SUPREME COURT COPY

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff & Respondent, v. LESTER HARLAND WILSON Defendant and Appellant.	(California Supreme Court No. S189373) Riverside County Superior Court No. RIF 079858 AUTOMATIC APPEAL

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF RIVERSIDE COUNTY

THE HONORABLE ELISABETH SICHEL

SUPREME COURT
FILED

MAR 24 2014

Frank A. McGuire Clerk

Deputy

APPELLANT'S OPENING BRIEF

PATRICK MORGAN FORD
Attorney at Law
1901 First Avenue, Suite 400
San Diego, CA 92101
(619) 236-0679
State Bar No. 114398

Attorney for Appellant
LESTER HARLAND WILSON

Under appointment of the
California Supreme Court

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff & Respondent, v. LESTER HARLAND WILSON Defendant and Appellant.	(California Supreme Court No. S189373) Riverside County Superior Court No. RIF 079858 AUTOMATIC APPEAL

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF RIVERSIDE COUNTY

THE HONORABLE ELISABETH SICHEL

APPELLANT'S OPENING BRIEF

PATRICK MORGAN FORD
Attorney at Law
1901 First Avenue, Suite 400
San Diego, CA 92101
(619) 236-0679
State Bar No. 114398

Attorney for Appellant
LESTER HARLAND WILSON

Under appointment of the
California Supreme Court

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff & Respondent, v. LESTER HARLAND WILSON Defendant and Appellant.	(California Supreme Court No. S189373) Riverside County Superior Court No. RIF 079858 AUTOMATIC APPEAL

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF RIVERSIDE COUNTY

THE HONORABLE ELISABETH SICHEL

APPELLANT'S OPENING BRIEF

Introduction

In 2000, appellant was convicted of special circumstance murder and sentenced to death for his role in a killing in which several others participated.

In the automatic appeal (No. S089623), this Court affirmed the guilt verdict, but reversed the judgment of death due to the improper dismissal of a juror. (*People v. Wilson* (2008) 44 Cal.4th 758.) The case

was remanded for a new penalty phase trial that resulted in another death judgment.

Appellant maintains the retrial was barred by double jeopardy principles and that due to a conflict of interest with his original attorney, new counsel should have been appointed for the trial.

Statement of Appealability

This is an automatic appeal from a final judgment of death It is authorized by the California Constitution, article VI, section 11, and Penal Code section 1239, subd. (b).[1]

Statement of the Case

Appellant Lester Harland Wilson was charged by way of grand jury indictment along with four codefendants with the 1997 murder of Uwe Durbin. (Penal Code section 187.) It was alleged that the murder was committed during the course of a kidnapping and involved the intentional infliction of torture. (Penal Code section 190.2 subds. (a)(17)(B) and (a)(18).)

He was further charged with two separate acts of rape against

---

[1] Unless otherwise noted, all further references will be to the California Penal Code.

Lisa Doe[2], the murder victim's sister-in-law (Penal Code section 261 subd. (a)(2)), along with an allegation that he personally used a firearm during those acts within the meaning of Penal Code sections 12022.5 subd. (a) and 1192.7 subd. (c)(8). He was also charged with three counts of kidnapping pursuant to Penal Code section 207 subd.(a).

In February, 2000, a jury convicted appellant of all charged counts, and found the special circumstance and enhancement allegations to be true. The jury returned a death verdict.

In the automatic appeal (California Supreme Court case no. S089623), this Court affirmed the guilty verdicts, but reversed the death penalty due to the trial court's improper removal of a juror. (*People v. Wilson, supra,* 44 Cal.4th 758.) The case was remanded for a new penalty trial.

Following the new trial, the jury again returned a death verdict. (1 CT 3232, 3236.) On December 17th, 2010, the court denied the motion for a new trial, and the Penal Code section 190.4 subd.(e) motion to modify the death verdict. (1 CT 3228.)

This appeal is automatic.

---

[2] In that Lisa was a rape victim in this case, she will be referred to as Lisa Doe, as she is in this Court's opinion affirming the guilt verdict.

Statement of the Facts

The Prosecution's Case

Circumstances of the offense

Mike Durbin was the brother of the victim, Uwe Durbin. (5 RT 793.) In June of 1997, Uwe was 32 years old and Mike was 27. (5 RT 795.) Mike was living in an apartment in Riverside with his girlfriend, Lisa Doe, and their three children. (5 RT 796.) He knew appellant because Uwe lived with appellant and his wife, Barbara Phillips,[3] for a short time. (5 RT 799.)

On the morning of June 8th, 1997, Mike and Lisa were preparing to go to his mother's house with the children, as they did nearly every Sunday. (5 RT 802.) Uwe called from a friend's house to verify that Mike and Lisa were going to pick him up, and he sounded "normal" at the time. (5 RT 804.)

Appellant knocked on the front door as they were preparing to leave. (5 RT 805.) He was with Phillips. (5 RT 809, 1235.) When Mike opened the door, appellant pointed a black semi-automatic handgun at

---

[3] Barbara Phillips was tried jointly with appellant, using separate juries. She was convicted of first degree murder with true findings as to the special circumstance allegations. She was sentenced to life without the possibility of parole. (See *People v. Phillips*, Court of Appeal, Second Appellate District, Division Two, Case No. E026884.)

his head and forced him inside the apartment. (5 RT 807, 1237.) Lisa was standing in the bedroom with the children and saw the gun, but no one said anything. (5 RT 808; 7 RT 1239.) She told the children to hide under the bed and she hid in a closet. (7 RT 1239.) Appellant and Phillips entered the bedroom and ordered her out of the closet. (7 RT 1242.) Appellant said "I won't hesitate to blow you and the kids away... Don't do anything stupid." (7 RT 1242.) Appellant ripped the telephone cord from the wall and demanded to know where his "stuff" was. Mike had no idea what he was talking about. (5 RT 810, 916.) Appellant held the gun to Mike's head and asked where he could find Uwe. (5 RT 812.) Mike refused to say, and appellant said they would all have to come with him. (5 RT 813.)

Appellant entered Mike's car and continued to hold the gun to Mike's head as Mike drove. (5 RT 816.) Lisa and the children entered appellant's car with Phillips. (5 RT 815; 7 RT 1244.) As they were leaving the carport, Uwe appeared. (5 RT 817) Appellant forced him into Mike's car at gunpoint. (7 RT 1246.) Appellant demanded that Uwe tell him what he had done with appellant's television, but Uwe denied knowing anything about it. (5 RT 819.) Appellant had Mike drive to Uwe's friend's house and all three men went to the door, with

appellant concealing his gun. (5 RT 820; 7 RT 1249.) Appellant and Uwe asked the friend about appellant's television, but the man denied having any knowledge of it. (5 RT 822.) They then drove to a second house where appellant got out and ran to the front door. (5 RT 823.) Mike thought about driving away, but Lisa and the children were in the other car with Phillips. (5 RT 824.) Appellant returned after about a minute, and ordered Mike to drive to appellant's house. (5 RT 823, 825.) When the two cars arrived together, everyone entered the living room and appellant drew his gun again. (5 RT 826; 7 RT 1251.) Mike still believed things would "work out." (5 RT 828.)

Appellant and Phillips began shouting about their missing property, and Uwe continued to deny any knowledge of it. (5 RT 829.) Appellant turned the stereo up to a high volume, and, without saying anything, shot Uwe in the knee. (5 RT 829; 7 RT 1253.) Uwe fell to the floor, moaning. (5 RT 831.) Mike got angry, left the couch and started walking toward appellant, who pointed the gun at him. (5 RT 833; 7 RT 1253.) Mike wanted Lisa and the children out of the room, so appellant let the kids go upstairs, and ordered Uwe into an adjacent bedroom. (5 RT 833.)

Appellant placed some batteries into a glove and used it to beat

Uwe. (5 RT 834.) Mike could see this through the open bedroom door. (5 RT 835.) He said that appellant hit Uwe between 50 and 100 times, all over his body. (5 RT 837.) Appellant placed more batteries into a second glove and continued to hit Uwe in the face and body. (5 RT 530.) By then, Uwe was bleeding heavily. (5 RT 837.) He continued to deny taking appellant's property but he ultimately admitted that he had. (5 RT 838-839.) Appellant stopped the beating and told Mike he was taking him to retrieve the television. (5 RT 840.) Before leaving, appellant bound Uwe with duct tape and rope. (5 RT 841.)

Appellant had Mike drive his car back to the house where they had stopped earlier. (5 RT 845.) He went inside and was unable to find the television, which made appellant even angrier, and they returned to appellant's house. (5 RT 847.) Upon arriving, appellant gave the gun to Phillips and left for a friend's house. (5 RT 848.) Mike asked Phillips to let them all go. (5 RT 850.) Phillips was angry and she said they were all going to die. (5 RT 850.)

Appellant returned in about 15 minutes with three black men. (5 RT 851; 7 RT 1259.) One was short, muscular and stocky; another was tall and thin; the third man had a light complexion. (5 RT 851.) Appellant was calm but Phillips remained angry. (5 RT 850.) Appellant

and the other men took turns beating Uwe. (5 RT 853.) They were dripping sweat and blood. (5 RT 853.) Appellant took a roll of plastic sheeting and unrolled it on the floor. (5 RT 854.) He and the other men placed Uwe onto the tarp. (5 RT 854.) The taller man, later identified as Charone Parker, read aloud from a Bible, and told Mike they were all going to die. (5 RT 855.) Mike and Lisa were going to be killed because of what they had seen. (5 RT 856.) All of the men repeated this to Mike and Lisa. (5 RT 857.) Mike offered to pay for the missing television and asked appellant to let his family go. (5 RT 858.) When he offered himself to save his family, the men tied him up, held a gun to his head and told him they would kill him, but let his family go. (5 RT 859.)

