IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	No S126560
Plaintiff/Respondent	)	Los Angeles County
vs.	)	
JAMELLE EDWARD ARMSTRONG	)	NA051938-01
Defendant/Appellant	)	

APPELLANT'S OPENING BRIEF

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Tomson Ong, Judge.

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DEATH PENALTY

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On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Tomson Ong, Judge.

STATEMENT OF THE CASE

An Information was filed on June 25, 2002, charging appellant with eight counts of criminal activity. The charged counts are as follows: Count I - first degree murder of Penny Keptra[1], on or about December 29, 1998, in violation of Penal Code section 187 (a). Six separate special circumstances allegations were also alleged, charging that during the commission of the crime set forth in Count I, appellant was engaged in the commission of a

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1. In the record, this name has also been spelled "Keprtra." Appellant will use the rendering of the deceased name as used in the Information.

robbery, kidnaping, kidnaping for the purpose of rape, rape, rape with a foreign object and torture; Count 2- second degree robbery against the person of Penny Keptra, on or about December 29, 1998, in violation of Penal Code section 211; Count 3- kidnaping for the purposes of rape against the person of Penny Keptra, on or about December 29, 1998, in violation of Penal Code section 209 (b)(1); Count 4-forcible rape while acting in concert against the person of Penny Keptra, on or about December 29, 1998, in violation of Penal Code sections 264.1, 261(a)(2) and 262(a)(2); Count 5- forcible Rape against the person of Penny Keptra, on or about December 29, 1998, in violation of Penal Code section 261 (a)(2); Count 6-sexual penetration by foreign object while acting in concert against the person of Penny Keptra, on or about December 29, 1998, in violation of Penal Code sections 289(a)(1) and 264.1; Count 7- sexual penetration by a foreign object against the person of Penny Keptra, on or about December 29, 1998, in violation of Penal Code section 289(a)(1); Count 8- torture against the person of Penny Keptra, on or about December 29, 1998, in violation of Penal Code section 206. (II CT 306.)

A Motion to Suppress appellant's confession was heard and denied. (1 RT 129 et seq.) Jury selection began on February 2, 2004 (III CT 683) and the jury was empaneled on March 30, 2004. (III CT 726.) The prosecution's case commenced on April 1, 2004 (III CT 728), with it

resting on April 12, 2004. (III CT 750.) On the same day, appellant testified on his own behalf. (III CT 751.) On April 14, 2004, the prosecution commenced its rebuttal case. (III CT 755.) The jury was instructed on April 16, 2004. (III CT 872.) On April 23, 2004, the jury returned a guilty verdict on all counts and true findings on all allegations. (IV CT 933 et seq.)

The penalty phase of the trial commenced April 29, 2004. (IV CT 961.) The prosecution rested the next day. (IV CT 967.) Appellant commenced presentation of his case on May 3, 2004, resting the next day. (IV CT 969 et seq.) The prosecution began its rebuttal case on May 4, 2004 (*supra)* and rested on May 5, 2004. (IV CT 1003.) The jury was instructed and began deliberations on May 6, 2004. (IV CT 1067-1068.) On May 10, 2004, the jury returned a verdict of death. (IV CT 1074.)

On July 16, 2004, appellant's Motion for a New Trial and Modification of Sentence were denied by the trial court and a judgment of death was entered. (V CT 1410.)

This appeal is automatic. Counsel was appointed on January 31, 2008.

STATEMENT OF FACTS

GUILT PHASE

PROSECUTOR'S CASE

In the early daylight hours of December 30, 1998, a highway worker discovered the body of Penny Keptra on a 405 Freeway embankment near Long Beach Boulevard and Wardlow Street in Long Beach, California. (22 RT 4808, 4833.) The area where the body was found was fenced in, and would have been difficult to see from either Wardlow Street or Long Beach Boulevard. (22 RT 4832-4833.) There was evidence that the something had been dragged through the embankment area. There were also boot prints surrounding the area of the body. (22 RT 4814-4832, 4838-4840.) A piece of a broken wooden stake was found in the area of the body. (22 RT 4815.)

An autopsy revealed that the cause of death was multiple traumatic injuries to the head and neck, most of the injuries being caused by blunt trauma. Strangulation could not be excluded as a contributing cause of death. (19 RT 4233-4234.) The body evidenced various bone fractures and soft tissue injuries, including trauma to the genital area consistent with penetration with a foreign object. (19 RT 4233.) It was opined by the medical examiner that the injury to the genitalia took place ante-mortem.

(*Ibid.*)

On December 29, 1998, Penny Keptra was residing with Joseph O'Brien. That evening, he gave Penny a book of food stamps, serial number F02520550V, containing a five dollar coupon and a dollar coupon, with instructions to purchase milk and cereal for him at the local store. (20 RT 4351.) This booklet was originally part of a shipment of Los Angeles County food stamps which were shipped to and received by the Nix check cashing store, at 6583 Atlantic Boulevard in Long Beach. (20 RT 4245.)

Penny left for the store between 10:00 and 10:30 p.m. that evening. This was the last time Mr. O'Brien saw her alive. (20 RT 4351-4353.)

Between Christmas and New Years of 1998-99, Efram Garcia was working at the Lorena Market located at 6725 Broadway in Los Angeles. (20 RT 4383.) He identified appellant as being a person that he had seen in the neighborhood of the store. (20 RT 4389-4390.) During the investigation of this crime, the police obtained from Mr. Garcia two food stamp coupons that bore the serial number F02520550V. (People's Exhibit 18 and 18A; 20 RT 4393.) Mr. Garcia was not able to provide the exact date that these coupons came into the possession of the Lorena Market. (20 RT 4394.)

Paul Edwards was a homicide detective assigned to the Keptra murder investigation. (21 RT 4586-4587.) He conducted a search of the murder scene, and found a single white sock and a food coupon book cover.

The serial number on the book was F-02520550. (21 RT 4592-4593.)

