the court with

all the information needed to determine whether prospective jurors were biased in favor of death. (RB 123.) Respondent conflates and confuses comprehensive questions with comprehensive responses. One does not necessarily flow from the other.

At the time of appellant's trial in 1996, the California Code of Civil Procedure section 223 provided in part that, "In a criminal case, the court shall conduct an initial examination of prospective jurors." Nothing in section 223 contemplates or sanctions the substitution of written questionnaires for the required examination in open court. As this Court recently pointed out in *People v. San Nicolas, supra,* 34 Cal.4th 614, section 223 gives the trial court discretion in the manner in which voir dire is conducted, so long as it takes place in open court. (*Id.* at p. 632 and fn. 3.)

In *People v. Stewart, supra*, this Court stressed that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear in a jury questionnaire. "Indeed, as the high court noted in *Witt*, '[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." (*People v. Stewart, supra*, 33 Cal.4th at p. 451.) Respondent is thus wrong in asserting that a questionnaire alone -- however comprehensive -- may suffice or substitute for follow-up oral voir dire. Absent

clarifying follow-up examination to questionnaire responses during which the trial court would be able to explain the role of jurors in the judicial system, examine the demeanor of prospective jurors, and make assessments as to the ability of potential jurors to weigh a death penalty decision, "bare written responses" in jury questionnaires are simply insufficient to establish a basis for exclusion for cause. (*People v. Stewart, supra*, 33 Cal.4th at p. 448, 451-452.)

These standards apply to jury selection in a capital case under both the federal and state constitutions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1246, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 and *People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Heard, supra,* 31 Cal.4th at p. 958.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Jones, supra,* 29 Cal.4th at p. 1246.)

Appellant was entitled under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, sections 15 and 16 of the California Constitution to be tried by a fair, representative, and impartial jury, "a right of particular significance in capital cases because of the magnitude of the decision and because jury unanimity was required." (*Gray v. Mississippi, supra,* 481 U.S. at p. 659, fn. 9; see also *id.* at pp. 658, 668; *Morgan v. Illinois, supra,* 504 U.S. at pp. 726-728.) The trial court at appellant's trial was obligated therefore to determine that the jurors ultimately selected to serve on the jury in his case did not

hold views concerning capital punishment that would "'prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath.'" (*Wainwright* v. *Witt, supra,* 469 U.S. at p. 424, quoting *Adams* v. *Texas* (1980) 448 U.S. 38, 45; U.S. Const., 6th & 14th Amends.; see also *Gray v. Mississippi, supra,* 481 U.S. at p. 668 ["*Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury"]; *Darden v. Wainwright* (1986) 477 U.S. 168, 178; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 21; *People v. Cunningham, supra,* 25 Cal.4th at p. 975.)

In the capital context, the United States Supreme Court has emphasized that, "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) The voir dire process is therefore essential to the court's ability to make these assessments of a juror's qualifications to serve.

The expectation that the critical process of examining jurors will take place through "live" questioning in open court is well-settled in federal and state law. Moreover, this "open court" examination is integral to the constitutional validity and integrity of both the jury selection and trial process. The United States Supreme Court has repeatedly explained that the touchstone of a fair trial is an impartial trier of fact -- a jury capable and willing to decide the case solely on the

evidence before it. (*Smith v. Phillips, supra,* 455 U.S. at p. 217.) "Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." (*McDonough Power Equipment, Inc. v. Greenwood, supra,* 464 U.S. at p. 554.) In addition, the High Court has observed that the trial court's determination of a prospective juror's bias "has *traditionally been determined through voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind ... [and] such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." (*Wainwright v . Witt, supra,* 469 U.S. at p. 429 [italics in original; footnote omitted].) Thus, the literal *examination* of jurors verbally, in open court, so their demeanor may be observed and their views explored, is key to these determinations.

In *Morgan v. Illinois, supra,* 504 U.S. 719, the United States Supreme Court discussed at length the critical importance of voir dire to a reasonable determination of juror bias. The court observed, inter alia, as follows:

> [I]t is true that '[v]oir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion."' *Ristaino v. Ross,* 424 U.S. 589, 594 [] (1976) (quoting *Connors v. United States,* 158 U.S. 408, 413 [] (1895)). The Constitution, after all, does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. *Dennis v. United States,* 339 U.S. 162, 171-172 [] (1950); *Morford v. United States,* 339 U.S. 258, 259 []

> (1950). 'Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' *Rosales-Lopez v. United States,* 451 U.S. 182, 188 [] (1981) (plurality opinion). Hence, '[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness.' *Aldridge v. United States,* 283 U.S. 308, 310 [] (1931)."
>
> (*Morgan v. Illinois*, 504 U.S. at pp. 729-730 [footnotes omitted].)

The defendant's interests in this process are equally important, and, consequently, the High Court has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections, see, *e.g., Turner v. Murray,* 476 U.S. [28,] 36-37 [1986]; *Ham v. South Carolina,* 409 U.S. 524, 526-527 [] (1973)." (*Morgan v. Illinois, supra*, 504 U.S. at p. 730.)

The long line of United States Supreme Court opinions which set out the principles and procedures to be used in the selection of an unbiased jury in capital cases all contemplate actual voir dire of potential jurors by the trial court. (See *Gray v. Mississippi, supra,* 481 U.S. at pp. 651-657; *Ross v. Oklahoma, supra,* 847 U.S. at p. 83; *Darden v. Wainwright, supra,* 477 U.S. at pp. 175-178; *Wainwright v. Witt, supra,* 469 U.S. at pp. 415-416; *Adams* v. *Texas, supra,* 448 U.S. at pp. 41-42; *Witherspoon v. Illinois, supra,* 391 U.S. 510, 514-515; see also *Lockhart v. McCree, supra,* 476 U.S. at p. 166; *Patton v. Yount, supra,* 467 U.S. at p. 1027;

Davis v. Georgia (1976) 429 U.S. 122 and *Davis v. State (Georgia)* (1976) 225 S.E.2d 241, 243; *Maxwell v. Bishop* (1970) 398 U.S. 262, 264-265; *Boulden v. Holman, supra,* 394 U.S. at pp. 482-483; *Irvin v. Dowd, supra,* 359 U.S. at p. 397; *Reynolds v. United States, supra,* 98 U.S. at pp. 156-157.)

There is no suggestion, direct or indirect, in any of these cases, that a written questionnaire could ever substitute for actual voir dire as asserted by respondent. On the contrary, these opinions have consistently emphasized the importance of the prospective jurors' physical presence in court for questioning so that the trial court can observe them.

Patton v. Yount, supra, 467 U.S. 1025, is instructive on this point. There, the Supreme Court reflected on the federal statutory rule of deference to trial court determinations of venire members' bias as follows:

> There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. First, the determination has been made only *after an often extended voir dire proceeding designed specifically to identify biased veniremen*. It is fair to assume that the method we have relied on since the beginning, e.g., *United States v. Burr*, 25 F.Cas. No. 14,692g, p. 49, 51 (No. 14,692g) (CC Va.1807) (Marshall, C.J.), usually identifies bias. Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'"
>
> (*Patton v. Yount*, *supra*, 467 U.S. at p. 1038 [italics added.)

Quoting from *In re Application of National Broadcasting Co.* (1981) 209 U.S.App.D.C. 354, 362, 653 F.2d 609, 617, the *Yount* Court observed that "'voir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner[.]'" (*Patton v. Yount, supra,* 467 U.S. at p. 1038, fn. 13.)