Appellant and the other men entered the bedroom, one at a time, beat Uwe with weights and used a chain to choke him. (5 RT 859.) They brought in a pit bull dog, but the dog refused to attack him. (5 RT 859, 871.) Although the bedroom door was closed, Mike could hear the men beating Uwe. (5 RT 860.) Eventually, Uwe became quiet. (5 RT 860.) Parker, the man with the Bible, tried to talk the others into stopping, but they continued with the door now open. (5 RT 862.) Mike could see blood and parts of Uwe's head splattered on the wall. (5 RT

940.) Uwe's face was no longer recognizable. (5 RT 865.) The men laughed. (5 RT 863.) Mike was then duct-taped to a chair, gagged and brought into the bedroom. (5 RT 864.)

They were drinking 40 ounce beers and began to urinate into a cup, forcing Uwe to drink it. (5 RT 867.) When the pit bull refused to attack Uwe, appellant angrily struck the dog. (5 RT 871.) He put the dog chain around Uwe's neck and dragged him around the room. (5 RT 873.) Appellant used a propane torch to burn Uwe all over his body, and then poured bleach over him. (5 RT 874.) Uwe only moaned. (5 RT 875.) Mike was struck in the head, and then told they were going to let Lisa go. (5 RT 876.) She was crying and entered the bedroom where Mike and Uwe were being held. (5 RT 876.) Mike had not seen her for a few hours. (5 RT 827.) While Lisa was gone, all four men had left the house. (5 RT 878.) Phillips held the gun, with a potato over the barrel to act as a silencer. (5 RT 879.)

Nicole Thompson, who testified under a grant of immunity, came to the house at approximately 2:00 pm, and held the gun for Phillips. (6 RT 880, 1001.) Appellant had gone to her house a short time earlier. (6 RT 1001.) He was "jacked up," and told her he had shot someone. (6 RT 1001.) Appellant asked her for gauze and for someone to come to

his house and stay with Phillips. (6 RT 1002.) She went to the house. (6 RT 1002.) Appellant answered his door when she arrived and then left with the other three men. (5 RT 1006.) Thompson held the gun for a few minutes, but the sight of Uwe and Mike was so upsetting that she had to leave. (5 RT 881; 6 RT 1012.) She wanted to get Lisa and the children out of the house, and so she put them in her car. (6 RT 1021.) Appellant returned as they were leaving and told Thompson to take the children back, but she drove away instead. (6 RT 1021.) She went to her house, and then took Lisa and the children to a park where they remained for about three hours. (6 RT 1022.) She then drove them to her house, where appellant met her. (6 RT 1024.) Appellant took Lisa and the youngest child with him, while the two other children remained at Thompson's house. (5 RT 1026.) Appellant drove to a nearby park. (5 RT 1282.) He told Lisa he wanted some assurance that she wouldn't talk to anyone, and ordered her to remove her pants. (6 RT 1283.) He then raped her. (5 RT 1283.) He said he would let her family go, but that Uwe wasn't leaving. (6 RT 1283.) Appellant returned to Thompson's house and left again with Lisa and the children. (6 RT 1029.) When Lisa returned to appellant's house, Mike looked terrified. (6 RT 1029.)

Lisa, the children, appellant and the other men were gone for about three hours. (5 RT 822.) While they were gone, Phillips told Mike that appellant "liked white women that way." (5 RT 882, 916, 926.) Lisa was crying when she returned and Mike suspected that she had been raped. (5 RT 884.) Appellant began to burn Uwe with the torch again. (5 RT 883.) He and Phillips argued as Phillips wanted to kill everyone and appellant asked her what they would do with the bodies. (7 RT 1285.)

Appellant cut Mike's bindings and told him he had to go with Phillips to look for a bike that was also missing. (5 RT 886.) After Mike and Phillips left, appellant took Lisa into the kitchen, told her he "wanted more pussy," and raped her again. (7 RT 1289.) He then told Lisa to help him move Uwe, who was still breathing. (7 RT 1292.)

When Mike returned with Phillips, he saw Uwe wrapped in the plastic sheeting, being carried out to appellant's car by appellant and Lisa. (5 RT 889.) They placed him in the back seat of appellant's car and covered him with the sheet. (5 RT 890.) Lisa was forced to help Phillips clean the blood and debris. (5 RT 891; 7 RT 1294.)

Appellant had a case of Red Devil lye. (5 RT 893.) He said a body would dissolve in the desert if someone poured lye over it. (5 RT 892.)

Appellant put the lye, the gloves and some other items into the trunk of his car. (5 RT 896.) He told Mike to drive his own car with Lisa and the children, and follow Phillips and him. (5 RT 897.) Mike drove away and at the first opportunity stopped following and went to their apartment, and then to Lisa's sister's house. (5 RT 905; 7 RT 1296.) But no one was home, and they drove to Mike's mother's house. (5 RT 906; 7 RT 1297.) He didn't immediately call the police because he was in shock, but he called later. (5 RT 907.) Lisa was later taken to a hospital. (7 RT 1297.)

Mike said he didn't believe Uwe used drugs, and originally thought that it was appellant who owed Uwe money for car repairs. (5 RT 912.) He admitted that he and Lisa used marijuana and methamphetamine, and that Lisa may have ingested methamphetamine at a party a few days earlier. (5 RT 914.)

The next morning, Uwe's body was found lying in a ravine next to the 91 freeway, submerged in water. (6 RT 984, 987; 7 RT 1170.) A criminalist testified about bullets found at the scene, and concluded that they were fired from the same gun as the bullet that had hit Uwe's knee. (7 RT 1216, 1223.) A medical examiner (not the pathologist who performed the autopsy) detailed the extensive wounds found on Uwe's

body, including burns, heavy bruising and blunt force trauma. (6 RT 1096, 1121, 1125.) Gunshot wounds were found in his knee, hand, and several near his right eye, which caused his death. (6 RT 1101, 1130, 1135.) There was no evidence that bleach had been poured on his body. (6 RT 1133.)

A tow truck driver said that on the morning on June 9th, 1997, he was dispatched to tow a disabled vehicle from the shoulder of the 91 freeway (near where Uwe's body was later found). (6 RT 1148.) A black male and female were the driver and passenger. (6 RT 1150.) He towed the car to a house later identified as appellant's. (6 RT 1151.) They paid him in cash and Barbara Phillips signed the receipt. (6 RT 1152.)

A Riverside homicide detective processed appellant's vehicle and found blood and numerous bloody items, a cloth and some duct tape. (6 RT 1161.) Four bullet casings and a projectile were found near Uwe's body next to the freeway. (6 RT 1165.)

A Department of Justice criminalist examined stains in Lisa's underwear and, through DNA analysis, concluded it was appellant's semen. (7 RT 1394.)

////

Penal Code section 190.3(b) evidence

The 1996 shooting

The prosecutor called Jermaine Moore and Darla Manning, who were alleged targets of a shooting at an intersection in Los Angeles in 1996. (7 RT 1196, 1187.) Neither could remember details of the incident, and were impeached with inconsistent statements they had made to the police. (7 RT 1188,1198.) A former LAPD sergeant recalled the incident and indicated that the victims had identified appellant as the shooter. (7 RT 1318.) She took statements from the two victims, and then arrested appellant. (7 RT 1324.)

Katri K.

Katri K. came to the United States from Finland in 1992. (7 RT 1331.) She met appellant through a mutual friend, they began dating and she eventually moved in with him at his mother's house. (7 RT 1333.) They had heated, sometimes violent arguments where appellant would assault her. (7 RT 1335, 1337, 1340, 1343.) But she stayed with him. (7 RT 1345.)

On July 16th, 1992, they were living in the back of appellant's mother's bail bond office in Los Angeles. (7 RT 1347.) They argued about appellant's drinking and Katri's suspicion that he was seeing

other women. (7 RT 1349.) Appellant dragged her to the back of the office, raped and sodomized her. (7 RT 1351, 1355.) He then displayed a handgun but said nothing about it. (7 RT 1356.) She didn't leave him immediately because she still loved appellant and had nowhere else to go. (7 RT 1357.)

The next day she called a friend who picked her up and took her to a hospital where she was examined and talked to police. (7 RT 1359.) She continued to see appellant, even after he was sent to prison. (7 RT 1364, 1365.) She lied at a parole hearing, trying to protect appellant. (7 RT 1366.) She eventually returned to Finland, but continued to feel the impact of his abuse. (7 RT 1363.)

Katri's statements were corroborated by a friend and a police officer who took a report from her in 1992. (7 RT 1370, 1376.)

Victim impact evidence

Uwe's mother, Helga Durbin-Axt, testified as to the impact his death had on her. (7 RT 1397.) She described Uwe's childhood and achievements and spoke about their close family. (7 RT 1399, 1402.) She left Uwe's bedroom at her house in the same condition it was in when he was murdered. (7 RT 1409.) She is raising Uwe's son, Matthew. (7 RT 1410.)

Defense Case

Appellant was raised in a highly dysfunctional family. He was the product of his mother's rape by his abusive father when she was 13 years old. (8 RT 1558.) He moved from one bad living situation to another, and was ultimately raised by his grandmother, Ivory Walters. (8 RT 1531.) His siblings also suffered abuse by appellant's father and stepfather.

Appellant's half-sister, LaTonya Looney, did not meet him until she was five years old. (8 RT 1427.) Although she described their father, Lester Looney, as a "good man," she said he raped her when she was 16 years old. (8 RT 1430.) He threatened to kill her if she told anyone. (8 RT 1431.) She became pregnant after the rape, but had a miscarriage. (8 RT 1431.) He was eventually sent to prison for murder. (8 RT 1431.) When she was 25 years old, she met her father in a bar after he had been released from prison. (8 RT 1434). He apologized for mistreating her, and wanted her and his grandchildren to move in with him. (8 RT 1434.) He said she would be his daughter during the day, and his "lover" at night, but she refused. (8 RT 1434.) LaTonya continues to love appellant because he is her brother. (8 RT 1438.) She will stay in touch with him, regardless of the outcome. (8 RT 1438.)