In the early evening of December 29, 1998, appellant, his brother Warren Hardy, Kevin Pearson and another man named "Chris" arrived at Monte Gmur's residence in Long Beach. All of these men were acquaintances. (20 RT 4361-4363.) They spent part of their time at the Gmur residence drinking, although Gmur did not know exactly how much appellant drank. (20 RT 4363-4366.) However, Mr. Gmur referred to appellant as being "stupid drunk" when appellant and the three others left the Gmur residence sometime after 9:30 p.m. (20 RT 4366, 4369.)

Mr. Gmur stated that when they were at his apartment, Pearson was wearing black high work type boots, dark brown Dickies pants and a light brown sleeved shirt. Appellant was wearing black tennis shoes, blue corduroy pants and a long sleeve University of Michigan shirt that was blue and gold in color. (20 RT 4376.) Hardy was wearing a black leather jacket and dark pants. (20 RT 4377.)

On January 7, 1999, a search was executed at appellant's mother's house at 731 Redondo Avenue in Long Beach. A pair of black shoes were found that were identified as belonging to Warren Hardy. (20 RT 4481.) DNA analysis of a blood stain on said shoes revealed that the stain was contributed by Ms. Keptra. (20 RT 4338.) A cream colored shirt with black checks was recovered from the premises that had a semen stain that

matched Jamelle Armstrong. (22 RT 4758, 4322-4324.) In addition, Ms. Keptra's blood was found on the pants that Pearson was wearing. (20 RT 4336.) At the same location, police recovered 3 pairs of tennis shoes. No blood stains were present on these shoes. (22 RT 4807.)

Blue denim overalls were recovered at the house of Hardy's girlfriend, Tiyaire Felix. (21 RT 4594.) Appellant admitted to wearing these overalls the night of the crime. (23 RT 4978.) They bore a blood stain contributed by Ms. Keptra. (20 RT 4338.) In addition, black boots, like those worn by Pearson, were also found at this location. (21 RT 4594-4595.) These boots bore blood stains that matched Ms. Keptra. (20 RT 4337.) At the same location, a black leather jacket belonging to Mr. Hardy was found in a closet. (20 RT 4778.) It bore a stain of Ms. Keptra's blood. (20 RT 4333.)

Keith Kendrick was an acquaintance of appellant and Kevin Pearson. He initially testified that on either December 30th or December 31st, 1998, he was at his residence with appellant and Kevin Pearson. They were all watching a television news report about a woman found murdered near the freeway. Kendrick commented to the other two men, "[o]h, I know who did that, Killer Kev did that." Immediately after hearing this remark, appellant whispered to Pearson, "[h]ow did he know that?" (20 RT 4416-4418.)

Kendrick testified that even though he wasn't paying much attention

to Pearson after this, he "vaguely remembers" Pearson giving further details about what happened. Kendricks stated that Pearson related that he, appellant and Warren Hardy "had a girl in the bushes having sex with her." Kendrick also stated that Pearson stated that appellant and Hardy started beating the woman with a stick. (20 RT 4419.)

On cross examination, by appellant's counsel, Kendrick stated that the first time that Pearson had talked to him about the murder was December 29, 1998, when the two of them were alone. (20 RT 4424.) In addition, he testified that appellant never made a statement to him that appellant had any involvement appellant in the death of the woman. (20 RT 4424.) Kendrick also testified that Pearson told him the details of the attack during an occasion when Kendrick was alone with Pearson. (*Ibid.*) Kendrick stated that Pearson didn't relate any details of the assault while the in presence of appellant. (20 RT 4431.)

During a recess, the prosecutor and Kendrick conferred about the nature of Kenrick's testimony. After the recess, Kendrick again changed his story, now stating that on December 30, 1998, he was at Monte Gmur's house with Pearson when Pearson told him about the crime. No one else was present. (20 RT 4447.) Kendrick stated that the next day, that he was watching the news with Pearson, appellant and Gmur. A new story came on about a woman's body being found near the freeway. It was at this point

that the witness made the remark about "Killer Kev" and appellant stated "[h]ow he know?" Kendrick testified that at this point Pearson began relating some of the details as to what had happened to the woman, including that "they" had sex with this woman in the bushes. Kendrick stated that appellant looked "disgusted and concerned when he heard this." (20 RT 4451-4453.) Kendrick testified that while Gmur was present during this conversation, he doesn't know what Gmur actually heard. (20 RT 4453-4454.)

It was also revealed on cross-examination that Kendrick was in police custody at the time he initially spoke to the police about this matter. He was released soon thereafter. (20 RT 4428-4429.)

At the time of the search of appellant's mother's residence, Detective Steven Lasiter also spoke to Pamela Armstrong, appellant's mother, who lived at that address. Mrs. Armstrong stated that appellant Armstrong and his brother, Hardy, spent the night at her house on December 28, 1998, and left that next morning. The last time she saw them that morning they were on foot as they did not have a car. (21 RT 4601-4602.)

Mrs. Armstrong told Detective Lasiter that the next time she saw appellant was January 5, 1999, when he came over to spend the night. She told the witness that she last saw appellant was when she left for work at 5:40 a.m. the next day. (21 RT 4601-4602.) The witness stated that Mrs.

Armstrong said she thought that Warren Hardy came over her house either December 30th or 31st, 1998, to get some clothes. (21 RT 4603.)

Detective Lasiter further stated that Mrs. Armstrong said when she saw her son on January 5th, he was acting particularly "sneaky. (21 RT 4603.)

On January 8, 1999, Detective Lasiter interviewed Jeanette Carter, appellant Armstrong's girlfriend. Before the interview, Ms. Carter was aware that appellant had been arrested for murder. (21 RT 4604-4606.) Ms. Carter stated that appellant called her on December 30, 1998, from his mother's house and told her something to the effect, "I did something bad." (21 RT 4606.) Appellant then asked Ms. Carter if she heard about the lady that was found on the freeway and Ms. Carter responded by asking him if he was involved in that crime. Appellant answered in the affirmative, but when Ms. Carter pressed him for details he stated "[p]syche, I'm just kidding. I wasn't involved in that." (21 RT 4607.) Detective Lasiter testified that Ms. Carter said that appellant subsequently told her that he was involved in the incident on the freeway. She indicated that appellant sounded nervous when he answered her questions. (21 RT 4607-4608.)