The *Yount* Court also noted that "Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated voir dire calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible." (*Id.* at p. 1038, fn. 14.) Clearly, the live examination of jurors in open court by the trial court is integral to the jury selection process.

In *Wainwright v. Witt, supra*, 469 U.S. 412, 429, the Supreme Court opined that "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." Implicit in this observation is the *Witt* Court's assertion that "determinations of juror bias cannot be reduced to question-and-answer sessions that obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough

questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. [] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully *infra,* this is why *deference must be paid to the trial judge who sees and hears the juror.*" (*Id.* at pp. 424-426 [footnote omitted; italics added]; see also *Darden v. Wainwright, supra,* 477 U.S. at p. 178 [trial court aided by observing prospective juror's demeanor].)

In *Morgan v. Illinois, supra,* 504 U.S. 719, the United States Supreme Court specifically focused on the necessity of voir dire in the context of *Witherspoon* concerns, stating that "the principles first propounded in *Witherspoon v. Illinois,* 391 U.S. 510 [] (1968) ... demand inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting." (*Id.* at p. 731 [fn. and parallel citations omitted].)

The United States Supreme Court opinions in *Boulden v. Holman, supra,* 394 U.S. 478 and *Maxwell v. Bishop, supra,* 398 U.S. 262, elucidate this point. These pre-*Witherspoon* trials, in which voir dire had been conducted, reached the High Court post-*Witherspoon*, and the Court found the voir dire inadequate because it did not sufficiently explore the jurors' attitudes beyond their simple answers.

The *Boulden* Court found that jurors had been wrongfully excluded because the voir dire was insufficient to determine whether, in spite of statements that they had a fixed opinion against capital punishment or did not believe in it, those excluded were "able as [jurors] to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (*Boulden v. Holman, supra,* 394 U.S. at pp. 482-484.)

If, as these cases make clear, an *actual* voir dire examination can be constitutionally insufficient to make the determination required by *Witherspoon*, it necessarily follows, contrary to respondent's repeated assertions, that sole reliance on a written questionnaire without any personal questioning or participation by the trial court in the voir dire process, is implicitly insufficient. The notion that in-person questioning of potential jurors is basic to a constitutionally-valid determination of fitness to serve is not new. Over 120 years ago in *Reynolds v. United States, supra*, 98 U.S. 145, the United States Supreme Court let stand the trial court's ruling not to exclude an apparently biased juror following voir dire, observing that potential jurors sometimes even "seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." (*Id.* at pp. 156-

157.) Indeed, a sufficiently comprehensive questioning and examination of jurors is so crucial to the voir dire function of determining fitness to serve that even when jurors' answers are indicative of bias, the High Court has still found voir dire inadequate where the questioning is insufficient to fully explore the jurors' views.

Like the United States Supreme Court, this Court has emphasized that "a prospective juror who simply would find it 'very difficult' to impose the death penalty, is entitled -- indeed, duty-bound -- to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart, supra,* 33 Cal.4th at p. 446.)

A review of the specific line of cases in which this Court has reviewed trial court evaluations of prospective jurors under *Wainwright* establishes that actual voir dire has been the process consistently used in the trial courts to provide information sufficient for making a reliable determination of this nature. (*See, e.g., People v. Bolden, supra,* 29 Cal.4th 515; *People v. Boyette* (2002) 29 Cal.4th 381, 417-418; *People v. Farnam* (2002) 28 Cal.4th 107, 133; *People v. Ayala* (2000) 24 Cal.4th 243, 275.) In fact, in *Bolden*, this Court stated that "[t]he trial court may excuse for cause a prospective juror who on voir dire expresses views about capital punishment, either for or against, that 'would "prevent or substantially impair"' the performance of the juror's duties as defined by the court's instructions and the juror's oath.'" (*People v. Bolden*, supra, 29 Cal.4th at pp. 536-537.)

The trial court's duty with regard to jury selection under state law is the same today as it was when this Court defined it nearly a century ago:

> "It [is] the function of the trial court to determine the true state of mind of each member of the panel who [is] questioned touching his qualifications to serve as a juror. Frequently there is a conflict between different portions of the testimony given during an examination on voir dire, due not always to the lack of candor on the part of the person examined but to his misunderstanding of the questions asked and of the duties of a juror, until such duties are explained by the court. When such conflict occurs, the trial court must decide, if possible, which of the answers most truly reveals the state of the [venire member's] mind."
>
> (*People v. Loper* (1910) 159 Cal. 6, 11.)

Thus, the law contemplates that each prospective juror will be examined regarding his or her views.

Six years before appellant's trial, in *Lesher Communications, Inc. v. Superior Court (Contra Costa)* (1990) 224 Cal.App.3d 774, a case involving public access to juror questionnaires, the Court of Appeal drew a distinction between the questionnaires of people questioned during voir dire and those who were not. In ruling that only the questionnaires of prospective jurors *actually questioned* are accessible to the public, the court explained that,

> "[W]e assume that these questionnaires play no role whatsoever until a prospective juror is actually called to the jury box. The *Press-Enterprise* Co.*[v. Superior Court* (1984) 464 U.S. 50] court rested its decision that voir dire must be open to the public on the

> the interest of the public in open criminal trials. A review of the history and tradition of open criminal proceedings in English and American courts led to the conclusion that an open trial included an open voir dire. However, venire persons who are never called to the jury box do not play any part in the voir dire or the trial. They fill out the questionnaire only as a prelude to their participation in voir dire. *The questionnaire serves no function in the selection of the jury unless the person filling it out is actually called to be orally questioned."*
>
> (*Id.* at p. 779 [italics added].)

Lesher Communications thus contradicts respondent's argument that jurors in this case did not require personal questioning by the trial court because their questionnaires alone were sufficient to provide the court with all the necessary information. To the contrary, as the *Lesher* Court's pronouncement makes clear, without the actual examination of prospective jurors, the voir dire process has neither substance nor legal significance.

Although in *People v. Brown* (2004) 33 Cal.4th 382, this Court relied on *Witt* to hold that it does not violate the constitution to "leave to the judgment of the trial court the determination whether a prospective juror's attitude toward imposing the death penalty will support an excusal for cause" (*id.* at p. 403 [citation to *Wainwright v. Witt, supra,* 469 U.S. at pp. 424-429 omitted]), this in no way vitiates appellant's position. In *Witt*, the trial court had conducted actual voir dire. *(Id.* at pp. 415-416.) Thus, as appellant asserts, the essence of voir dire is the questioning, and the trial court's failure to conduct such questioning in his

case violated appellant's rights under both the state and federal constitutions. Neither *Witt* nor any other United States Supreme Court case sanctioned the truncated procedure used by the trial court in appellant's case in which the court withdrew totally from voir dire and failed to ask any follow-up questions of any of the prospective jurors who were ultimately seated in this case.

In the capital jury selection context, this Court has instructed that "given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death." (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 81.)

The trial court in appellant's case utterly failed to safeguard the neutrality, diversity, or integrity of appellant's jury. Indeed, the trial court's conduct in this case completely undermined these laudable and constitutionally-mandated principles which are so crucial to ensuring and protecting a defendant's right to fair trial and due process.