Appellant's other half-sister, Alexa Vann, also testified. (8 RT 1453.) She met appellant when she was 16 years old, and still loves him even though he committed this terrible crime. (8 RT 1454, 1461.) Their father, Lester Looney, was involved in street gangs. (8 RT 1455.) He once committed a drive-by shooting while she was in the car. (8 RT 1455.) He picked her up at school one day with a woman in the car. (8 RT 1457.) He told her the woman was asleep, but the woman, who was pregnant with his baby at the time, was actually dead. (8 RT 1457.) Their father was sent to prison for the murder. (8 RT 1458.) He had molested his daughters and allowed other men to touch them in a sexual manner. (8 RT 1458.)

The defense presented the prior testimony of appellant's former teacher, Milton Harris. (8 RT 1462.) He did not recall appellant as a student, but strongly believed that the lack of family support is the cause of most problems children experience. (8 RT 1465.) Another teacher, Stephen Irshay, recalled appellant as a student in his special education class. (8 RT 1491.) He believed appellant needed individualized counseling. (8 RT 1489.)

The defense presented the prior testimony of appellant's older sister, Maria Antoinette Powell. (8 RT 1468.) Appellant contacted her

from jail. (8 RT 1470.) She had never seen him before appearing in court. (8 RT 1468.) She wanted to stay in touch with him. (8 RT 1473.) A second full sister, Marsha Wilson-Massey, told of their father raping her when she was six or seven years old. (8 RT 1507.) Her mother would sometimes take the children on "extended field trips," which she later realized were efforts to separate them from her father. (8 RT 1511.) A third, much younger half-sister, Marchanna Brown, testified that appellant had offered her good advice on parenting and life. (8 RT 1552.) She will stay in contact with him. (8 RT 1553.)

Appellant's grandmother, Ivory Walters, who ultimately raised him, described his troubled childhood. (8 RT 1531.) She has remained in contact with appellant since he has been in prison. (8 RT 1537.)

Appellant's half-brother, Charleston Brown, who is 25 years younger, described how appellant helped him when he was young. (8 RT 1478.) He was only 12 years old when appellant was arrested in this case. (8 RT 1477.) He will stay in contact with appellant, who he believes has been a positive influence in his life. (8 RT 1480.)

Appellant's 15 year-old daughter, Amber Woodson, described how she has established a relationship with appellant and relies on his advice regarding the importance of making good decisions. (8 RT 1493,

phase reversal, retrial would be barred by state and federal double jeopardy protections. This Court reversed the death verdict finding the trial court erred by discharging the holdout juror. (*People v. Wilson* (2008) 44 Cal.4th 758, 841.) However, the court made no reference to the double jeopardy issue in the opinion.

Defense counsel moved to preclude the penalty phase retrial and argued that further prosecution was prohibited by the double jeopardy protections described in the state and federal constitutions. (2 RT 149-150.)

The prosecutor argued that "it would fly in the face of the Supreme Court of California basically to say that it would be double jeopardy" because the court remanded the case for retrial. (2 RT 149.) In fact, the court did not rule on, or even mention the double jeopardy issue in the initial appeal, although appellant raised the claim. And there was no reason for the court to address the retrial issue since the district attorney's office had not indicated whether it would again seek a death sentence.

The trial court noted the present issue was controlled exclusively by this Court's previous decision in *People v. Hernandez* (2003) 30 Cal.4th 1. (2 RT 149.) After indicating the defense theory did not apply

1495.)

Appellant's mother, Marsha Brown, testified about meeting appellant's father when she was 12 or 13 years old. (8 RT 1556.) He forced her to have sex with him and they got married when she became pregnant. (8 RT 1558.) The relationship quickly became abusive and ended after he tried to kill her. (8 RT 1562.)

Appellant's stepfather, Michael Woodson, said he abused appellant as a child. (8 RT 1609.) He provided for the children, but also abused his daughter, Marsha. (8 RT 1611.) He was a criminal and drug user at the time. (8 RT 1614.)

The jury returned a death verdict after deliberating for one day. (8 RT 1734.)

Argument

I

Double jeopardy barred the penalty phase retrial following the erroneous discharge of the lone juror holding out for a life verdict at the penalty trial.

Introduction

In the original direct appeal, appellant argued the trial court erred by discharging a juror during penalty phase deliberations. As part of that argument, appellant claimed that in the event of a penalty

because the juror who was wrongfully discharged was a pro-defense juror, the trial court denied the motion. (2 RT 149.)

Background[4]

Summary of events

Appellant is a black man. One black person served on his jury, Juror No. 5. That juror joined the other 11 jurors to convict appellant on all counts during the guilt phase of the trial. Following the presentation of evidence at the penalty phase, the jury retired to deliberate the question of penalty. In the middle of the penalty phase deliberations, Juror No. 1 sent the court a complaint about Juror No. 5. A lengthy investigation into the complaint ensued. The investigation, which involved questioning the jurors individually, revealed that Juror No. 5, although he had initially voted for death, changed his mind and was the only juror holding out for a life sentence. He explained his decision, both to the other jurors and to the trial court, as being based on his assessment of the strength of the mitigating evidence showing that appellant had been raised in an extremely dysfunctional family.

---

[4] The facts in this section are taken from the Court's opinion and the reporter's transcripts from the original trial. Appellant will separately request that this court take judicial notice of the transcripts and briefs filed as part of the original appeal.

Juror No. 5 asserted he ultimately found those mitigating circumstances predominated because, being black himself and having raised a son, he believed he had some insight into the negative family dynamics and harsh circumstances in which appellant was raised. After its investigation, the trial court, citing multiple reasons, removed Juror No. 5, and replaced him with an alternate juror. The court later removed that juror as well and appointed a second alternate juror. The jury, as finally reconstituted, then sentenced appellant to death. (*People v. Wilson*, *supra*, 44 Cal.3d at p. 814.)

The trial court summarized the potential problems raised by Juror No. 1's allegations: First, that Juror No. 5 may be relying on facts not in evidence to reach a decision; second, that Juror No. 5, contrary to his voir dire statements, may not be able to sentence someone to suffer the death penalty; third, that Juror No. 5 may have been relying on race or racial stereotypes to render a verdict; fourth, that Juror No. 5 may believe that life imprisonment was a more severe penalty than death; fifth, that Juror No. 5 may have discussed the case outside the jury room; and sixth, that Juror No. 5 may not be deliberating because he did not expect the other jurors to understand. (27 ORT 3375-3376.)

After discussing the issues with the attorneys, the trial court

concluded, "I think we narrowed it down really to these particular areas: The comments made outside the jury room, the apparent forming of opinions in the guilt phase after only one witness and the attempted transmission of these opinions to the other jurors, potentially considering facts not in evidence, and the concern that he believes life is worse than death, which may need an instruction." (27 ORT 3394-3395.)

The parties agreed with the court that the most immediate concern was the discussion of the case outside the courtroom. (27 ORT 3395.)

The trial court then examined all of the jurors individually, beginning with Juror No. 1, and ending with Jury No. 5, before deciding to excuse Juror No. 5. (27 ORT 3399-3498.)

The guilt phase comments

None of the other jurors said they heard the comments that Juror No. 1 reported hearing from Juror No. 5 during the guilt phase. (27 ORT 3408, 3420, 3431, 3437-3438, 3444, 3451, 3458, 3469, 3478, 3478-3488.)

Juror No. 5 did not recall commenting to another juror after the testimony of the first guilt phase witness "How can you hold someone

responsible for their actions?" (27 ORT 3496.) It did not sound like something he would say. (27 ORT 3496.) He told the court he may have made the other statement — "This is what you expect when you have no authority figure, this type of behavior," as he could imagine himself making that comment. (27 ORT 3496.)

Comments suggesting Juror No. 5's decision was based on race

The questioning on the second issue — whether Juror No. 5's decision was based on race — was more complicated in that 12 jurors were asked the general question, which was then followed up with the specific statements alleged to have been made by Juror No. 5. There was a certain amount of uniformity in the jurors' answers with some exceptions.

As to the primary question, only four of the jurors said Juror No. 5 was basing his decision on race. Noteworthy here is the way the court phrased the question. The court told each juror "It has been reported to me that during those six hours of deliberations, a juror made statements indicating his decision was based on race rather than on the evidence and the law. Did you hear any comments that might indicate that?" Of the four who said yes, one (Juror No. 11) based his answer on the fact that Juror No. 5 spoke of the importance of a father figure in

the background of a black male. (27 ORT 3432.) Another (Juror No.3) based her answer on a single statement that the Caucasian jurors did not know how life was for young black males in the streets. (27 ORT 3479.)

However, the remaining jurors, who found that race was not a factor, emphasized that Juror No. 5's reference to race was a discussion of his own perspective. For instance, Juror No. 6 noted that No. 5 told the other jurors that he could impose the death penalty against a black defendant, such as appellant, if he had been raised in a good family. (27 ORT 3426.) Juror No. 5 later explained the difference between a black person with appellant's background, and a person such as his own son who was given everything necessary to properly function in society, including two parents, a proper education and nurturing. (27 ORT 3500-3501.) However, he now questioned the death penalty for those who lacked parental supervision and suffered abuse as a child. Juror No. 6 concluded No. 5's position was based on family circumstance rather than race, and it would not matter if the defendant was white, Hispanic or another race. (27 ORT 3426.) Likewise, Juror No. 7 told the court "I never got the feeling that he was necessarily more biased if it would have been a white man than a black man." (27 ORT 3463.)