Detective Lasiter stated that when Ms. Carter's statement was tape recorded, she told Lasiter that she asked appellant again if he was involved in the incident, and he said he was. Appellant told her that he was with

Kevin Pearson and Warren Hardy when they encountered a woman. Kevin got into an altercation with the woman "and they began beating her and ultimately they raped her...or Kevin raped her, and they beat her and dragged her away and left her on the side of the road naked." (21 RT 4610.) She also told Detective Lasiter that appellant told her that Pearson raped the victim with a stick, as well. (*Ibid.*)

Ms.Carter also talked to Detective Lasiter "about the beating, and stripping off the woman's clothes, throwing her over a fence and dragging her down a drainage ditch, stomping on her." (21 RT 4610.) She also stated that while Kevin Pearson raped the victim, appellant held her arms and Hardy held her legs.[2] (21 RT 4611.) She also stated that during the incident, while appellant was holding the victim's arms, Pearson also stuck a stick up her vagina. She also stated that Pearson told "them" to throw the victim over a fence, then they dragged the victim down a drainage ditch and then up a hill where they left her there naked. (*Ibid.*).

Ms. Carter also told Detective Lasiter that during the incident Kevin said "we should kill" the victim. Ms. Carter also mentioned to the detective that "they" had taken some food stamps and a small amount of cash from

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2. The syntax of the direct testimony at this point makes it appear that Ms. Carter was a percipient witness to the crime. From the context of the entire testimony, she was not. Her knowledge of the crime came from appellant.

the victim. She said that appellant told her that "we stomped on her, we beat her, we drug her, we left her alone, you know, naked." (21 RT 4611-4612.)

Detective Lasiter testified that on January 7, 1999, he and other police personnel interviewed appellant, after reading appellant his *Miranda* rights. (21 RT 4621-4625.) The initial statement was not recorded. Detective Lasiter told appellant the police were investigating a crime and wanted some information about his activities over the past few weeks, specifically December 29, 1998. (21 RT 4625-4626.) Appellant told the detectives that on the evening question, he was at Monte Gaur's house with Warren Hardy, Kevin Pearson and several other individuals named, Chris, Gerard, Harold and Daniel. (21 RT 4629.) He said that Monte's house was a place where he would regularly hang out. On the evening of December 29, 1998, appellant said that he was drinking a combination of Cisco, Nighttrain and Thunderbird alcoholic drinks. (21 RT 4629-4630.) Appellant said that he was not "falling down drunk," but he could feel the affects of the alcohol. Appellant stated that some time between 10:00 and 10:15 p.m., he, Hardy, Pearson and Chris walked to the area of Anaheim and Long Beach Boulevards. (21 RT 4630.)

Appellant stated that they went to the bus stop at that intersection. Chris got on a city bus. Appellant, Hardy and Pearson, walked north on Long Beach Boulevard to the Pacific Coast Highway. Once they arrived at

the Pacific Coast Highway, they tried to get people to buy them alcohol but failed, so they decided to take the Blue Line train to Hardy's girlfriend's house. (21 RT 4631.) They all boarded the train but they soon had to get off because the train line was shutting down for the night. (*Ibid.*)

According to appellant, when he and his two companions debarked the train, their intent was to catch a bus. They began walking toward Long Beach Boulevard. Appellant stated that they were walking single file, with him in the lead. At some point, appellant looked back and saw Hardy crossing the street with Pearson following him. Appellant stated that he did not know where they were going but turned to follow them as they approached the center divider of the road. (21 RT 4631-4636.) At this point, appellant noticed a woman in the area toward which Hardy and Pearson were walking. (21 RT 4636.)

As appellant continued to follow the other two across the street, he heard the woman say something to the effect of "I hate you." Pearson then stated something like, "[h]ow about $50.00 for the three of us," which appellant interpreted this to be a solicitation for oral sex. (21 RT 4637.) Appellant told the detectives that the woman pushed by Hardy and Pearson and walked toward him. As the woman passed him, he heard the word "no" and then saw the woman fling the back of her hand at his face, making light contact with his cheek. (21 RT 4637-4638.)

Appellant then said the woman ran into a "leafy area." She then turned around and extended her two middle fingers to appellant and his two companions and said something to the effect of "I hope they kill you all." Appellant then heard Pearson say "I'm fixing to BKC this bitch." Appellant explained to the detectives that "BKC" is a derogatory rap term used against people that the speaker might want to beat up. Appellant then told the police that Pearson ran up to the woman and began punching her. (21 RT 4638-4639.) Hardy began walking toward where the assault was taking place with appellant following. (21 RT 4639.)

Immediately thereafter, appellant saw that Hardy had the woman's arms in the air. He said he saw the woman fall down as a result of being punched by Pearson, who then went through her pockets looking for and demanding money. (21 RT 4639-4640.) Appellant told the detectives that he saw Pearson take food stamps from the woman's pants pocket. He then heard Pearson announce that he was going to take her pants off. As Pearson started to do that, the woman began to struggle and Pearson told appellant to hold her arms and Hardy to hold her feet. Appellant said that as she was lying on the ground, he grabbed the woman's arms and held them over her head. (21 RT 4642.)

Appellant then said that the woman began screaming and Pearson started to stomp on her stomach and chest. Pearson then said, "[t]his isn't

over yet bitch. Let's kill the bitch," at which point Pearson tore off the woman's underwear and ripped her shirt to expose her breasts. Appellant stated that the woman pulled away from his grasp but he managed to regain control of her. The woman continued to struggle and scream and appellant said he let her go. Pearson then got up and began to stomp the woman's face and neck. Appellant said he saw the woman's head coming off the ground as she was gasping for air, making a coughing noise. (21 RT 4645-4646.)