Finally, respondent asserts that appellant is required to show how he was prejudiced by the trial court's failure to question the jurors seated in this case. (RB 134.) Respondent ignores that the trial court's failure to conduct meaningful or constitutionally adequate death qualification voir dire makes it impossible to determine precisely from the record whether any of the prospective jurors who were ultimately seated as jurors or alternates held disqualifying views. The court's error is thus structural and requires reversal per se of the penalty. (See

Morgan v. Illinois, supra, 504 U.S. at p. 739; see also *People v. Holt, supra,* 15 Cal.4th at p. 661].)

Respondent also overlooks that where, as in this case, there has been no voir dire examination by the trial court and no follow-up questioning by the court, the usual rule of appellate review requiring deference to a trial court's decision as to bias or substantial impairment cannot apply because there is nothing on which the reviewing court's deference can operate. Deference is conferred where the trial court actually engaged in a process calculated to elicit evidence of impermissible or other substantial impairment in a juror's ability to abide by his or her oath. Such proceedings would indeed generate evidence or information to which the reviewing court might well defer.

The long line of opinions by this Court that have established and relied on the rule of deference to trial court rulings concerning juror qualifications all involved determinations of bias made after personal questioning of the venire by the court through voir dire. (*See, e.g., People v. San Nicolas*, *supra*, 34 Cal.4th at p. 634 [trial court considered questionnaire and asked follow-up questions in voir dire that "covered the range of issues necessary to establish bias and test the prospective jurors' feelings and attitudes toward the death penalty"]; *People v. Ghent, supra,* 43 Cal.3d at p. 768; *People v. Fields, supra,* 35 Cal.3d at pp. 354-355; *People v. Eudy, supra,* 12 Cal.2d at pp. 44-45; *People v. Craig, supra,* 196 Cal. at pp. 25-26 [trial court's "position" is superior to that of reviewing court whose examination is limited to record]; *People v. Loper, supra,* 159 Cal. at p. 11;

People v. Ryan (1907) 152 Cal. 364, 371; *People v. Fredericks* (1895) 106 Cal. 554, 559-560; *People v. Wong Ark* (1892) 96 Cal. 125, 127.) In appellant's case, therefore, the trial court's conduct of death qualification without voir dire is not entitled to deference.

Even if the standard reserved for errors of constitutional dimension were to apply (see *Chapman v. California, supra,* 386 U.S. at p. 24), the trial court's failure to conduct meaningful death qualification voir dire in this case cannot be deemed harmless beyond a reasonable doubt. As amply demonstrated in appellant's opening brief (AOB 295-312), virtually every seated and alternate juror in this case provided ambiguous questionnaire responses demanding some follow-up questioning by the trial court. As more fully discussed in Argument XVII, *infra*, because the trial court disengaged from death qualification and jury voir dire, at least six of the seated jurors were biased or prejudiced in some manner against appellant at trial. For example, Juror No. 1 indicated she would not be willing to weigh and consider all of the aggravating and mitigating factors presented before deciding penalty. (See AOB 331-332.) Respondent concedes that Juror No. 1 so stated her unwillingness. (RB 128.) Juror No. 3 indicated it would be difficult to follow the court's instructions as to the burden of proof and presumption of innocence, and he strongly favored the death penalty. (AOB 332.) Respondent fails to note that Juror No. 3 also indicated in his questionnaire that he was dubious about his own ability to be a fair and impartial juror. Juror No. 12 stated in her questionnaire that the death penalty was warranted for anyone who

killed another person and that a person serving life imprisonment without the possibility of parole was like "being catered to for a crime committed." She also indicated even a senseless killing warranted the death penalty. Juror No. 12 further asserted that the death penalty was used too seldom and that too few people have been executed. (See AOB 335.)

Despite these and other juror responses discussed in Argument XVII, *infra*, respondent remains adamant that nothing indicates substantial impairment or bias. (RB 133.) Respondent is just plain wrong. The noted juror responses in this case reveal and expose bias and impartiality in favor of the death penalty, juror unwillingness to consider all types of mitigating evidence, and prejudicial inability of seated jurors to remain impartial during the penalty trial until submission of the case. (See *People v. Avena, supra,* 13 Cal. 4th at pp. 413-414; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1085-1087.) Accordingly, even under the standard reserved for errors of constitutional dimension (*Chapman v. California, supra,* 386 U.S. at p. 24), the trial court's failure to conduct meaningful death qualification voir dire in this case to probe juror questionnaire responses cannot be deemed harmless beyond a reasonable doubt.

The procedure adopted and followed by the trial court to withdraw from voir dire and not ask follow-up questions was woefully inadequate and constitutionally deficient, because it did not sufficiently permit the exploration of prospective jurors' attitudes beyond their simple questionnaire responses. As a consequence, biased jurors were selected and seated in this case, and appellant's

fundamental rights to be fairly tried by an impartial jury drawn from a representative cross-section of the community, to due process, the right to a reliable determination of guilt and penalty, and to equal protection of the laws guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were egregiously violated.

XVII

APPELLANT'S JURY INCLUDED JURORS WITH ACTUAL PENALTY BIAS IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY IMPARTIAL JURY, DUE PROCESS, AND A TO RELIABLE DETERMINATION OF PENALTY GUARANTEED THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS; THE CONSTITUTIONAL VIOLATIONS AS TO PENALTY ARE REVERSIBLE PER SE

Owing perhaps to haste, or, conceivably, intended for greater emphasis, respondent makes the same points twice. The material beginning in respondent's brief on page 138 at line 21 with the line "Foster contends that the penalty must be reversed ... " and ending at page 142 at line 24 with the line "ones he singles out in this argument, ... " is identical to the material beginning with the first line under the Argument XVII heading on page 134 reading "Foster contends that the penalty must be reversed ... " and ending at line 20 on page 138 with the line "ones he singles out in this argument, ..."

In addition, the end of line 20 on page 138 is cut off and appears to be an incomplete sentence as it now reads. The cut-off sentence (ending at the line 20 on page 138) apparently continues with the last line on page 142 reading "penalty. Consequently, his claim ... ."

Appellant respectfully requests, therefore, that the material in respondent's brief commencing at page 138, line 21, and ending at page 142, line 24, either be stricken from the brief as confusing, duplicative, and superfluous, or, instead, disregarded or simply ignored for the same reasons. (Cal. Rules of Court, rule 8.204(e); *Concerned McCloud Citizens v. McCloud Community Services Dist.*

(2007) 147 Cal.App.4th 181, 190, fn. 3 [unnecessary material ordered stricken from supplemental brief]; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1254, fn. 15 [improper material disregarded]; *Berg v. Taylor* (2007) 148 Cal.App.4th 809, 812, fn. 2 [portions of improper brief ignored].)

In the opening brief (AOB 331-343), appellant demonstrated that Jurors Nos. 1, 3, 7, 10, 11, and 12 -- one-half of the seated guilt and penalty jurors -- were actually biased as to penalty thereby denying appellant a fair trial, due process, and to a reliable determination of penalty guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, section 16 of the California Constitution.

The United States Supreme Court has held that any claim the jury was not impartial must focus on the jurors who ultimately sat. (*Ross v. Oklahoma, supra,* 487 U.S. at p. 86.) By selectively omitting key questionnaire and voir dire responses, respondent fails to address the entire responses of the assertedly biased jurors. (See RB 135-138.) Respondent additionally ignores that the death qualification process was also flawed in that the trial court totally abdicated its responsibilities to clarify ambiguous responses or reliably expose disqualifying bias in the ultimately seated jurors.