The court then asked the jurors about the individual statements regarding race Juror No. 5 was alleged to have made. The jurors largely confirmed he made the statements. A more specific accounting of this questioning is unnecessary inasmuch as Juror No. 5 largely admitted to making the following statements:

a) You don't understand because you're not black.
b) You can't understand because you're not black.
c) Black kids have a different relationship with their fathers.
d) This is a cultural thing.
e) Black people don't admit to being abused. (27 ORT 3497.)

The single statement that was denied by Juror No. 5, "I know more [abuse] went on than we were shown" was also rejected by all but two of the other jurors. (27 ORT 3498.)

In addition to the specific questions, the court also asked whether Juror No. 5 was actively deliberating and whether he was considering the evidence in a context outside of race. Each juror asked, including Juror No. 1 who initially contacted the court, said that Juror No. 5 was participating in the deliberations without reference to race. (27 ORT 3442, 3448, 3454-3455, 3463, 3464, 3474, 3483, 3492.)

Whether life was worse than death

As to the third area, the court asked whether the jurors heard

Juror No. 5 say he considered life without possibility of parole worse punishment than the death penalty or "The defendant should sit in jail for the rest of his life and think about it because that's the worst of the two." Four of the jurors said they heard such a statement. (27 ORT 3455, 3462, 3482, 3491.) The others did not hear it. (27 ORT 3434, 3442, 3448, 3456, 3474.) The foreperson (Juror No. 12) said Juror No. 5 simply said he wanted the defendant to sit in jail for the rest of his life. (27 ORT 3415.)

When asked directly about the statement, Juror No. 5 said he simply told the others that life in prison is not "getting away." (27 ORT 3499.) Juror No. 5 then acknowledged death is considered to be the worse of the two penalties and that he was applying that standard. (27 ORT 3499.)

The trial court's ruling

After comment from counsel, the court made factual findings. (27 ORT 3521.) First, the court recalled that Juror No. 5 had been "evasive" during voir dire in his demeanor, body language and questionnaire. (27 ORT 3521.) The court remembered him "crossing his arms and glaring under the follow-up questioning." (27 ORT 3521.)

Second, the court found that Juror No. 5 approached Juror No. 1

during the guilt phase after the testimony of the first witness and said "How can you hold someone accountable for their actions?" and "This is what you expect when you have no authority figure." (27 ORT 3521-3522.) Even though Juror No. 5 did not recall making the first comment, he admitted he might have made the second. (27 ORT 3496.) The court found Juror No. 1 "completely credible" and found that Juror No. 5 made both of the statements. (27 ORT 3522.)

Next, the court noted there were "some splits" in the answers regarding the statements Juror No. 5 allegedly made about race. (27 ORT 3522.) However, the statements were "largely confirmed" by Juror No. 5. (27 ORT 3522.) Therefore, the court found Juror No. 5 said:

- You don't understand because you're not black.
- You can't understand because you're not black.
- I don't expect you to understand, you're not black.
- Black people don't admit being abused.
- Black kids have a different relationship with their fathers.
- A black father is an authority figure in the black family.
- This is a cultural thing, with respect to race and behavior.
- I know more [abuse] went on, more went on than we were shown.
- I know – this is a black thing [when responding to the others request to show proof for this position].

(27 ORT 3522-3523.)

Finally, with respect to his alleged statement that life is worse than death, the court found "I'm satisfied that he understands and can

follow the instructions that death is worse." (27 ORT 3523.)

The court then accepted the possibility that Juror No. 5 could impose death on a black defendant "who came from a good family." (27 ORT 3523-3524.) Nevertheless, the court found his statements were "so entangled with race-based assumptions, which [No. 5] himself doesn't appear to recognize, that I fear it's too much to ask him to attempt to disentangle the permissible, the entirely permissible from the totally impermissible." (27 ORT 3524.) The court noted that this was "a shame, because I think he's otherwise a good juror..." (27 ORT 3524.)

"Juror No. 5, I find, concealed his racial biases and fundamental beliefs in racial stereotypes on voir dire. He did say he would not base his decision on or consider race, but I find he's unable to do that." (27 ORT 3524.)

Second, by attempting to communicate with Juror No. 1 after Michael Durbin's guilt phase testimony, the court found that he began to reveal his fundamental biases and prejudices, because his unfounded assumptions about the defendant and authority figures were made at a time when there was no evidence to support the proposition. (27 ORT 3524-3525.) Since he was substantially repeating those sentiments in penalty phase deliberations, he was carrying through on his

prejudgment. (27 ORT 3525.)

The court repeated that Juror No. 5 exhibited a fundamental racial bias and improperly considered race contrary to his instructions and statements on voir dire. (27 ORT 3525.)

"So I find he's committed misconduct in that he's failed to follow his oath as a juror, he failed to disclose his biases, his race-based biases on voir dire, he failed to follow his instructions in stating that he considered life without possibility of parole worse than death and by engaging in speculation that there was more evidence that the jury wasn't told, by using race–based biases which find no basis in the evidence, by prejudging the appropriate penalty apparently beginning to do that after only the first guilt phase witness, in clear contradiction of his instructions, and by using sweeping generalizations and stereotypes about human behavior that are based on racial assumptions and not on the evidence." (27 ORT 3526.)

In conclusion, the court ruled that permitting jurors to vote for life or death based on racial stereotyping would violate the equal protection and due process clauses of the state and federal constitutions. (27 ORT 3526.)

The court then discharged Juror No. 5. (27 ORT 3526.)

The alternate juror

An alternate, Juror No. 17, was then selected and sworn. (28 ORT 3536.) Shortly after deliberations began, the foreperson informed the court that the new juror was not able to vote for death. (28 ORT 3541.) The court questioned the juror who said that during voir dire he was capable of imposing death, but as he listened to the evidence in this case, he began to change his mind. (28 ORT 3544-3545.) He said that he could not be certain about every case, but that "it would be pretty near impossible" for him to vote for death. (28 ORT 3545.)

Defense counsel emphasized that Juror No. 17 was a "thoughtful" juror, which the prosecutor had earlier noted, and that he only changed his opinion after listening to the evidence in the case. (28 ORT 3550-3552.) The trial court then discharged Juror No. 17 after finding he was unable to perform his function as a juror. (28 ORT 3557-3558.)

The court then selected the next alternate, and after deliberating for just over an hour, the jury returned a death verdict. (28 ORT 3567, 3573.)

This Court's Decision

In *People v. Wilson* (2008) 44 Cal.4th 758, 842, this Court reversed the penalty phase judgment after finding the trial court

improperly discharged Juror No. 5.

The court noted that the trial court cited four grounds for removing Juror No. 5 and that each reason was improper. (*Id.* at p. 841.)

Concealed bias

The trial court first found that the juror concealed a bias during voir dire. (*Ibid.*) "But the record fails to demonstrate that Juror No. 5 concealed anything." (*Id.* at p. 823.) "He was never asked whether he would interpret evidence of any abuse defendant may have suffered as a child through the prism of his own experiences, and we expect jurors to use their life experiences when evaluating the evidence." (*Ibid.*)

"The trial court apparently concluded that Juror No. 5 had concealed certain race-based assumptions regarding the nature of family dynamics in African-American families, especially with regard to young men who grow up without strong positive male role models. But Juror No. 5 was never asked about that." (*Ibid.*) The court continued that this was not the kind of concealment that would justify a juror's discharge under Penal Code section 1089 and to conclude otherwise would require accepting the notion that the other jurors were unable to perform the juror function because they concealed their unstated

assumption that there are no differences between family dynamics in black versus non-black families. (*Id.* at pp. 823-824.)

The court concluded these questions were more a matter of psychology or sociology, but the record did not show an intentional or unintentional concealment, and the trial court erred in finding otherwise. (*Id.* at p. 824.)

Relying on facts not in evidence

This Court noted the trial court also justified its decision to discharge Juror No. 5 because of his reliance on facts not in evidence. (*Id.* at p. 825.)

The facts in question had to do with abuse appellant likely suffered as a child, and Juror No. 5's mention of race during that discussion. (*Id.* at pp. 829-831.) But this Court emphasized that these were penalty phase deliberations where jurors may properly view the evidence in light of their life experiences. (*Id.* at p. 830.) Juror No. 5 was a black man who, because of his own life experiences, simply weighed the mitigating evidence more heavily than did the other jurors. (*Id.* at p. 831.) Juror No. 5 did not refer to facts outside the record, he merely drew an inference from the evidence presented. (*Ibid.*)

////

Refusal to follow the court's instruction that death is worse than life

The trial court also justified its discharge of Juror No. 5 because of his "misconduct" in failing to follow the court's instruction that death was a worse penalty than life in prison. (*Id.* at p. 832.)

However, this Court found that when taken in context of Juror No. 5's other remarks, his initial vote for death, and the trial court's original ruling that he knew death was worse, the record showed that he knew death was worse. (*Id.* at pp. 835-836.)

Prejudging the appropriate penalty

The trial court's final reason supporting the discharge of Juror No. 5 was premised on the finding that he prejudged the appropriate penalty. This was based on the report by another juror during the guilt phase that "this is what happens when you have no authority figure." (*Id.* at p. 836.)

This Court found that, assuming the juror made the statement, the trial court erred by finding it showed that he prejudged the appropriate penalty at that time. (*Id.* at p. 840.) This is especially true where Juror No. 5 voted to convict at the guilt phase and initially voted for the death penalty. (*Id.* at p. 841.)

In fact, this Court found Juror No. 5's guilt verdict was "inconsistent with the trial court's conclusion that Juror No. 5 harbored 'fundamental biases and prejudices' and 'unfounded assumptions about the defendant and authority figures' to wit, that those who are raised without stable families and proper role models cannot be blamed for their antisocial behavior." (*Id* at p. 840.)