Pearson then began to talk about what to do with the victim. (21 RT 4646-4647.) Appellant told the detectives that Pearson said they could not leave the woman where she was and they would have to move her to an area on the other side of a 5-6 feet high chain link fence. (21 RT 4658.) The appellant stated that he went to the chain link fence and forced it down so Hardy and Pearson could lift the woman over it. After Ms. Keptra was pushed over the fence by Hardy and Pearson, appellant said he saw her land in the drainage ditch. Pearson then grabbed the body and dragged it in a southerly direction in the ditch. (21 RT 4658-4659.)

Appellant told the detectives that he and Hardy proceeded to where Pearson was standing over the body. He saw Pearson trip over a wooden stake, breaking off part of it. Pearson then used that stake to beat Ms. Keptra. (21 RT 4659-4661.) After beating the woman, Pearson gave the

stake, which measured approximately three feet in length, to Hardy who gave it to appellant who put the stick down in the area of the chain link fence. (21 RT 4663.).

Appellant then told the detectives that prior to Kevin's beating the woman with the wooden stake, she was still alive because she was moaning. After Pearson finished beating her with the stick, Ms. Keptra was quiet. (21 RT 4665-4667.) Appellant related that Pearson wanted him to help move the body and gave him a piece of cloth, perhaps a piece of a shirt, and appellant wrapped it around Ms. Keptra's legs to help carry her. The body was carried part of the way up the embankment and dropped, but it rolled part of the way back down. (21 RT 4667-4668.)

The three men then went back over the fence, through the leafy area to the bus stop at the corner of Long Beach Boulevard and Wardlow Avenue. (21 RT 4668.) Appellant and Hardy arrived first. Pearson arrived soon thereafter carrying a bag and told appellant to put the clothes he had used to carry the body in it. About five minutes later they boarded a bus to Los Angeles. (21 RT 4672.) When they got off the bus they went to Hardy's girlfriend's residence where they spent the rest of the night. (21 RT 4673.) The next morning, appellant asked what happened to the food stamps, and was told by his two companions that they used them to buy soda and cookies at a liquor store. (21 RT 4674.)

At this point, Detective Lasiter told appellant that there was no stake at the crime scene, that there was evidence that the woman was sexually assaulted and that the police would probably be able to prove who committed said assault. The detective then told appellant that he needed to be honest with the police. (21 RT 4674.) Appellant then told the detectives that Pearson put the stick up the woman's vagina. In addition, appellant said that he held Ms. Keptra by the arms while Pearson got on top of her and was in between the woman's legs for three to five minutes. (21 RT 4674-4675.) Appellant said that before Pearson got on the ground between the woman's legs, he asked him and Hardy for a condom. (21 RT 4679.)

Appellant also stated that he thought that Kevin was trying to force the woman to fellate him. (21 RT 4676-4677.) Appellant said that Pearson stuck the stick inside the woman between five and fifteen times. (21 RT 4677.)

Appellant also stated that after Pearson got out of the position where he was in between the woman's legs he said, "I should have fucked her in the ass." After this comment, the woman began to struggle and pulled away from appellant's grasp. It was at this point that Pearson got up and began to stomp on the woman's neck and chest. (21 RT 4678-4679.)

Detective Lasiter asked appellant whether he had also stomped on the woman. Appellant replied that after Kevin did the act associated with

oral sex, appellant stomped on her chest and stomach area a few times. (21 RT 4682.) Appellant later told Detective Lasiter that the "stomping" in reality was a "pushing off" with his foot on Ms. Keptra's stomach. (22 RT 4793-4794.)

At this time, Detective McMahon came into the interview room with a portion of the interview tape he made with Hardy. He played a short part of this tape for appellant in which Hardy admitted raping the woman with a stick. McMahon then left the interview room and one of his police interrogators told appellant that they did not think he was telling them the complete truth. They told appellant that he needed to tell them the truth because his brother was doing so. (21 RT 4685-4686.) At that point, appellant told the detectives that he saw his brother put the stick in the woman after Pearson did and then handed the stick to appellant. (21 RT 4686-87.) Appellant still denied having any sexual contact with the victim. (22 RT 4783.)

It was at this time that the turned on their tape recorder and taped appellant's statement. The tape was played in its entirety for the jury. (21 RT 4704.)

DEFENSE CASE

Appellant's Testimony

Appellant testified that on the evening in question, he was at Monte Gmur's house with his brother Warren Hardy, Kevin Pearson and a person named Chris. They were at the Gmur residence to test some musical equipment. Appellant stated that while he was there he had approximately forty ounces of a mixture of three inexpensive wines. (23 RT 4918-4919.) Appellant felt "woozy and tipsy," but did not feel high, stating that "high" is a "mind altering thing" and "tipsy" is "a body function thing where you spin around and you feel it, you just go out of it." (23 RT 4918.)

At some point in the evening, appellant left the Gmur residence to get a cigar. Appellant returned, but soon thereafter he, Pearson, Hardy and Chris left because Gmur said he had to work the next morning. (23 RT 4920.) The four of them walked to the train station at intersection of Anaheim and Long Beach Boulevard. During the walk they looked for a store in which to buy more liquor but could not find an open store. When they got to the station, Chris left the other three. (23 RT 4921-4922.)

Appellant was 18 years of age on December 29, 1998. (23 RT 4924.) He was in a good mood that evening. He had no weapons on him and as far as he knew, his two companions were unarmed as well. (23 RT 4921-4922.) The three of them boarded the train, but the train only went as far as Wardlow Street when the train line shut down for the night. (23 RT 4923.) After the three got off the train, they walked up the hill of Wardlow Street.

Appellant again related he was very happy and had no intention of hurting anyone that evening. (23 RT 4925.)

At this point, appellant heard a voice yell "[f]uck you, niggers." The voice came from across the street. He saw Hardy cross the street but had no idea what was going on. Appellant followed his brother across Wardlow and observed a woman standing in the direction from which the voice had come. (23 RT 4926-4928.) At this point, the woman said something to Hardy in a raspy voice. From her actions and voice timbre, it seemed to appellant she was on some sort of drugs. (23 RT 4929-4930.)