In *People v. Boyette, supra*, 29 Cal.4th 318, this Court held that a juror who gave answers strikingly similar to many jurors' answers in this case should have been excluded for cause from a capital jury under the *Witt* standard. (See *Wainwright v. Witt, supra,* 469 U.S. at p. 424.) The *Boyette* juror indicated both

that he was strongly in favor of the death penalty and that he was "somewhat pro-death." (*Id.* at pp. 417-418.) Although agreeing that he could vote for life if it was appropriate, the juror also stated he would "probably have to be convinced" to vote for life and "would be more inclined to go with the death penalty." (*Ibid.*) He equivocated when asked other questions whether he could consider a life term. He also could not "assume" a life sentence without parole meant exactly that. On appeal, this Court s concluded the juror was biased. "This was not a case in which the juror gave equivocal answers: He was strongly in favor of the death penalty and was not shy about expressing that view. He indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty. . . ." (*People v. Boyette, supra,* 29 Cal.4th at p. 419.)

Respondent fails to address the similarity of the responses of Juror Nos. 1, 3, 10, 11, and 12 to the responses of the biased juror in *Boyette.* In her questionnaire, Juror No. 1 indicated that she would *not* be willing to weigh and consider all the aggravating and mitigating factors presented before deciding the penalty. Juror No. 3 said it would be difficult to follow court's instruction as to the presumption of innocence. Juror No. 3 indicated the enforcement of the death penalty was a mockery in this state. He stated bias in favor the death penalty: "*I favor the death penalty no doubt about that.*" (5 RT 1386 [italics added].) Finally, he even questioned his ability to be fair and impartial juror: "Only that my

background in police training may make it very difficult" and also questioned whether his "police atmosphere can be subdued." (Supp B -- Juror Questionnaires CT 1125.) As to the consideration of psychiatric evidence in mitigation, Juror No. 3 said he would not give any weight to such evidence. According to the United States Supreme Court, jurors unable to consider mitigating evidence must be excused. (*Morgan v. Illinois, supra*, 504 U.S. at p. 507.)

Juror No. 10 leaned toward the death penalty. Indeed, Juror No. 10 also described herself as "very pro-death as far as death penalty." (See 4 RT 875, 877.) As to whether she could consider both aggravating and mitigating evidence, Juror No. 10 stated she was unsure and that it would very difficult. (4 RT 880.) Here, too, the responses of Juror No. 10 are virtually identical to those given by the juror deemed by this Court in *Boyette* to have been biased.

Respondent takes solace in the response of Juror No. 11 that she would "listen" to psychological testimony (RB 137), although the same juror elsewhere indicated she would be unable to weigh and consider *any* evidence or circumstances that "causes sympathy or extenuates the gravity of the crime," including a person's life history, terrible abuse as a young child, abandonment, and so forth, all of which were involved in this case. (6 RT 1565.) Respondent ignores that appellant was entitled to jurors who could hear his case impartially, not someone who tentatively promised to try or simply to listen. Juror No. 11 said she would only listen to mitigating evidence yet remained unable to consider a large class of mitigating evidence that appellant would likely introduce in this

case. Like Juror No. 3 who also stated he would not give any weight to mitigating evidence, so, too, Juror No. 11, should have been excused. (*Morgan v. Illinois, supra*, 504 U.S. at p. 507.)

Finally, Juror No. 12 expressed deep reservations about the suitability of life imprisonment without the possibility of parole as an alternative to the death penalty.[5] He thought life prisoners were being "catered to." He also believed that the death penalty was imposed too seldom and that too few people were ever executed. While conceding that Juror No. 12 stated that senseless killings warranted the death penalty, respondent insists nevertheless the juror was not biased because he also stated the death penalty should not be imposed lightly. (RB 138.)

In *Wainwright v. Witt, supra*, 469 U.S. 412, the United States Supreme Court held that a trial court may excuse a prospective juror for cause whenever the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424,; see also *Witherspoon v. Illinois, supra,* 391 U.S. at pp. 522-523, fn. 21.) The High Court further emphasized that this standard does not require that a juror's bias be proved

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[5]/ Appellant referred to Juror No. 12 as a male juror at AOB pp. 56-58 but erroneously referred to the same juror as a female at AOB p. 335, lines 7 and 9. Juror No. 12 was a San Bernardino County employee with reserve sheriff training whose wife was a full-time San Bernardino County employee in Victorville (where the trial took place) and whose sister-in-law worked in the District Attorney's office as a "victim witness secretary." Appellant respectfully requests, therefore, that the two pronoun references to "she" in respect to Juror No. 12 at AOB p. 335, lines 7 and 9, be changed to read "he."

with "unmistakable clarity." (*Ibid.*) The relevant determination is not whether a prospective juror would always or automatically vote for one penalty or the other; nor is the question strictly whether the individual is unable to follow the law as respondent seems to imply. (RB 135.)

Here, it is apparent -- if not unmistakably clear -- that the responses of Jurors Nos. 1 and 3, 10, 11, and 12 did not manifest the requisite fairness and impartiality required both by this Court and the United States Supreme Court consistent with the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as defined in *Witt*. The responses of these jurors were virtually indistinguishable from those made by the juror deemed biased in *Boyette*. Thus, applying the constitutional standard of *Witt* -- which respondent appears to ignore -- the views of Juror Nos. 1, 3, 10, 11, and 12 at the very least prevented or impaired the performance of their duties as to penalty, compelling reversal of appellant's death sentence in this case.

XVIII

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND PROTECTION FROM THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY GUARANTEED BY THE FIFTH, EIGHTH AND, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In the opening brief, appellant discussed that the failure to conduct comparative or intercase proportionality review of death sentences violates his right to be protected from the arbitrary and capricious imposition of capital punishment, as well as his rights to a fair trial, due process, and equal protection of the laws guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Respondent argues that since this Court has already determined that intercase proportionality is not constitutionally required, citing *People v. Morrison* (2004) 34 Cal.4th 698, 730 and *People v. Box, supra,* 23 Cal.4th at p. 1217, and as the contention has long been settled, there is no need for the Court to revisit the issue. (RB 143.)

In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Appellant acknowledged that since *Pulley v. Harris, supra*, this Court has consistently held -- albeit without

discussion or analysis -- that intercase proportionality review by the trial or appellate courts is not constitutionally required. (See, for example, *People v. Beames* (2007) 40 Cal.4th 907, 935; *People v. Bell* (2007) 40 Cal.4th 582, 621; *People v. Smith* (2007) 40 Cal.4th 483, 527; *People v. Williams* (2006) 40 Cal.4th 287, 338; *People v. Stanley* (2006) 39 Cal.4th 913, 966.) So, too, has the Court consistently ruled that equal protection does not required that capital defendants be afforded the same sentence review as other felons in the noncapital context. (See, for example, *People v. Beames, supra*, 40 Cal.4th at p. 935; *People v. Rogers* (2006) 39 Cal.4th 826, 894; *People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Boyer, supra,* 38 Cal.4th at p. 484.) For the reasons fully discussed in appellant's opening brief (AOB 344-355), the Court should reevaluate its reliance on *Pulley v. Harris, supra.*

XIX

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND TO A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In his appellant's opening brief, appellant demonstrated that the trial court erred in failing to instruct the jury on the proper use of victim-impact evidence by denying his proffered penalty Special Instruction No. A2. (AOB 357-364.) As discussed in the opening brief, Gayle Johnson's daughter testified during the penalty trial about her mother's virtues and her closeness to her family, children, and grandchildren. During his penalty-phase closing argument, the prosecutor emphasized this victim-impact evidence and stressed its importance in the jury's determination of penalty. Given the obvious inflammatory nature of the crime and its circumstances, in the absence of some guidance how the victim-impact evidence should be evaluated by the jury, there was a very real danger that the penalty determination would simply become an irrational, emotional decision. An appropriate limiting instruction on the use and consideration of victim-impact evidence was therefore necessary.