Applicable Law

The penalty phase retrial following the erroneous discharge of the lone holdout juror, sympathetic to appellant, was barred by the double jeopardy clauses of the United States and California Constitutions.

There is no case law or other authority that allows the state a second chance to seek an execution, where the trial court manipulated the penalty phase jury to ensure a death verdict.

Following the remand to the trial court, appellant argued that state and federal double jeopardy protections prohibited a penalty phase retrial. (2 RT 149-150.) However, the trial court found retrial was proper under the "controlling authority" of *People v. Hernandez*, *supra*, 30 Cal.4th 1. (2 RT 149.)

The General Rule

The Fifth Amendment to the United States Constitution provides

that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." In a trial by jury, the defendant is placed in jeopardy when the jurors have been empaneled and sworn. (*Crist v. Bretz* (1978) 437 U.S. 28, 38.) Once this occurs, if a jury is discharged without returning a verdict, the defendant cannot be retried unless the defendant consented to the discharge, or manifest necessity required it. (*Green v. United States* (1957) 355 U.S. 184, 188.) Double jeopardy also protects a criminal defendant's interest in retaining a chosen jury — an interest that applies where, as here, a particular juror has been replaced. (See *Crist v. Bretz, supra*, 437 U.S. at p. 35.) Moreover, the courts have long recognized the special status of capital trials in the analysis. "To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner." (*United States v. Perez* (1824) 22 U.S. 579, 580.)

Where the Double Jeopardy Clause applies, "its sweep is absolute," and there can be no retrial. (*United States v. DiFrancesco* (1980) 449 U.S. 117, 131, quoting *Burks v. United States* (1977) 437 U.S. 1, 11, fn. 6 ["There are no 'equities' to be balanced, for the

Clause has declared a constitutional policy, based on grounds which are not open to judicial examination."].)

The Double Jeopardy Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. (*Benton v. Maryland* (1969) 395 U.S. 784; *Illinois v. Vitale* (1980) 447 U.S. 410, 415.) Additional protection against double jeopardy is embodied in Article I, section 15 of the California Constitution, which declares that, "Persons may not twice be put in jeopardy for the same offense ... ." Penal Code sections 687 and 1023 further codify the prohibition against double jeopardy.[5]

The United States Supreme Court has found no reason to allow a second "bite at the apple" following a prosecutor's own inaccuracy or neglect as to legal or factual matters or a court's legal

---

[5] Penal Code section 687 provides that "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

Section 1023 provides that "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal or jeopardy is a bar to another prosecution for the offense charged in such an accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

errors. (See *Sanabria v. United States* (1978) 437 U.S. 54, 64; *United States v. Ball* (1896) 163 U.S. 662, 667.)

Consistent with federal authority, California courts have agreed that double jeopardy prohibits retrial when the trial court has declared a mistrial before a verdict without a showing of legal necessity. (See *Paulson v. Superior Court* (1962) 58 Cal.2d 1; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712-713; *People v. Compton* (1971) 6 Cal.3d 55; *Larios v. Superior Court* (1979) 24 Cal.3d 324.)

Exceptions To The General Rule

There are well-established exceptions to the rule that a person may only be tried once for a criminal offense. Generally speaking, retrial is not barred when the trial ends without a verdict because of some manifest necessity. The doctrine of "manifest necessity" can be traced to *United States v. Perez, supra,* 22 U.S. 579. In *Perez,* the trial judge discharged the jury without the consent of either the defendant or the prosecution because the jury was unable to reach a verdict. On appeal, the defendant claimed he could not be retried. The Supreme Court found that under limited circumstances, retrial was not prohibited:

We think, that in all cases of this nature, the law has

> invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes...

(*Id.* at p. 580.)

Thus, when a jury is "deadlocked," retrial is not prohibited, and indeed, great deference is afforded a trial judge's decision to excuse the jury. (See also *Crist v. Bretz, supra,* 437 U.S. at p. 34, fn. 10; *Arizona v. Washington* (1977) 434 U.S. 497, 509-510; *Keerl v. Montana* (1909) 213 U.S. 135; and *Dreyer v. Illinois* (1902) 187 U.S. 71.)

Retrial is also allowed following a successful appeal by a convicted defendant. (*Ball v. United States, supra,* 163 U.S. 662, 672.) Similarly, the double jeopardy bar does not apply when the defendant requests or agrees to a mistrial during trial. (*United States v. Dinitz* (1976) 424 U.S. 600; *People v. Baillie* (1933) 133 Cal.App. 508, 512.)

Moreover, with or without consent, when a trial court orders a

mistrial "in the sole interest of the defendant," retrial is not barred. (*Gori v. United States* (1961) 367 U.S. 364, 369. The *Gori* court distinguished that case from situations "in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." (*Ibid;* see also *United States v. Jorn* (1971) 400 U.S. 470, 482-487.)

People v. Hernandez

Not long ago, this Court addressed the issue of whether the double jeopardy clauses of the state and federal constitutions bar retrial when a juror is improperly dismissed during trial and replaced with an alternate.

In *People v. Hernandez, supra,* 30 Cal. 4th 1, the court found the improper discharge of a single seated juror during a criminal trial requires a reversal of the judgment of conviction, but does not bar retrial of the defendant on double jeopardy grounds. (*Id.* at p. 3.)

The Court of Appeal had previously ruled that allowing the prosecution to retry a defendant would violate several policies underlying the double jeopardy clause, specifically, protecting the

interest of the accused in retaining his "chosen jury" (*Crist v. Bretz, supra,* 437 U.S. at p. 35), assuring a fair and impartial jury rather than one selected by the prosecution (*People v. Young* (1929) 100 Cal.App. 18, 23), and avoiding trials that unduly favor the prosecution. (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329.) (*People v. Hernandez, supra,* 30 Cal.4th at p. 6.) The lower court noted that "If the result of discharging a juror sympathetic to the defense without good cause was nothing more than a reversal of the conviction and remand for trial minus the offending juror, we fear such discharge could become routine." (*Ibid.*, quoting the Court of Appeal Opinion.)

This Court, with Justice Chin writing for the majority, reversed the Court of Appeal's holding for several reasons.

Initially, the court found the double jeopardy guarantee imposes no limitation on the power to retry a defendant who has succeeded in having his conviction set aside on appeal on grounds other than insufficiency of the evidence. (*Id.* at p. 3, citing *United States v. DiFrancesco, supra,* 449 U.S. at p. 131.) The court listed "the applicable policies and protections underlying, or afforded by, double jeopardy principles" that were reviewed in *DiFrancesco.*

> These include 1) protecting the defendant from being subjected to the embarrassment, expense, ordeal, and anxiety of repeated trials, 2) preserving the finality of judgments, 3) precluding the government from retrying the defendant armed with new evidence and knowledge of defense tactics, 4) recognizing the defendant's right to have trial completed by the particular tribunal, and 5) precluding multiple punishment for the same offense.

(*Id.* at p. 8, citing *DiFrancesco, supra,* 449 U.S. at pp. 127-128; see also *Green v. United States, supra,* 355 U.S. at pp. 187-188.)

The court then noted the primary reason the *DiFrancesco* court found that, absent insufficiency of evidence, double jeopardy does not bar retrial following reversal of a conviction on appeal. "[I]t would be a 'high price indeed for society to pay' if reversible trial errors resulted in immunity from punishment." (*Ibid,* citing *DiFrancesco, supra,* 449 U.S. at p. 131, quoting *United States v. Tateo* (1964) 377 U.S. 463, 466.)

The court in *Hernandez* then found the policies underlying double jeopardy did not warrant the ultimate sanction of immunity from prosecution under the circumstances in that case. When addressing the circumstances, the court emphasized that discharging the juror did not give the prosecutor an advantage. "The record did not reflect that Juror No. 8 was biased in favor of

the defense or prejudiced against the People." (*Id.* at pp. 9-10.)

Finally, the court rejected the appellate court's concern that reversal and retrial without the excluded juror could lead to the routine discharge of a juror sympathetic to the defense. "While it is true the prosecutor might risk a reversal to rid the jury of a defense-favorable juror, such a discharge would require the concurrence of the trial judge who would not welcome routine reversals of his or her judgments." (*Id.* at pp. 9-10.)

Justice Werdegar wrote a concurring opinion noting the "narrowness of today's decision." (*Id.* at p. 11.) She agreed there was no double jeopardy violation in the case where only one juror was discharged, and the record did not reflect that the juror was prejudiced in favor of the defense. (*Id.* at pp. 12-13.) However, if any of the noted factors, such as the discharge of only one juror, were missing, or had the court's purpose in discharging the juror been to influence the verdict, "this case might require a different outcome." (*Id.* at p. 13.) "Although affording a criminal defendant what is, in essence, immunity from future prosecution of his crimes as result of a trial court's legal error exacts a steep price from society, both our state and federal constitutions may require that

price be paid in some cases." (*Ibid.*)

The reasoning of Hernandez does not apply to the retrial of the penalty phase of a capital case, and retrial should have been barred under the present facts.

While *Hernandez* may be logical in the context of an ordinary criminal trial, it has no application to the penalty phase of a capital case, and is particularly inappropriate in the present case.

This is so for several reasons.

There is far less net loss to the public.

The majority and concurring opinion in *Hernandez* stress the primary factor cited in *DiFrancesco* — that a criminal defendant would receive a free pass if the trial court's error invoked double jeopardy principles.

However, that profound consequence is absent in a penalty phase case. Barring a penalty phase retrial would result in a guaranteed life prison term, which is in stark contrast to immunity from prosecution in the case of an ordinary trial. The issue to be determined at the penalty trial is the choice between the two worst sentencing alternatives available in our criminal justice system. It is not guilt or innocence of the crime. So the difference to the public interest in retrial of penalty phase as opposed to retrial of guilt

phase is not simply a matter of degree, but rather of kind. Barring a guilt phase retrial would mean that criminal behavior would go entirely unpunished, whereas barring a penalty phase retrial would ensure a life term in state prison.