Appellant testified that up to this point, he had no contact with the woman at all. Hardy made some sort of statement to the woman about "fifty dollars for the three of us," which appellant assumed to be Hardy just "playing around." (23 RT 4930.) Appellant was not sexually attracted to the woman. At the time, he was living with his girlfriend, with whom he had a three month old baby. (23 RT 4931.) The woman then ran past Pearson and Hardy and as she was running her hand lightly slapped appellant's check. It didn't cause appellant any pain and appellant felt that "it was nothing to be alarmed about." (23 RT 4932.)

The woman then "ran into the mulch, this leafy area." She then stuck out her middle fingers and said "[f]uck you niggers. You niggers should die." (23 RT 4933.) Pearson then ran up to the woman and starting

"socking her" in the face until she fell to the ground. He continued striking her with his fists. (23 RT 4933-4934.) Appellant was caught by surprise by Pearson's actions. Pearson then said that he was going to "BKC this bitch" as he continued to stomp and punch her. (23 RT 4934.)

Appellant had no role in Pearson's attack on the woman. However, when Pearson started going through the woman's pockets, he ordered appellant to hold the woman's arms down. (23 RT 4935-36.) Appellant did so but not with the intent to effect a robbery. Appellant saw Pearson take food stamps from the woman and put them in his pockets. (23 RT 4940.) Thinking that the contact with the woman had ended, appellant let go of the woman's arms. (*Ibid.*) However, Pearson commenced to again stomp her chest and neck. (23 RT 4937.) Appellant tried to get Pearson and Hardy to leave the woman alone and to leave the area. (23 RT 4937-38.) Appellant wanted to leave but Hardy had the money that appellant would have needed to get transportation home. (23 RT 4938.)

Instead of leaving, Pearson again ordered appellant to hold the woman down again, as he again went through her pockets. Pearson was unable to obtain any additional property from the woman and appellant let go of her. (23 RT 4941.) Appellant then moved behind a wall in the leafy area. Pearson asked in a sarcastic voice whether appellant had a condom. Appellant answered he did not. Pearson then asked Hardy for a condom

who also said he did not have one. Appellant then saw Pearson stand between the woman's legs. Pearson then got down on her knees and lifted the woman from the back of her thighs, got down between her legs and unzipped his pants. It appeared to appellant that Pearson had sex with the woman for a minute or two. Appellant denied having any contact with the victim at this point. (23 RT 4942-4943.)

Appellant testified that after Pearson got up from between the woman's legs, he stood by her face and then dropped to his knees. From his viewpoint, he could not tell whether Pearson was masturbating or trying to force the woman to fellate him. (23 RT 4943-4944.) At that point, Pearson got up from his knees and said "I should fuck this bitch in the ass." Appellant told Pearson once again that they should all leave. Appellant testified trying to get Pearson and Hardy to leave was his way of helping Ms. Keptra. (*Ibid.*)

Hardy and Kevin then moved Ms. Keptra from the leafy area and threw her over a chain link fence. Appellant stated that while Hardy never had any direct sexual contact with the woman, he did see his brother holding a stick and putting it in the woman's vagina. Appellant thought that Hardy's conduct was "animal-like" and took the stick from him. (23 RT 4945-4946.)

Appellant also saw Pearson using the stick on Ms. Keptra. The stick

was obtained by Pearson after he tripped over it and picked it up. He used it to strike Ms. Keptra five to fifteen times and force it into her vagina. (23 RT 4951-4952.) Appellant found this attack "scandalous" and only watched, by the light of a Bic lighter, because looking at her would "teach me (appellant) a lesson." (23 RT 4955.)

He further condemned Pearson because of "[t]he way he acted like an animal and snatched her clothes off and raped her like he had no morals like he didn't have a care in the world, like he didn't give...like he didn't care about her." (23 RT 4955.)

PENALTY PHASE

PROSECUTOR'S CASE

Monte Gmur, who was also a witness in the guilt phase, testified that appellant was at his house on December 29, 1998 for approximately 3-3 ½ hours. During this period of time, appellant was accompanied by Pearson, Hardy and a person named Chris. (26 RT 5620, 5623.)

At some time during this evening, Pearson approached Mr. Gaur and asked him if he could use the back bedroom to put Chris "on the block," which meant to violently initiate him into a gang. Appellant's counsel objected to this line of questioning, but the objection was overruled by the

court. Mr. Gmur refused this request. (26 RT 5621-5622.) Mr. Gmur stated that he did not know for sure where appellant was when Pearson asked his question but thought he "was still in the studio." The witness later stated that he really couldn't say if appellant overheard this conversation. (26 RT 5622-23, 5633.)

Shortly after this brief conversation, appellant and his three companions left the Gmur residence. The four of them returned 15-20 minutes later. Upon returning, Hardy made a phone call to someone named "Capone" and said "Yeah, he's cool, we're going to call him 'Playboy.'" (26 RT 5624-5625.) Mr. Gmur wasn't sure if appellant was within hearing distance of Hardy's phone conversation. (26 RT 5633.) He did not observe any indication that Chris had been assaulted, nor did it appear that appellant was out of breath when he returned to the Gmur residence. (26 RT 5631, 5637.)

Janisha Williams testified that she had known appellant for about seven years but had no contact with him since he was arrested for the instant crimes. She said that the "Capone Thug Soldiers" were "a little crew" or gang of between 12-30 members of which appellant was a member. (26 RT 5641-5643, 5663.) She stated that to get into the gang, a person has to beat someone up and be beaten up himself. (26 RT 5644.)

She stated that several years ago, she observed appellant engaged

with a group of people who were kicking "innocent people" off their bicycles, "just for the fun of it." This happened on several different occasions. (26 RT 5644-45, 5650.) She also said that she had observed appellant using a stick to hit people and getting into fist fights. (26 RT 5647.) She also said that appellant had a temper and could be a thug. (26 RT 5648.) She also stated that she specifically saw a group that appellant was with kick a woman off her bike. Ms. Williams stated that although appellant went along with the others, he did not engage in the assault. She remembered paramedics assisting this woman. (26 RT 5648-5649.)