Respondent counters that CALJIC No. 8.84.1 adequately guided the jury in its sentencing discretion in that the instruction told the jury that "it must neither be influenced by bias or prejudice against the defendant, nor swayed by public

opinion or public feelings." (RB 144, 147-148.)

Respondent overlooks that appellant's proposed Special Instruction A2 was governed both by statute and well-established legal principles. As noted in 1 Witkin, *Cal. Evidence 4th* (2000) Circum. Evid. § 30, p. 360, "[s]ome evidence may be relevant for one purpose and inadmissible for another purpose, either because it is irrelevant or because some rule excludes it for that other purpose. It may be admitted, but only for the proper purpose, and under instructions of the court so limiting it." Evidence Code section 355 has codified this rule, requiring upon request an appropriate instruction limiting to its proper scope the use or consideration of evidence admitted for one purpose and inadmissible as to another. This Court has characterized Evidence Code section 355 as "mandating [a] limiting instruction upon request. (*People v. Falsetta* (1999) 21 Cal.4th 903, 914.) Thus, the failure to give a limiting instruction upon request is error when evidence, as here, is introduced for a limited purpose. (*People v. Miranda* (1987) 44 Cal.3d 57, 83.) It is even error simply to refuse, as here, an arguably infirm proposed instruction rather than modifying it to give the jury appropriate guidance. (*People v. Falsetta, supra*; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1318.)[6]

The rule requiring a limiting instruction is a complement to the trial court's

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[6]/ Although the Court in *People v. Harris* (2005) 37 Cal.4th 310, 358-359 upheld a trial court's refusal to instruct the jury with an instruction containing some of the language in appellant's proposed Special Instruction A2 (see *id.* at p. 358 [text of proposed *Harris* instruction]), the Court gave no indication that it was asked to or even considered the right to an instruction regardless of the correctness of the version requested. Hence, *Harris* is not dispositive. (*People v. Braxton* (2004) 34 Cal.4th 798, 819.)

power to exclude unduly prejudicial evidence embodied in Evidence Code section 352. Both sections 352 and 355 of the Evidence Code deal with the dilemma created when evidence is offered for a legitimate purpose but may be misused by the jury for another, improper or inadmissible purpose. Exclusion is the more drastic remedy, and, within limits, it is discretionary. While the use of a limiting instruction may be the fallback solution, it is mandatory when proposed as in this case. (*Adkins v. Brett* (1920) 184 Cal. 252, 258-259; *People v. Sweeny* (1960) 55 Cal.2d 27, 42-43; see also *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 544.)

Contrary to respondent's suggestions (RB 147), appellant was not required to have proposed initially an absolutely correct instruction in order to become entitled to the protection of a limiting instruction. (*People v. Falsetta, supra*, 21 Cal.4th at p. 924; *People v. Jennings, supra*, 81 Cal.App.4th at p. 1318.) Respondent ignores that the key language of appellant's proposed instruction was drawn from *People v. Edwards, supra,* 54 Cal.3d 787 in which the Court stressed that the trial court "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper rule or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.) Thus, appellant's proposed instruction on the whole appropriately directed the jury to the

purpose of the victim-impact evidence, reminded the jury of the issue on which it was to focus -- the appropriate punishment for appellant -- and advised the jury not to let emotional evidence and argument interfere with its sober and rational exercise of judgment on that question. Even assuming for purposes of argument that some of the wording of appellant's proposed instruction might have been better stated, it would have been a minor matter to change any improper language. However, it was not within the trial court's discretion to refuse entirely to give appellant's proffered instruction because of disagreement with some of the wording. (*People v. Falsetta, supra*, 21 Cal.4th at p. 924; U.S. Const., 8th & 14th Amends.)

Finally, respondent argues that the reasoning of *People v. Ochoa, supra,* 26 Cal.4th 398 applies here. (RB 146-147.) In *Ochoa*, the Court found another instruction (similar to that proposed by appellant in this case) had been properly refused as the information was elsewhere covered in CALJIC No. 8.84.1. (See RB 147.) Refusal of the instruction involved in *Ochoa* was also upheld on the ground that it was found confusing in *People v. Harris, supra,* 37 Cal.4th at pp. 358-359. In neither case, however, did the Court give any indication that it had been asked to or did consider the contentions raised and principles brought to the Court's attention in the present case. An appellate court's opinion is not authority for propositions the court did not consider, such as those raised by appellant in this case. (*People v. Braxton, supra,* 34 Cal.4th at p. 819.) Respondent's reliance on *Ochoa*, therefore, is misplaced.

In any event, the version of CALJIC No. 8.84.1 given to appellant's jury did not fulfill the functions of a limiting instruction. Unlike appellant's proposed special instruction, CALJIC No. 8.41.1 did not draw the jury's attention to the victim-impact evidence and did not identify the proper and prohibited uses of this evidence. The only part of CALJIC No. 8.84.1 even marginally relevant to appellant's requested instruction was the general admonition to accept and follow the law which, in one form or another, is given in every trial. The language of CALJIC No. 8.84.1 totally fails to implement the requirements of Evidence Code section 355 that when evidence has been admitted for one purpose but is inadmissible for another purpose, as the victim-impact evidence in this case, the trial court upon request must restrict the evidence to its proper scope and so instruct the jury. That cannot be done without mentioning the evidence at issue.

As a state-law error in a capital trial, the failure to give appellant's proffered limiting instruction requires reversal because it is at least reasonably possible that the error affected the verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) That the jury is presumed to have followed other instructions, including CALJIC No. 8.84.1, does not -- as respondent asserts (RB 148) -- address either the error involved or the correct standard of review. The reason for a limiting instruction in this case was to permit a fair trial and a reliable and individualized penalty determination. Its refusal thus violated appellant's Fourteenth Amendment right to due process and the Eighth Amendment's guarantee of a reliable penalty determination. It also violated appellant's due

process right to the protections of state law and to equal protection of those laws. (U.S. Const., 14th Amend.; Evid. Code § 355; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Reversal is required because the state cannot show that the error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.) Indeed, respondent does not even try.

XX

THE JURY INSTRUCTIONS ON THE MITIGATING AND AGGRAVATING FACTORS IN § 190.3, AND THE JURORS' APPLICATION OF THESE SENTENCING FACTORS, RENDERED APPELLANT'S DEATH SENTENCE CAPRICIOUS AND ARBITRARY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Respondent does not dispute appellant's claim that, given the expansive interpretation of Penal Code section 190.3, subdivision (a) [factor (a)] by this Court, virtually any circumstance of the crime can be argued as aggravating. Nor does respondent dispute that section 190.3, subdivision (a) allows prosecutors to make the kind of diametrically inconsistent arguments described in appellant's opening brief. (AOB 368-372.) Respondent's position, rather, is that there is nothing wrong with a death penalty scheme, including the implementing jury instructions (CALJIC Nos. 8.85, 8.87, and 8.88) that permits prosecutors to argue and juries to find that every capital homicide is aggravating. (See RB 151-152.)