Practical reasons

There are practical considerations in the capital process that would render a subsequent penalty retrial inherently unfair.

For instance, a retrial following jury deadlock in any ordinary case would begin immediately after the mistrial was declared, or shortly thereafter if there was good cause to continue the trial. On the other hand, a penalty phase retrial after a finding of an improper juror discharge would take place only after an appellate reversal. This process might take several years for a variety of reasons. In most cases, there is a period of years between the judgment of death and the appointment of appellate counsel. The problem would be exacerbated in cases where the legal error is not developed on the record and is addressed in the petition for writ of habeas corpus. The appointment of habeas corpus counsel represents additional, and in most cases, prolonged delay.

A natural consequence of such delay is the inability of the

capital defendant to prepare an effective case. Witnesses may be lost, memories can fade, and important records may be lost or destroyed by various school districts, jails, or hospitals. The lost witness factor is especially significant in that witnesses who testify as to the presence of mitigating factors often come from disadvantaged backgrounds similar to the defendant. In that case, the realities of addiction, incarceration, homelessness or abuse can render the witnesses, if found, less reliable. The remedy of retrial following an appellate reversal is simply inadequate to put the defendant in the position he would have been in after a mistrial. While the defendant might be able to present the former testimony of an unavailable witness, the manner in which such testimony is presented is likely to have a reduced impact on the jury.

Next, the prosecution will not be legally restricted from presenting new or better evidence at the penalty phase retrial, creating a substantial burden on the defense to challenge such evidence at that very late date. At the present retrial, for instance, the prosecution presented a forensic pathologist, Dr. Joseph Cohen, who did not testify at the first trial. He testified that Uwe's skin discoloration was consistent with appellant's use of a blow torch (a

fact that Lisa mentioned in her testimony even though no torch was found.) (6 RT 1127-1128.) But the prosecution's forensic expert at the first trial concluded the opposite — that the evidence was inconsistent with the use of a blow torch. (15 ORT 2426.) So the state benefitted by using this stronger evidence at the retrial.

Also, there was evidence discussed at the first trial that the state's key witnesses, Michael Durbin and Lisa Doe, were heavy methamphetamine users, and may have ingested methamphetamine near the time of the incident, their police interviews and perhaps their trial testimony. (9 ORT 1434, 1440-1441, 1485, 1518-1519.) This would likely have made an impression on the jurors when analyzing their credibility and ability to perceive and recall. But allowing the witnesses to testify at the retrial years later gave them time to clean themselves up, and they may well have been perceived as better witnesses, resulting in a stronger case for the prosecution.

Finally, the prohibition of a retrial following the trial court's error in manipulating the penalty phase jury may produce the incidental benefits of reduced anguish to the victims through the finality of a life term, as well as substantial financial savings to the

criminal justice system.

Therefore, whatever the merits of applying the double jeopardy clauses to the erroneous juror discharge in noncapital cases, allowing a penalty phase retrial in a capital case would be unfair and improper. This is especially true in the present case. Justice Werdegar emphasized in her concurring opinion in *Hernandez* that the constitution may require the "steep price" of "immunity from further prosecution" in certain cases. This is a case where the facts require the steep price of prohibiting a penalty phase retrial.

Other reasons relevant to appellant's case

The majority and concurring opinions in *Hernandez* emphasized the discharged juror in that case did not favor the defendant. (*People v. Hernandez, supra*, 30 Cal.4th at p. 9-10, 13.) In contrast, the discharged juror in the present case was the lone holdout for life, and the only obstacle standing between appellant and a death verdict. This is a meaningful distinction between *Hernandez* and the present case.

The United States Supreme Court has emphasized that double jeopardy principles may apply where, as here, the trial judge

exercises his or her authority to help the prosecution, by giving it another chance to convict, or in this case, seek a death verdict. (*United States v. Jorn, supra,* 400 U.S. at p. 484.) Where the trial court aborts a proceeding without the defendant's consent, the defendant is deprived of his valued constitutional "right to have his trial completed by a particular tribunal." (*Ibid,* citing *Wade v. Hunter* (1949) 336 U.S. 684; see also *State v. Rogan* (Haw. 1999) 984 P. 2d 1231, 1249, where the court ruled double jeopardy prevents retrial where the prosecution intentionally seeks to subvert the defendant's right to complete the proceeding before the original jury.)

The state may argue that prohibiting a retrial is improper because, absent the juror discharge, the likely result would have been a hung jury followed by a retrial. However, the case law and reasoning cited suggest that the sanction for the improper discharge of a defense-favorable juror is the enforcement of the double jeopardy provisions. Invoking this constitutional principle is especially appropriate where the manipulation of the seated jury will assist the state in executing a defendant, and where the alternative is not acquittal but rather a life term. Manifest

necessity exists in the case of a natural juror deadlock, but not where the trial court has attempted to create a pro-death jury.

Next, Juror No. 5 was not the only juror discharged, although this Court specifically declined to rule on the propriety of dismissing the alternate juror. (See *People v. Wilson*, *supra*, 44 Cal.4th at p. 841, fn. 19.) This was another factor emphasized in *Hernandez*. In fact, the majority repeatedly referred to the discharge of a "single juror," a "single seated juror," and "one particular juror." (*People v. Hernandez*, *supra*, 30 Cal.3d at pp. 3, 8.) Justice Werdegar referred to the "single juror" factor four times in her concurrence. (*Id.* at pp. 10, 13.) The alternate juror who took Juror No. 5's place informed the court that after listening to the evidence in the case, he could no longer impose a death sentence. This was due to a transformation of the beliefs he harbored during jury selection. The discharge of the two jurors favoring life constituted an improper shaping of the jury that was not present in *Hernandez*.

Another distinction involves the *Hernandez* court's characterization of the discharged juror as "borderline" in terms of his or her potential bias. (*People v. Hernandez*, *supra*, 30 Cal.4th at p. 10.) In the present case, Juror No. 5 was not "borderline." He

was not a biased juror and the discharge was clearly improper. It was not a close call.

The final significant fact is that the discharge of Juror No. 5 deprived appellant of the only juror with the cultural experience necessary to accept and explain the defense argument at the penalty phase. As previously noted, the other jurors confirmed that Juror No. 5 rationally discussed the evidence while deliberating. However, while initially favoring a death verdict, he changed his mind after contemplating the defense argument relating to the appellant's abusive background. Notwithstanding the fact that two other jurors were unsure as to the appropriate penalty when the jury first voted, Juror No. 5, because of his background and life experiences, would have been the only juror with a realistic chance of persuading the others as to the merits of the defense request for a term of life in state prison with no chance of parole.

So Juror No. 5 was a capable juror who was deliberating properly. But he stood in the way of a death verdict and the trial court wanted him off the jury. To do this, the judge ruled the juror was racially biased and therefore not able to properly perform the function of a juror. Reversal with a retrial is an inadequate remedy

for such a serious error.

The present facts are qualitatively different from the facts in *Hernandez.* This Court should hold that when the trial court manipulates a penalty phase jury to guarantee or increase the chances of a death verdict, the federal and state double jeopardy protections prohibit a penalty phase retrial.

II

Allowing a retrial would also violate the capital defendant's Fourteenth Amendment right to due process.

The United Stated Supreme Court has consistently maintained that a capital defendant must be given a fair opportunity to meet, rebut or explain any evidence that the state offers as a reason the defendant should be sentenced to death. (*Gardner v. Florida* (1977) 430 U.S. 349 ; *Simmons v. South Carolina* (1994) 512 U.S. 154.) Moreover, due to the uniqueness of the death penalty, the United States Supreme Court requires heightened reliability in the decisions made by the jury and judge during the course of a capital trial. (*Zant v. Stephens* (1983) 462 U.S. 862, 877, 884.)

In *Woodson v. North Carolina* (1976) 428 U.S. 280, the court

explained that the penalty of death is qualitatively different from the sentence of imprisonment, however long. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

For the reasons previously stated, allowing a penalty phase retrial following the wrongful discharge of a penalty phase juror would impair the defendant's fair opportunity to challenge the prosecution's evidence, detract from the heightened reliability requirement, and fail to recognize the qualitative difference accompanying a death sentence.

The present due process violation in allowing the penalty phase retrial is aggravated by this Court's failure to address appellant's argument in the first appeal that the trial court erroneously discharged the alternate juror who first replaced Juror No. 5. (*People v. Wilson, supra,* 44 Cal.4th at p. 841, fn. 19.) The court noted that it was unnecessary to resolve this contention in light of its conclusion that penalty phase reversal was already required. However, analysis of the issue was relevant to appellant's due process claim.

Appellant had argued in the appeal that by discharging Juror No. 17 after he decided during penalty phase deliberations that he could no longer impose a death sentence, the trial court was essentially reopening the death qualification process.

This was significant because Justice Werdegar's concurrence in *Hernandez* noted an important fact in describing the issue was that "Unlike in *People v. Young* (1929) 100 Cal.App. 18, where an empaneled juror was discharged and replaced with someone called from the venire [citation], Juror No. 8 in the instant case was replaced with a *sworn alternate*." [emphasis in the original.]

While Juror No. 5 in the present case was replaced by a sworn alternate, the alternate was then replaced because of his newly formed views regarding the death penalty. This is important in light of Justice Werdegar's next point:

> "second, unlike in *People v. Burgess* [citation], voir dire was not reopened, and the parties were not allowed to exercise additional peremptory challenges. Even in circumstances where but a single juror is replaced, reopening voir dire and permitting a party to exercise additional peremptory challenges, in addition to violating Code of Civil Procedure, section 226, subd.(a), may also compromise a defendant's constitutionally protected right to a chosen jury."