Hugo Barajas was a deputy sheriff at the Los Angeles County Jail. He was responsible for inmates when they went to the shower, received visitors or went to get their medicine. On December 10, 1999, appellant was one of the inmates in his custody. (26 RT 5672-5673.) There had been some racial tension at the time between Hispanic and black inmates and the two groups were being segregated from one another. Officer Barajas was sitting in the officer's cage where he was able to observe everything on his assigned module. As part of his duties, he released four black inmates, including appellant, to shower. (26 RT 5674-5676.)

Immediately after this release, there was a call to release a Hispanic inmate to the visitor's room. (26 RT 5676-5677.) In order to get to the visitor's room, the Hispanic inmate had to pass by the shower. As he did,

the Hispanic inmate was attacked by the four black inmates, including appellant. At this point, the cellmate of the Hispanic inmate ran to help his friend. Officer Barajas observed appellant punch and kick both Hispanic inmates. (26 RT 5677-5681.)

Officer Barajas observed one of the Hispanics having a piece of metal wire, sharpened at one end, protruding from under his left armpit. The other Hispanic inmate was bruised around the face and body. (26 RT 5680.) The witness could not say who used the sharpened piece of wire in the assault and could not say for sure who originally possessed it, the black or Hispanic inmates. (26 RT 5698.)

Teddy Keptra was the son of Penny Keptra. He was fifteen years of age when his mother was murdered. He identified various photos of his mother interacting with both himself and other members of the family. (26 RT 5755-5757.) He stated that he had sisters, but they were not living at home at the time of his mother's death. (26 RT 5758.)

The witness indicated that he was not able to finish high school after his mother's death. He stated that his mother was his friend and was never able to talk to his father the way he was able to talk to his mother. (26 RT 5758-5759.) He felt he shared a special bond with his mother as they shared the same birthday. Holidays have been difficult for him as his mother died during the holiday season. (26 RT 5759.)

When the witness heard the guilty verdict in the trial he felt better but not much. On his birthday, he locks himself in his room and thinks about his mother. He stated that the death of his mother still affects him. He feels sad and lonely and not a day goes by when he doesn't think of her. (26 RT 5760-5762.)

APPELLANT'S CASE

Detective Lasiter was called by appellant's counsel in an attempt to demonstrate that appellant appeared remorseful while giving his statement to the police. However, Detective Lasiter stated that appellant did not really seem remorseful during the January 7, 1999, interview and felt that he only felt badly about his situation and not the murder of the victim. (27 RT 5769-5770.) This opinion was based upon the fact that when appellant first came into the interview room he asked why he was in custody. Appellant first denied involvement, and it wasn't until he was confronted with other evidence that he gave several different stories about what happened. (27 RT 5770-5771.)

Detective Lasiter said that appellant never said he felt badly. There were times during the interviews when appellant put his head down and became quiet. It was at this point that the witness formed the opinion that

appellant felt badly because the risk to him was becoming graver. (27 RT 5771-5772.) However, the witness stated that during an January 8, 1999, interview, appellant apologized for his actions. Detective Lasiter testified that he was not sure if this was remorse, but, at that point, appellant seemed to feel badly about what happened. (27 RT 5772.)

Appellant's counsel referred Detective Lasiter to his preliminary hearing testimony in which he stated that during the January 7, 1999, interview of appellant there were times when appellant appeared to feel badly about what happened and seemed contrite and remorseful. (27 RT 5775-5776.) However, the witness insisted that the only time that appellant demonstrated any remorse was when he apologized on January 8th. (27 RT 5778-5781, 5795.)

Larry Clark testified that he has been a minister for fifteen years. He had contact with appellant for four or five years beginning when appellant was ten years old. He met appellant's family at the First Shining Light Church. Mr. Clark stated that he counseled the family both at church and at their home. (27 RT 5818-5821, 5825.) The witness stated he had no contact with the family for eight years prior to trial. (27 RT 5822, 5861.)

Mr. Clark testified that during the period he knew them, the Armstrong family lived in Carmelitas, a government housing project for welfare recipients. This was a very rough neighborhood with a lot of drug

dealing, prostitution and gangs. (27 RT 5821.) Mr. Clark stated that Warren Hardy was the oldest child in the family, and appellant followed him everywhere. (27 RT 5824.) Mr. Clark stated that Pamela Armstrong struggled as a mother and that the family had financial problems. (27 RT 5876.) He really did not know much about appellant's father, except that there were times that the father was separated from the family. (27 RT 5877.)

Mr. Clark stated that appellant enjoyed art. He also testified that while appellant was at the church, he taught him right from wrong. (27 RT 5826.) Mr. Clark stated that during the time period he knew the family, he would see Jamelle every Sunday and sometimes during the week. Appellant would participate in basic clean-up duties and hand out gifts to poor children. (27 RT 5837-5838.)

On cross examination, Mr. Clark indicated that toward the end of his pastorship at the church, his contact with appellant became more sporadic. (27 RT 5850.) He also testified that he had no idea what appellant did when he was not in church. (27 RT 5853.) In response to the prosecutor's questioning, Mr. Clark stated that he wasn't aware that appellant was a gang member or that he had committed acts of violence against innocent persons other that Ms. Keptra. Mr. Clark told the jury that this changed his opinion of appellant. (27 RT 5854-5856.)

The witness also stated that when Warren, appellant's older brother, had a problem with someone, appellant would become involved as well. He also stated that as far as he was concerned, appellant had the ability to control his own destiny. (27 RT 5857-5858.) Mr. Clark further testified that whomever committed the crimes against Ms. Keptra was a "horrible person." (27 RT 5886.)

James Armstrong, appellant's father, testified that he was "a poor excuse for a parent." He stated that he never taught his son right from wrong but, instead, to be a "hustler," to make money anyway he could. Armstrong stated he made his money by selling drugs and pimping. (27 RT 5900.) He said that he was in and out of appellant's life during his childhood. (27 RT 5901-5902.)

Armstrong stated that he used drugs in the presence of appellant on an everyday basis. He also stated that on one occasion, he took appellant to Chicago with him and exposed him to this criminal lifestyle. (27 RT 5904-5905.) On the way to Chicago from Long Beach, Armstrong said he used and sold drugs. The witness bought drugs for appellant while in Chicago. They were also accompanied by two of the witness's "lady friends" who stayed with them. During the stay in Chicago, appellant was given marijuana, cocaine and alcohol to ingest. Mr. Armstrong's own drug habit cost him up to $800.00 a day. (27 RT 5915-5919.)