Respondent initially asserts that since appellant neither challenged the implementing instructions pertaining to Penal Code section 190.3 nor sought clarifying instructions in the trial court, he has waived any claims of instructional error on appeal. (RB 150.) At the same time, respondent concedes that the Court has consistently considered the merits of challenges to California's death penalty without discussing whether these challenges were raised at trial. (RB 150.) Instructional errors, of course, are reviewable on appeal to the extent they affect the defendant's "substantial rights" whether or not objections were first raised at

trial. (Pen. Code §§ 1259, 1469; *People v. Prieto, supra,* 30 Cal.4th at p. 247.)

Recently, in *People v. Beames, supra,* 40 Cal.4th 907, although recognizing that there is a constitutionally required narrowing function, the Court held that a constitutionally valid death penalty statute is not required to exclude most murders from eligibility for the death penalty. (*Id.* at p. 934.) Appellant respectfully disagrees with this Court as posited in *Beames* that the United States Supreme Court has effectively abandoned a genuine narrowing requirement.

The Court in *Beames* cited *Tuilaepa v. California* (1994) 512 U.S. 967, 971-972, and Justice Kennard's concurring opinion in *People v. Jurado* (2006) 38 Cal.4th 72, 146, which, in turn, cites, *Tuilaepa* and *Arave v. Creech* (1993) 507 U.S. 463, 475. Neither case, however, abandoned a "genuine" narrowing requirement as incorrectly held by this Court in *Beames*.

Here, appellant is asserting a systemic challenge that Penal Code section 190.3, the implementing instructions, and the jurors' application of the sentencing factors violates the narrowing requirement because its "eligibility" provisions (which include all of the ways in which first degree murder may be committed), plus all of the special circumstances, viewed cumulatively, make virtually every murderer death-eligible. (See AOB 366-374.)

Neither *Tuilaepa* nor *Creech* involved a systemic narrowing challenge. Indeed, *Tuilaepa* did not involve any form of narrowing challenge. The claim in *Tuilaepa* involved rather that three of section 190.3's aggravating factors ("selection" factors) were unconstitutionally vague. No issue was raised regarding

this state's special circumstances. Each of the three opinions in *Tuilaepa* clearly stated -- in varying degrees of explicitness -- that the High Court was making no judgment whether California's special circumstances "collectively perform sufficient, meaningful narrowing" to pass muster under the Eighth Amendment. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 975 [majority opn. of Kennedy, J.] and 984 [concurring opn. of Stevens, J.]; see also *id.* at pp. 994-995 [dissenting opn., Blackmun, J.].

As a prelude to resolving the vagueness claim at issue in *Tuilaepa*, Justice Kennedy's majority opinion made a general statement about "two different aspects of the capital decision-making process: the eligibility and the selection decision." The opinion stated that the "aggravating circumstances" that makes a defendant "eligible for the death penalty" -- which, as the High Court recognized, is a "special circumstance" under the California statute -- must meet two requirements. First, while "the circumstance may not apply to every defendant convicted of murder," it must apply "only to a subclass of defendants convicted of murder." Second, the aggravating circumstances may not be unconstitutionally vague. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 971-972.)

The Court in *Beames* interpreted the phrase "may not apply to every defendant convicted of a murder" to mean that a scheme is constitutional as long as it does not make "all murderers" eligible for death. Appellant disagrees that the statement can be so construed.

First, Justice Kennedy was referring to the threshold challenge a defendant may make regarding the particular eligibility factor -- special circumstance -- used to make his case a capital prosecution. As all opinions in *Tuilaepa* make clear, it was not intended as a statement that an entire statutory scheme would pass constitutional muster as long as all of the eligibility factors, viewed cumulatively, make fewer than "all murderers" death eligible. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 975, 985, 994-995.)

Second, as authority for the phrase used in *Tuilaepa* -- "may not apply to every defendant convicted of a murder" -- Justice Kennedy quoted language in *Arave v. Creech, supra*, that "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." (*Arave v. Creech, supra*, 507 U.S. at p. 474.) As the quoted statement indicates, *Creech*, too, involved a challenge to the single eligibility factor of which the defendant was convicted. (See *id.* at p. 478.) *Creech* did not involve the kind of systemic challenge raised by appellant in this case.

Third, the sentence in *Creech* that Justice Kennedy quoted in *Tuilaepa* originated in turn in two other High Court cases that struck down eligibility factors that were so vague that a sentencer could interpret them as applying to all or almost all murders. (See *Arave v. Creech, supra*, 507 U.S. at p. 474, citing the holdings in *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 and *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429.) It is one thing, in striking down an

eligibility factor, for the Supreme Court to describe just how overbroad the factor is as was the case in *Cartwright* and *Godfrey*. It is quite another to turn that description into a limitation on the "constitutionally required narrowing function" to which the Court referred in *Beames*. The United States Supreme Court did not do so in *Cartwright* or *Godfrey* nor did it do so in *Creech*. To the contrary, the Supreme Court in *Creech* found the "utter disregard" eligibility factor at issue there constitutional because, in its construction of the factor, the Supreme Court of Idaho had "narrowed in a meaningful way" the category of defendants upon whom capital punishment may be imposed. (*Arave v. Creech, supra*, 507 U.S. at p. 476.)

Contrary to language in *Beames*, therefore, the United States Supreme Court has not abandoned the narrowing principle. It has not turned the descriptions in *Cartwright* and *Godfrey* into limitations. Thus, to comply with the Eighth Amendment, even single eligibility factors still must "narrow … in a meaningful way the category of defendants upon whom capital punishment may be imposed." Consequently, it also necessarily follows that an entire statutory scheme, viewed cumulatively, must do so. (*Kansas v. Marsh* (2006) __ U.S. __ , 126 S.Ct. 2516, 2527, fn. 6.) Neither *Tuilaepa* nor *Creech* supports the contrary conclusion reached in *Beames*.

California's death penalty statute makes virtually every murder death-eligible, allows any conceivable circumstance of a crime to justify returning a verdict of death, and allows the decision to be made without critical reliability safeguards taken for granted in non-capital trials. The result is a "wanton and

freakish" system (*Furman v. Georgia* (1972) 408 U.S. 238, 320 (conc. opn. of Stewart, J.)) that, because it arbitrarily determines the relatively few offenders subjected to capital punishment, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

XXI

PENAL CODE § 190.3 AND IMPLEMENTING JURY INSTRUCTIONS (CALJIC NOS. 8.84-8.88) ARE UNCONSTITUTIONAL, BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF OR CONTAIN OTHER CONSTITUTIONALLY COMPELLED SAFEGUARDS AND PROTECTIONS REQUIRED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant demonstrated in the opening brief that the principal penalty phase determinations the jury had to make before it could return a verdict of death required certainty beyond a reasonable doubt. Appellant thus argued that these and other omissions in the California capital sentencing scheme embodied in Penal Code section 190.3 and CALJIC Nos. 8.84-8.88 violated appellant's rights to trial by jury, fair trial, unanimous verdict, reliable penalty determination, due process, and equal protection of the laws guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 393-429, citing, inter alia, *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; and *Blakely v. Washington* (2004) 542 U.S. 296.)