(*People v. Hernandez, supra*, 30 Cal.4th at p. 12, emphasis in the

original.)

So appellant argued that discharging the alternate was remarkably similar to reopening voir dire, a fact Justice Werdegar emphasized was important to the double jeopardy analysis in *Hernandez*. And yet this Court chose not to address the issue in appellant's first appeal.

The dismissal of the alternate juror, especially after the dismissal of Juror No. 5, violated due process, and the Court had no occasion in the first opinion to address the dismissal of the alternate because there was no reason at the time to assume that the prosecutor would seek a penalty retrial. It is now clear that the death verdict was a product of sequential due process violations that could not be remedied by retrying the penalty phase.

III

The judgment must be reversed because the trial court failed to inquire into a conflict between appellant and counsel, despite having been informed that appellant claimed counsel had rendered ineffective assistance at his first trial and objected to counsel representing him at the retrial.

Introduction

Appellant informed the trial court that he objected to the

appointment of attorney Michael Belter for the penalty retrial because he had pending claims of ineffective assistance of counsel from the first trial. But the trial court failed to inquire about the conflict, despite having an obligation to do so, and there was no indication in the record that appellant's objection was ever resolved or withdrawn.

Background

Michael Belter represented appellant at the original capital trial. (1 RT 1.) He was mentioned in several early conferences as a logical choice to represent appellant at the penalty phase retrial. (1 RT 1, 4, 7-8, 11-12.)

On November 18th, 2008, attorney Paul Grech appeared specially on behalf of appellant and indicated the county was negotiating with Belter who was willing to accept the appointment. (1 RT 7-8.) The prosecutor and trial court agreed that it would be efficient to appoint Belter and "that's what we should do." (1 RT 8.)

On January 7th, 2009, attorney Steve Harmon appeared on behalf of Criminal Defense Lawyers ("CDL" - the organization that assists with the appointment of defense counsel), informed the court that the county approved the necessary funds to appoint Belter, and

that he agreed to take the case. (1 RT 22.) Attorney Chris Harmon was also appointed as second counsel. (1 RT 23.)

The trial court asked appellant if the appointment of Belter (and Harmon) was "agreeable" to him. (1 RT 23.) Appellant answered, "Well, I can't really say nothing 'til they show up." (1 RT 23.) The court told appellant that he would be well-represented by these attorneys. (1 RT 23.)

The next conference occurred on January 9th, 2009. Steve Harmon again appeared for appellant, and neither of his appointed attorneys were present. (1 RT 25.) The parties discussed potential trial dates, and other calendaring matters. The court suggested another pretrial conference take place on February 20th and asked appellant if that day worked for him. (1 RT 28.)

Appellant responded "I mean, I don't really have no choice in the matter." (1 RT 28.) The trial court responded, "My concern is, I want Mr. Belter — did you meet this gentleman?" (1 RT 28.) Appellant responded, "Yes, actually, *I have an objection to Mr. Belter*. But since he's not here, I really don't want to raise it." (1 RT 28, emphasis added.) The court then said appellant could "take that up with counsel or wait until the next hearing." (1 RT 28.)

The parties convened again on February 20th, and Belter and Chris Harmon appeared for the first time. (1 RT 32.)

After discussing certain administrative issues, Belter said "the court should be aware that there is still a pending habeas petition before the California Supreme Court. We need to speak with appellate counsel and habeas counsel to determine the scope of that and also the interplay that that may have on this proceeding." (1 RT 35.) Belter proposed that the parties reconvene in three weeks (after he had a chance to confer with habeas and appellate counsel) "and then address any issues with respect to the pending litigation and this case." (1 RT 35.)

Shortly thereafter, appellant started to say something, but the trial court informed him that he needed to speak with his attorney before addressing the court. (1 RT 36.) Belter then informed the court, "Just to make the record clear, Mr. Wilson — he's conferred with me this morning. He wants the court to be aware that there are pending issues with respect to the guilt phase of his case, competency of trial counsel in that proceeding and other issues. And those are in the habeas petition that is still pending before the Supreme Court." (1 RT 37.)

The court said nothing in response and only asked the parties to bring their calendars to the next appearance so they could calendar realistic trial dates. (1 RT 37.)

At the next appearance, on March 13th, 2009, Belter noted that appellant's habeas corpus petition was still pending in the California Supreme Court, that appellant had filed the petition, the Attorney General had filed a response, and that habeas counsel, Michael Meaney, told him he would soon be filing the reply brief. (1 RT 40.)[6]

Belter suggested that if appellant prevailed on the petition, it "could affect this litigation." (1 RT 40.)

The trial court never inquired about the conflict Belter described regarding the pending ineffective assistance of counsel claims, or appellant's objection to Belter because of that conflict.

Applicable Law

The present issue involves two general areas of applicable law — conflict of interest, and requests for substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118.

---

[6] The issue was never addressed again on the record. This Court's official website indicates the habeas petition was denied on June 30th, 2010.

Conflict of Interest

The right to the effective assistance of counsel, secured by the Sixth Amendment to the United States Constitution, and article 1, section 15 of the California Constitution, includes the right to representation that is free from conflicts of interest. (*People v. Cox* (2003) 30 Cal.4th 916, 948.) Conflicts may arise in various factual settings but include situations where counsel's loyalty to, or efforts on behalf of, a client are compromised by his own interests. (*People v. Hardy* (1992) 2 Cal.4th 86, 135.)

Under the federal constitution, when counsel suffers from an actual conflict, prejudice is presumed. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 348.) An actual conflict is one that affects trial counsel's performance — as opposed to a mere theoretical division of loyalties. (*Mickens v. Taylor* (2002) 535 U.S. 162, 171.) To obtain reversal for an actual conflict, the defendant must show that a conflict existed and that it affected trial counsel's performance. (*People v. Bonin* (1989) 17 Cal.3d 808, 837-838.)

To establish a conflict of interest under the state constitution, the defendant is required to show that counsel performed deficiently and that but for counsel's deficiencies, it is reasonably probable the

results of the proceedings would have been different. (*People v. Doolin* (2009) 45 Cal.4th 390, 421.) Conflict of interest allegations have evolved into claims of ineffective assistance of counsel. (*Ibid.*)

A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that defendant and counsel have become embroiled in a conflict that will likely result in ineffective representation. (*People v. Earp* (1999) 20 Cal.4th 826, 876.)

Marsden

When a defendant seeks to discharge his appointed counsel and substitute another attorney, asserting inadequate representation, the trial court must permit the defendant to explain the reasons for his request. (*People v. Marsden, supra,* 2 Cal.3d 118, 124.) *Marsden* is rooted in a defendant's constitutional right to counsel. (*Id.* at p. 123.) Although no formal motion is necessary, there must be "at least some clear indication by defendant that he wants a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281.)

The trial court's failure to inquire into a defendant's reasons to replace counsel is reversible per se. (*People v. Lewis* (1978) 20

Cal.3d 498, 499.) Moreover, the trial court's inquiry into the issue must be careful and searching because the failure to do so "may make it difficult for a trial court to thoughtfully exercise" its discretion in the manner required by *Marsden*. (*People v. Miranda* (1987) 44 Cal.3d 57, 77.)

Legal Analysis

When this case was returned to the trial court, the court, the prosecutor and CDL (the organization responsible for appointing counsel) believed that it would be expedient to reappoint Michael Belter to represent appellant at the penalty retrial. (1 RT 1, 4, 7-8, 11-12.)

There were extended discussions about the appointment, but after the decision had been made, appellant informed the trial court that he objected to the appointment of Belter, and that he would raise the issue again when Belter was actually present in court. (1 RT 28.)

Michael Belter, along with co-counsel Chris Harmon, appeared at the next hearing, and Belter informed the court that it should be aware the habeas corpus litigation from the original trial was still pending, and that matters raised in that case might affect the

affect the penalty retrial. (1 RT 35.)

When appellant began to speak, the trial court instructed him to speak through counsel. (1 RT 36.) Thereafter, Belter informed the court in order to "make the record clear" that appellant intended to inform the trial court that some of the issues raised in the pending habeas petition involved claims that Belter rendered ineffective assistance of counsel at the original trial. (1 RT 37.)

But the trial court never inquired about this conflict of interest regarding the appointment of a lawyer whose representation at the original trial was simultaneously being litigated in this Court.

The failure to make any inquiry once apprised of this issue requires automatic reversal. (See *People v. Lewis*, *supra*, 20 Cal.3d at p. 499.)

Respondent may argue that no formal *Marsden* motion was ever made. But none was required here where appellant informed the court that he objected to Belter's appointment, and at the next appearance Belter informed the court that appellant's concern was that he would be represented at his penalty retrial by the very attorney whose ineffective assistance at the original trial he had

challenged in this Court.

The trial court asked for no further explanation, and defense counsel provided none.

The problem in this circumstance is that trial counsel faced ineffective assistance of counsel allegations during the time he would be making decisions regarding the penalty phase retrial. The claims made in the habeas petition included allegations that Belter failed to adequately present appellant's social history at the first penalty trial, and more importantly, that he failed to properly investigate or present critical evidence regarding appellant's extensive cognitive deficits and other mental impairments. (See Appellant's Petition For Writ of Habeas Corpus, pp. 424-473.)

Belter was invested in his original strategy, and no lawyer wants to admit a mistake. If he presented the extensive neurological and psychiatric evidence at the retrial that he failed to investigate or present at the original trial, it might be viewed as an admission of his ineffective assistance originally. Counsel in this situation might reasonably believe that sticking with the original strategy at the retrial could improve his own chances of avoiding an IAC finding.

Here, counsel again chose to forego the presentation of any psychological or neurological impairment evidence, proceeding instead with a case that focused on appellant's dysfunctional social history. Appellant had challenged counsel's presentation of that case at the original penalty trial, and the record does not show a stronger case was presented at the retrial. The impairment evidence was now fully developed by habeas counsel, and Belter still chose to keep it from the jury despite the strength of the evidence and the effect it might have on a jury considering mitigation.