In addition, while living at home, Armstrong would provide appellant with alcohol even through he knew it was harmful and wrong to give alcohol to a child. (27 RT 5920.) Armstrong also said that his wife was an alcohol and drug user and they would use these substances in front of appellant when he was a younger child. The witness supplied Mrs. Armstrong with marijuana, PCP and alcohol, which she would use on a daily basis. He also stated that he has been in jail on many occasions for spousal abuse. (27 RT 5923-5925.)

Appellant's father testified that he never paid any attention to appellant's schooling, rarely took him to school, and never helped with his homework. He further stated that he had no idea what life was like for his son between the ages of 6-16 because the witness was "always loaded or on the streets." (27 RT 5931-5932.) Armstrong said that during this time period he stole from appellant's piggy bank and was engaged in repeated violence against his wife. (27 RT 5932-5933.)

On cross-examination, Armstrong stated that he had never been arrested for drugs even though he ingested them for 30 years. (27 RT 5939.) He also admitted to not being present for the greater part of appellant's childhood. (27 RT 5940.) Armstrong testified that although he had a very similar upbringing to his son, he never committed murder or rape. (27 RT 5945.)

PROSECUTOR'S REBUTTAL CASE

Cindy Marcotte, an investigator with the Alternate Public Defender's Office testified that she interviewed James Armstrong in January, 1999. At that interview, Armstrong told her that he believed that the children never saw him take drugs. (28 RT 5985.) However, he also stated that the children saw a lot of drinking, fighting, dysfunction and "drugging." (28 RT 5987-5989.)

The prosecution then called Pamela Armstrong, appellant's mother, who stated that she loved him a lot and did not want to see him get the death penalty. She further stated that she taught him right from wrong as he was growing up and the family celebrated holidays. (28 RT 5993-5994.)

Mrs. Armstrong indicated that while raising her sons she was employed outside of the home. When she worked, she would have a family member or friend take care of the boys. (28 RT 5999-6001.) She also indicated that when her husband James did drugs, most of the time the kids were not present. (28 RT 6001-6004.)

She also testified that her husband abused her. (28 RT 6004-6007.) The two brothers, three years apart, were close and shared a bedroom. (28 RT 6008.) At an early age, Hardy began his association with gangs. (28 RT 6008.) Appellant started his gang association when he was 12-13 years of

age. (28 RT 6008-6009.)

The witness stated that she spanked appellant to discipline him. (28 RT 6014.) She stated that appellant dropped out of school in the tenth grade. (28 RT 6014-6015.) She further stated that gang members would show up at her house and eventually became aware that appellant was a member of a gang. (28 RT 6017-6019.) She stated that she knows very little about gangs and had no idea that appellant drank or was engaged in criminal activity when he was growing up. (28 RT 6020.)

Mrs. Armstrong stated that at some point appellant moved out of her house. In December, 1998, appellant was living with his girlfriend but occasionally visited with her. He did not have a key to her premises. (28 RT 6021-6022.)

Regarding her relationship with her husband, Mrs. Armstrong testified that they were separated for as long as they were together, sometimes for just days and sometimes for a year or two. Extended separations occurred several times. She made her husband leave their residence because he was doing things she did not want the kids to see. (28 RT 6026-6028.)

Mrs. Armstrong also testified that she and the children lived in governmental housing, first in Pasadena, then Monrovia and then the Carmelitas housing project. They eventually moved to a private home in

Long Beach on Fashion Avenue. She didn't remember exactly how old appellant was when they made this move but remembered that appellant attended elementary or middle school while living there. (28 RT 6031-6039.) The family moved to an apartment on Redondo Avenue in Long Beach when appellant was in high school. Appellant moved out of that apartment when he was sixteen years old and impregnated his girlfriend. (28 RT 6037.)

Mrs. Armstrong testified that when the family first moved to Carmelitas, their apartment was clean and refurbished. There were rules that no gang members were allowed in the apartment complex. She stated that while she living in Carmelitas, she attended the Shining Light Church where Miller Jackson was the head pastor. He knew the family better than Reverend Clark, who was just an assistant pastor. During appellant's elementary and middle school years, appellant participated in as many church related activities as Mrs. Armstrong could arrange for him. (28 RT 6041-6044.)

Mrs. Armstrong testified that she never personally "exposed" appellant to drugs nor did she give him alcohol. She admitted to using alcohol and drugs, but did not remember if she did so in front of her children. (28 RT 6046.)

On cross examination, Mrs. Armstrong admitted that there were

times that she drank heavily while appellant was present. (28 RT 6047-6048.) She also indicated that there were times that home life would "be hell." (28 RT 6048.) Her husband James had a pretty severe drug problem and he would steal money from the children. He would also steal food from the house and presents from under the Christmas tree. She, herself, was convicted of welfare fraud. (28 RT 6048-6049.)

James would attack her in front of the kids. Once he bit her very hard and she was forced to flee the residence with the children. (28 RT 6049-6050.) She also testified that when James was under the influence of drugs he would take off his shirt, stand under the streetlight and "act crazy." The children observed this. (28 RT 6050.) Further, on one occasion, James took Jamelle to a park but a stranger had to bring him home because James had gotten high. (28 RT 6050-6051.) Mrs. Armstrong also stated that she stopped going to church because James was accusing her of having affairs with various church members. Mrs. Armstrong stated that her husband's conduct exacerbated her drinking problem. She stated that she tried to hide her drug and alcohol abuse from the children but there were times when the children were around when she was drunk or high. (28 RT 6052.)

When Mrs. Armstrong went to work, she left her children with either a neighbor or a family member. There were times when she would come home and find the children hanging out in a common apartment area with

no one supervising them. (28 RT 6053.) In 1984, there was an incident in which James kicked the front door in and beat her up in front of the children. (28 RT 6054.)