In a number of recent cases, this Court has consistently ruled that the failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, or Fourteenth Amendment guarantees of due

process and a reliable penalty determination. (*People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298; *People v. Morrison, supra,* 34 Cal.4th at p. 731.) The Court has also repeatedly ruled that neither *Apprendi*, *Ring*, *Blakely* -- and now -- nor *Cunningham v. California* (2007) 549 U.S. __ , 127 S.Ct. 856, 166 L.Ed.2d 856 -- apply to the penalty phase of a capital trial under California's death penalty law. (*People v. Prince, supra*; *People v. Cox* (2003) 30 Cal.4th 916, 971-972; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.)

The Court's reasoning for this determination was set forth in *People v. Cox, supra*. In *Cunningham v. California, supra*, the United States Supreme Court rejected this Court's interpretation of *Apprendi* and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra*, 127 S.Ct. at pp. 868-873.) In so doing, it explicitly rejected the reasoning used by this Court in such cases as *Cox* to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

In *Cunningham*, the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to the California's DSL. The High Court examined whether or not the circumstances in aggravation were factual in nature and concluded they were. (*Id.* at p. 863.) As the Supreme Court held, "[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and found beyond a reasonable doubt.'" (*Cunningham v. California, supra*, 127 S.Ct. at p. 868.)

In the wake of *Cunningham*, it is clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In resisting the mandate of *Apprendi*, this Court has held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code § 190, subd. (a)[7]), *Apprendi* does not apply. (See *People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th at p. 263; see also *People v. Prince*, supra, 40 Cal.4th at pp. 1297-1298.)

The Court's interpretation is wrong. As Penal Code section 190, subdivision (a) indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence

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[7] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, life imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that cold be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts -- whether related to the offense or the offender -- beyond the elements of the charged offense." (*Cunningham v. California, supra*, 127 S.Ct. at p. 862.)

Even with the finding of factual aggravating factors that were required to support a death sentence in *Ring*, the judicial sentencing choice between life and death remained discretionary, because the statute specified that a life sentence should be imposed, if there were "mitigating circumstances sufficiency substantial to call for leniency." (*Ring v. Arizona, supra*, 536 U.S. at p. 593.) *Ring* nevertheless held the state statute unconstitutional, because the finding of aggravating circumstances was not made by a unanimous jury. (*Id.* at p. 609.) Instead, *Ring* held that the Sixth and Fourteenth Amendment required of a unanimous jury funding applied to any "aggravating circumstance necessary for imposition of the death penalty." (*Ibid.*)

Moreover, unlike *Williams v. New York* (1949) 337 U.S. 241, a California death sentence cannot be imposed for "no reason at all." *Apprendi* makes clear that the distinction is between sentencing schemes requiring a factual finding and those which allow a judge to impose an increased sentence as a discretionary

choice, as long as the increased sentence is still within the maximum range permitted based on the facts admitted by defendant's guilty plea, or necessarily established by the guilty verdict. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 487.)

Thus, the findings of aggravating circumstances are necessary under California law to increase a sentence for special circumstances murder from life imprisonment without the possibility of parole to death. This requirement is present for several reasons.

First, in order to return a death sentence, both Penal Code section 190.3 and CALJIC No. 8.88 require the jury to find that the aggravating circumstances outweigh mitigating circumstances. (See, e.g., CALJIC No. 8.88: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.") Manifestly, before substantial aggravating circumstances can outweigh mitigating circumstances, there must first be aggravating circumstances to consider. The mere finding of guilt on special circumstances murder is insufficient, because this Court has repeatedly recognized that Penal Code section 190.3, factor (a) -- the circumstances of the crime -- may be mitigating as opposed to aggravating in any given case. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1189; *People v. Smith* (2003) 30 Cal.4th 581, 639; *People v. Haskett* (1990) 52 Cal.3d 210, 229, fn. 5.) Thus, the jury must first find something that is truly aggravating which is defined

as "a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences." (*People v. Davenport* (1985) 41 Cal.3d 247, 289; accord, CALJIC No. 8.88.)

Second, as explained above, not only must the jury find the presence of aggravating circumstances, it must also find that they are so substantial in comparison to mitigation that death is warranted. As the Court recognized in *People v. Murtishaw* (1989) 49 Cal.3d 1001, 1027, in order to vote for the death penalty, a jury "must believe aggravation is so relatively great, and mitigation so comparatively minor, that the defendant deserves death rather than society's next most serious punishment, life in prison without parole." (See also *People v. Breaux* (1991) 1 Cal.4th 281, 318 [a jury can "return a death verdict, only if aggravating circumstances predominated and death is the appropriate verdict"].)

Third, the California requirement that a death sentence cannot be returned unless there is not only aggravation but it is so substantial in comparison to mitigation that it warrants death, is similar to the Arizona standard found unconstitutional in *Ring* because of the failure to honor the Arizona defendant's Sixth and Fourteenth Amendment rights to a jury finding on any aggravating circumstance necessary to support a death sentence. As observed by the United States Supreme Court in *Ring*, the Arizona statute permitted a defendant to be sentenced "to death, only if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" (*Ring v. Arizona, supra*, 536 U.S. at p. 593.)

Of course, a California capital defendant does have the right to have a unanimous jury decide the ultimate question of life or death. The Sixth Amendment, however, requires more than the mere right to a jury trial; the right to jury trial is meaningless without the corollary requirements of a unanimous finding, beyond a reasonable doubt, on each fact essential to a death sentence. Indeed, *Ring* specifically holds that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact no matter how the State labels it must be found by a jury beyond a reasonable doubt." (*Id.* at p. 602.) Further, both *Apprendi v. New Jersey, supra*, 530 U.S. at p. 483 and *Blakely v. Washington, supra*, 542 U.S. at p. 313, expressly require those findings to be made by a unanimous jury.

Lest there be any doubt whether aggravating factors constitute the type of finding covered by the Sixth Amendment, Justice Scalia, concurring in *Ring v. Arizona, supra*, 536 U.S. at p. 610, stressed "that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt." Justice Scalia also concluded his analysis by stating that "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Id.* at p. 612.)

Therefore, *Apprendi*, *Ring*, *Blakely*, and *Cunningham* all apply to the California death penalty statute. While, as respondent notes (RB 155), a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, this does not make the finding any less subject to *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. In *Blakely* itself, the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his or her own -- a finding which, appellant submits, must inevitably involve both normative and factual elements. The United States Supreme Court in *Blakely* rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington, supra*, 542 U.S. at pp. 304-305.) Consequently, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the findings must be made by a jury and must be made beyond a reasonable doubt.

As discussed above, absent additional findings of fact at the penalty phase of a capital trial in California, the maximum sentence that can be imposed is life without the possibility of parole. (Pen. Code § 190.4, subd. (b).) The only way

that a death sentence can be imposed is if jurors first find the existence of one or more aggravating circumstances and then find that they substantially outweigh the mitigating circumstances. Additional factual findings are clearly required at the penalty phase to justify imposition of a death sentence in this state; those findings must be found by a unanimous jury beyond a reasonable doubt.

For the foregoing reasons, the Court should reconsider its rejection of claims that the California death penalty statutory scheme and sentencing instructions are unconstitutional to the extent that they (1) fail to require proof beyond a reasonable doubt as to any finding that an aggravating factor exists; (2) fail to require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and (3) fail to require that any aggravating factor relied upon as basis for death be found by a unanimous jury.