So under the facts, as known by the trial court, it was likely that Belter would adopt his original strategy, leaving out key mitigating evidence in the same way that appellant complained of in the habeas petition. The likelihood of the decision was confirmed by the fact that it happened.

Trial counsel in Belter's position faces a very real conflict of interest. Appellant and Belter advised the trial court of this issue at the time counsel was appointed but the court asked no questions.

The trial court also had a duty to inquire because appellant's comments amounted to a request to replace appointed counsel under *People v. Marsden*.

At the beginning of the proceedings, appellant informed the trial court of an actual conflict of interest in that there were pending ineffective assistance claims based on Belter's decisions at the first trial. This Court dismissed those claims as moot, meaning there was no finding that the claims were meritless. So appellant went into the penalty retrial with unresolved complaints about his counsel, and objected to Belter's appointment on that basis. But the trial court proceeded without any discussion of the issue.

The court's failure to inquire into appellant's request to replace counsel was reversible per se. (*People v. Lewis, supra*, 20 Cal.3d at p. 499.) It certainly cannot be found that the court "thoughtfully exercised" its discretion in the manner required by *Marsden* (*People v. Miranda, supra*, 44 Cal.3d at p. 77).

Reversal of the judgment is required.

IV

California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution.

Many aspects of California's capital sentencing scheme, individually and in combination with each other, violate the United States Constitution. Because challenges to most of these have been

rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional basis, and requests the Court's reconsideration of each claim in the context of California's entire death penalty system.

Appellant further requests the Court to consider their cumulative impact on the functioning of California's capital sentencing scheme. As the United States Supreme Court has stated, "[t]he constitutionality of a state's death penalty system turns on review of that system in context." *Kansas v. Marsh* (2006) 548 US.163, 178, fn. 6.[7] See also, *Pulley v. Harris* (1984) 465 US. 37,51.

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a constitutionally adequate basis for selecting the relatively few defendants to be

---

[7]In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of" the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." 548 US. at 178.

subjected to capital punishment. In short, California's special circumstances are now so numerous and so broadly construed as to be chargeable in virtually every non-vehicular homicide.

Nor are there adequate penalty phase safeguards that ensure the reliability of the verdict. Instead, jurors are not required to agree with each other at all as far as the existence of aggravating factors, and jurors are not required to find that evidence of aggravating factors meets any burden of proof at all. The result is truly a "wanton and freakish" system that arbitrarily imposes the death penalty on a handful of unfortunate defendants from among the thousands of murderers in California annually.

A. *Appellant's death penalty is invalid because Penal Code § 190.2 is impermissibly broad.*

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of

murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Ca1.4th 857,868.)

The 1978 death penalty law was drafted *not* to *narrow* those eligible for the death penalty but to *expand* liability to make virtually *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") Since 1978, the legislature has increased the number of special circumstances from 19 to 22, and both the legislature and the judiciary have expanded the scope of many of them.

Virtually all felony-murders are ostensibly special circumstance eligible, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or during a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Ca1.3d 441.)

Section 190.2's reach has been extended to virtually all intentional murders by this Court' s construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse*

(2002) 27 Ca1.4th 469, 500-501, 512-515.

B. *Penal Code § 190.3(a) as applied allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States constitution.*

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. *(People v. Dyer* (1988) 45 Ca1.3d 26, 78; *People v. Adcox* (1988) 47 Ca1.3d 207,270) The Court has approved numerous expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime, (*People v. Walker* (1988) 47 Cal.3d 605,639) or

having had a "hatred of religion, (*People v. Nicolaus* (1991) 54 Ca1.3d 551,581-582) or threatened witnesses after his arrest, *(People v. Hardy* (1992) 2 Ca1.4th 86, 204) or disposed of the victim's body in a manner that precluded its recovery. (*People v. Bittaker* (1989) 48 Ca1.3d 1046, 1110, fn.35.) It also is the basis for admitting evidence under the rubric of "victim impact." (See, e.g., *People v. Robinson* (2005) 37 Ca1.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge, *Tuilaepa v. California* (1994) 512 U.S. 967, it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

All this was consistent with this Court's previous interpretations of California's statute. *People v. Fairbank* (1997) 16 Ca1.4th 1223, 1255, stated that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors..." But this position has been squarely rejected by the U.S.

Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *Cunningham v. California* (2007) 549 U.S. 270.

Apprendi held that a state may not impose a sentence greater than that authorized by the jury' s simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

Ring struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law, *Walton v. Arizona* (1990) 497 U.S. 639, it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding that increases the possible penalty is the functional equivalent of an

element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Blakely considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra,* 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) *Blakely* ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

The governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Blakely*, at p. 304.)

United States v. Booker (2005) 543 U.S. 220, 224 reiterated the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Cunningham 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 mid-term specified by the legislature. *Cunningham v. California, supra.* In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

In the wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, any jury finding relied on to impose the death penalty must be found true beyond a reasonable doubt. However, California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance — and even in that context the

required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Ca1.4th 43,79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of-proof quantification"].)

In the wake of *Cunningham*, it is crystal-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 there is a requirement that further factual findings must be made before a death penalty can be imposed.

Under California law, the maximum punishment that may be imposed upon a *guilt* verdict of first degree murder with special circumstances, the death penalty may be imposed *only* upon a *further* factual finding that is *not* encompassed within the guilt verdict or the penalty procedure.

Arizona argued in *Ring* that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment. *Ring* was therefore sentenced within the range of punishment authorized by the jury's *guilt* verdict. The Supreme Court squarely rejected that argument:

> This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] exposed] [*Ring*] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. *Ring*, 124 S.Ct. at 2431.

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Even where the jury finds a special circumstance true under section 190.2, a death verdict is not an available option unless the jury makes *further* findings that one or more aggravating circumstances exist, *and* that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of

a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) *Blakely*, made it clear that, as Justice Breyer complained in dissent, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely*, *supra*, 124 S.Ct. at 2551; emphasis in original.)

The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite fact finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

////

////

////

////

C. *This Court's interpretation of the capital sentencing provisions in a manner as to preclude intra-case or inter-case proportionality review in either the trial court or this court results in arbitrary, discriminatory, or disproportionate impositions of the death penalty.*

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review — a procedural safeguard this Court has not adopted. *In Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional
muster without comparative proportionality review."

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the appropriateness of the death penalty, either

intra-case or inter-case proportionality review. (See *People v. Fierro, supra,* 1 Ca1.4th at p. 253.) Those common sense comparisons are essential to an equitable and constitutional capital sentencing mechanism, and are lacking in California.

D. *California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the eighth and fourteenth amendments; imposition of the death penalty now violates the eighth and fourteenth amendments to the united states constitution.*

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339,366.) The non use of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death

Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.anmesty.org].)

Although California is not bound by the laws of any other sovereignty in the administration of its criminal justice system, both the federal and state governments have relied on the customs and practices of other parts of the world as relevant reference points. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, ' subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.' " (1 Kent 's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. ofFi e ld, J.]; *Hilton v. Guyot, supra,* 159 U.S. at p. 227.)

In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *(Atkins v. Virginia, supra,* 536 U.S. at p. 316, fu. 21, citing the Brief for The European Union as Amicus Curiae.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes.") Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. *(Cf. Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.)* Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence must be set aside.

Conclusion

Retrial of the penalty phase under the circumstances of this case violated defendant's double jeopardy protections and right to due process. And the trial judge erred by failing to inquire into his complaint and allowing him to be represented in a death penalty trial by an attorney with a conflict. Reversal of the death judgment is required.

Dated: 3/14/14

Respectfully submitted,

Patrick Morgan Ford

PATRICK MORGAN FORD,
Attorney for Appellant
LESTER HARLAND WILSON

Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 16,571 words, as determined by the word count feature of the program used to produce the brief.

Dated: 3/14/14

Patrick Morgan Ford

PATRICK MORGAN FORD

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served an *Appellant's Opening Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Michael Hestrin
Deputy District Attorney
3960 Orange Street
Riverside, CA 92501

Michael R. Belter
Attorney at Law
16 N. Marengo #619
Pasadena, CA 91101

California Appellate Project
Attn: Morey Garelick
101 Second Street, Suite 600
San Francisco, CA 94105

Hon. Elisabeth Sichel
Riverside County Superior Ct
4100 Main Street
Department 53
Riverside, CA 92501

Lester "Woody" Wilson,
#P84799
P.O. Box P84799
San Quentin State Prison
San Quentin, CA 94974

Additionally, I electronically served a copy of the above document as follows: 1) California Supreme Court, Courts.CA.gov/supremecourt and 2) Attorney General, ADIEService@doj.ca.gov. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on March 19, 2014, at San Diego, California.

Esther F. Rowe

People v. Lester Harland Wilson CASE NO. S189373

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE — SUPPLEMENTAL

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served an *Appellant's Opening Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Michael Hestrin
Deputy District Attorney
3960 Orange Street
Riverside, CA 92501

Michael R. Belter
Attorney at Law
16 N. Marengo #619
Pasadena, CA 91101

California Appellate Project
Attn: Morey Garelick
101 Second Street, Suite 600
San Francisco, CA 94105

Hon. Elisabeth Sichel
Riverside County Superior Ct
4100 Main Street
Department 53
Riverside, CA 92501

Lester "Woody" Wilson,
#P84799
P.O. Box P84799
San Quentin State Prison
San Quentin, CA 94974

Additionally, I electronically served a copy of the above document as follows: 1) California Supreme Court, Courts.CA.gov/supremecourt and 2) Attorney General, ADIEService@doj.ca.gov. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on March 25, 2014, at San Diego, California.

Esther F. Rowe