XXII

THE USE OF CALJIC NO. 8.88 (1989 REVISION), DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND TO A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As demonstrated in appellant's opening brief (AOB 431-443), the use by the trial court of CALJIC No. 8.88 (1989 Revision) was constitutionally flawed. CALJIC No. 8.88 failed to convey critical deliberative principles and was misleading and vague. Whether considered singly or together, the flaws inherent in CALJIC No. 8.88 violated appellant's fundamental rights to due process, fair trial by jury (U.S. Const., 5th, 6th & 14th Amends.), and to a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As usual, respondent initially asserts that appellant waived his claims of error by failing to request changes or modifications in CALJIC No. 8.88. (RB 160.) For the reasons previously discussed elsewhere in this reply brief in response to other claims of waiver or forfeiture, respondent's argument advanced here as well should be rejected. Instructional errors are reviewable on appeal to the extent they affect the defendant's "substantial rights." (Pen. Code §§ 1259, 1469; *People v. Prieto, supra,* 30 Cal.4th at p. 247.) Virtually an identical waiver argument was asserted by respondent and rejected by the Court in *People v.*

Smithey, supra, 20 Cal.4th at p. 976, fn. 7. Accordingly, the merits of appellant's claim of instructional error by the trial court may appropriately be addressed on appeal.

Respondent also ignores that while factual issues may be subject to the waiver rule, purely legal issues -- such as the constitutional issues raised by appellant based on undisputed facts as here -- are not necessarily subject to the waiver rule and may be addressed even when raised for the first time on appeal. (*In re Sheena K., supra,* 40 Cal.4th at pp. 887-888; *People v. Percelle, supra,* 126 Cal.App.4th at p. 179; *Rosa S. v. Superior Court, supra,* 100 Cal.App.4th at p. 1188.)

In respect to appellant's substantive claims, respondent does not respond in kind to appellant's arguments other than to cite the Court's rejection of similar claims in prior cases. (See RB161.) Appellant, therefore, will rely on the arguments previously made in the opening brief.

XXIII

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In his opening brief, appellant argued that capital punishment violates both international law and the Eighth Amendment's prohibition against cruel and unusual punishment because it is contrary to international norms of human decency. Appellant also argued that even if capital punishment itself does not violate the Eighth Amendment, its use as a regular punishment for a substantial number of crimes does. (See AOB 445-450.)

Appellant is well aware that this Court has repeatedly rejected the argument in several decisions after the filing of appellant's opening brief in this case. (See, for example, *People v. Beames, supra*, 40 Cal.4th at p. 935; *People v. Cook, supra,* 39 Cal.4th at pp. 619-620; *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Cornwell* (2005) 37 Cal.4th 50, 106.) Recent developments in Eighth American jurisprudence, however, undermine the Court's conclusions and support appellant's claims. Appellant thus notes the following developments since the opening brief was filed:

1. The United States Supreme Court affirmed that it has looked and will continued to look "to the laws of other countries and to international authorities as instructive for its interpretations of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" (*Roper v. Simmons* (2005) 543 U.S. 551.)

2. Every nation in greater Europe -- Eastern and well as Western -- has now abolished the death penalty in law except for the Russian Federation, which is "abolitionist in practice." (Amnesty International, *Abolitionist and Retentionist Countries* [as updated March 13, 2007], at http://web//amnesty.org.

3. Nine countries have abolished the death penalty for all crimes since the opening brief was filed in 2004 (*ibid.*) and over 40 countries have done so since 1990. (*id.*, *Facts and Figures on the Death Penalty* [as updated March 14, 2007].)

4. In 2005, 94 per cent of all known executions took place in China, Iran, Saudi Arabia, and the United States. (*Ibid.*)

Appellant, therefore, asks the Court to reconsider its position on this issue and, accordingly, to reverse the judgment of death imposed on appellant in this case as incompatible with current and evolving standards of international law as applied to or as binding on the laws of the United States and those of the several states, including California, and as contrary to the Eighth Amendment to the United States Constitution.

XXIV

THE CUMULATIVE EFFECT OF ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant's opening brief summarized the various errors that occurred during the guilt and penalty trials and the manner in which they had a combined, negative impact, rendering the degree of unfairness to appellant more than that flowing from the sum of the individual errors. (*People v. Hill, supra,* 17 Cal.4th at p. 847.) Respondent does not directly address -- or even mention -- *Hill* or appellant's arguments. Respondent simply offers instead that all of appellant's assignments of error "are either meritless or harmless individually, and in combination." (RB 164.)

Respondent's arguments are unhelpful in deciding the issues raised in this assignment of error. It is, of course, up to the Court to determine whether appellant's contentions of error have merit. If, as respondent contends, there were no errors, then appellant's cumulative error argument would be moot. If the Court does find error, then the issue becomes what relief, if any, is appropriate in this case.

Where the Court finds more than one error, it must carefully review not only the impact of each individual error, but the combined impact of all errors found. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 180; *People v. Jones,*

supra, 29 Cal.4th at p. 1268; see also *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 [cautioning against a "balkanized" harmless error analytical approach].)

Appellant offers that the cumulative effect of the multiple errors he has identified and raised compel reversal of the judgment of conviction on all counts, the special circumstances findings, and the judgment of death. When all of the errors and constitutional violations are considered together, it is clear that appellant has been convicted and sentenced to death in violation of his fundamental rights to due process of law, fair trial, equal protection of the laws, and to a reliable penalty determination guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California constitutional counterparts.

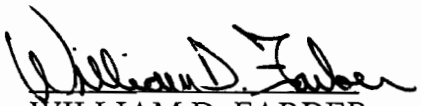
For the reasons elsewhere discussed and analyzed, appellant's convictions, special circumstances, and death sentence were obtained as the result of a host of errors constituting multiple violations of his fundamental constitutional and statutory rights at every stage of his trial. While appellant did not expect a perfect trial, he did expect, and was entitled to, a fair one. (*Schneble v. Florida* (1972) 405 U.S. 427, 432*; Lutwak, et al. v. United States* (1953) 344 U.S. 604, 619.) Accordingly, the combined and cumulative impact of the various errors in this case requires reversal of appellant's conviction on all counts, reversal of the special circumstances, and reversal of the judgment of death. (*People v. Hill, supra*, 17 Cal.4th at p. 847.)

CONCLUSION

By reason of the foregoing and of the arguments advanced in the opening brief, appellant Richard Don Foster respectfully requests that the judgment of conviction on all counts, the special circumstances, and the sentence of death in this case be reversed.

DATED: July 30, 2007.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, William D. Farber, certify (pursuant to California Rules of Court, rule 8.630(b)(2)) that the number of words in this reply brief, excluding the tables, totals at least 41,623 words. In counting words, I have relied on the word count of the computer program used to prepare this brief.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Rafael, California, on July 30, 2007.

WILLIAM D. FARBER

PROOF OF SERVICE

RE: **PEOPLE v. FOSTER**
S058025

I, WILLIAM D. FARBER, declare under penalty of perjury that I am counsel of record for appellant Richard Don Foster in this case, and further that my business address is William D. Farber, Attorney at Law, P.O. Box 2026, San Rafael, CA 94912-2026. On July 30, 2007, I served APPELLANT'S REPLY BRIEF by depositing each copy in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at San Rafael, California, addressed respectively as follows:

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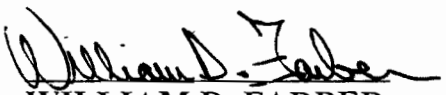

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