Mrs. Armstrong testified that she thought that living at Carmelitas would be an improvement for the family but it wasn't. She and her family were threatened and other kids would threaten her children on the way to school. The project was claimed by drug dealers and gangs. Fights were commonplace and Mrs. Armstrong could not always protect her children. She would often call the police for assistance. She admitted she wasn't a very good role model for appellant. She tried to get him into a boy's home for his protection but failed to do so. (28 RT 6055-6056.) Further, there were times she was accused of neglect by the police. (28 RT 6057.)

The prosecutor then called a series of police witnesses to discuss appellant's alleged gang affiliation. On March 7, 1996, Detective John Bruce was working as a patrol officer in Long Beach, when he made contact with appellant on the street. Appellant informed the officer that he was a member of the Rolling 20's gang and that his "moniker" was "Big Young Dog." (28 RT 6156.)

On October 28, 1997, Long Beach Patrolwoman Janet Cooper also made contact with appellant, who told her that he was a member of the Rolling 20's gang and was called "Young Dog." (28 RT 6158-6159.)

In July, 1996, Officer Phil Candelaria, assigned to the juvenile division of the Long Beach Police Department came into contact with appellant. As a result of this contact, he called Pamela Armstrong, who as a result of their conversation came to the police station to pick up appellant. Appellant gave his name as "Young Dog." (29 RT 6218-6219.)

Detective Victor Thrash has been a gang enforcement officer for the Long Beach Police Department for the past ten years. (29 RT 6221.) The witness stated that there are three major black gangs in Long Beach; the Insane Crips, the Rolling 20's and the Mack Mafia. The Insane Crips and Rolling 20's gangs would sometimes band together against the Bloods but generally kept apart from one another. Lately, there had been friction between the gangs. (29 RT 6221-6223.)

The witness also described the gang related term of "jumping in." He stated this is when an established member of a gang would instruct two or three other members of the gang to initiated a new member by fighting him. (29 RT 6224.) The witness also testified that these gangs are involved in violent crime and committing such crimes increases one's status in the gang and the more violent the crime the better stating that doing a murder "puts them pretty high up there." He further stated that gangs have organizational structures and to move up in the structure one must either commit violent crimes or show loyalty. (29 RT 6225-6226.)

Detective Thrash also testified that he reviewed the Long Beach Police Department data based which revealed that appellant was a member of the Rolling 20's gang. (29 RT 6226-6228.)

Tom Keleler, was a Long Beach Police Officer working South Division Patrol. He made contact with Jamelle Armstrong who stated that he was a member of the "terrorist street gang the Insane Crips." (29 RT 6231.)[3]

ARGUMENTS

JURY SELECTION ARGUMENTS

I. THE TRIAL COURT COMMITTED FUNDAMENTAL CONSTITUTIONAL ERROR UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY EXCLUDING QUALIFIED POTENTIAL JURORS FROM PARTICIPATION IN THE PENALTY PHASE

A. DISCUSSION OF THE LAW

The nature of the weighing process in the penalty phase has essentially been distilled into CALJIC 8.88 which states to return a verdict of death, each of the jurors, *individually*, must be persuaded that the aggravating factors "are so substantial in comparison with the mitigating

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3. It is unclear from the transcript whether this characterization of the gang was made by appellant at the time of contact or whether it was a gratuitous remark by Officer Keleler.

that it warrants death..."

This basic maxim of California law leads to the question that is at the center of appellant's argument. On what basis may the trial court exclude prospective jurors for cause on the grounds that their personal beliefs are such that they cannot follow the law. The answer has evolved from decisions of the United States Supreme Court and this Court over many years and clearly demonstrates that the trial court committed reversible error in this case in excusing many qualified prospective jurors.

Over forty years ago, in *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court made clear that the Sixth and Fourteenth Amendments to the United States Constitution prohibited the sovereign from excluding jurors who said they were opposed to capital punishment and/or who indicated that they had conscientious scruples against inflicting it but could otherwise follow the law and impose it under the law. (*Id.* at 513.) The High Court expressly rejected the notion that such individuals could be constitutionally excluded because they will frustrate the states interest in the legitimate enforcement of its death penalty statute. (*Id* at 518-519.) *Witherspoon* rejected the exclusion of potential jurors because of personal opposition to or bias against the death penalty.

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to

> him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. (*Witherspoon, supra,* at 519.)

Witherspoon then firmly corrected the trial court that uniformly excluded those jurors with personal qualms against the death penalty stating;

> ...when (the court) swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. (*Witherspoon, supra,* p.520,521.)

The High Court concluded

> It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' (Citations omitted) It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict or death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. (*Witherspoon, supra,* at 521-522.)

In *Wainwright v. Witt* (1985) 469 U.S. 412, the High Court reiterated

that the State cannot exclude prospective jurors for cause "because their acknowledgment that the possible imposition of the death penalty would or might affect their deliberations." (*Witt* at 420-421.) The Court stated that the fact that a prospective juror "would be more emotionally involved or would view their task with 'greater seriousness and gravity' did not demonstrate that the prospective jurors were unwilling or unable to follow the law or obey their oaths." (*Ibid.*)

In addition, the *Witt* Court affirmatively adopted the standard promulgated by *Adams v. Texas* (1980) 448 U.S. 38, 45 which stated that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Witt, supra,* 469 U.S. at p. 420.)

Obviously, there may be instances where the responses of a prospective juror as to his or her capacity to sit on a capital juror under the above law contain ambiguities as to said juror's true feelings about their ability to do their duty. The United States Supreme Court and this Court have recognized that the trial court is in the best position to resolve ambiguities in juror responses and to this end can look to the individual juror's demeanor and the totality of his voir dire to make the determination as to whether he or she should be excused under the above law. (*Darden v.*

Wainwright (1986) 477 U.S. 168, 178; *Wainwright v. Witt, supra,* 469 U.S. at 421.) In cases where after proper questioning, a particular juror's state of "substantial impairment" remains ambiguous, the trial judge must resolve this ambiguity. As stated by this Court "[o]n appeal we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Cunningham* (2001) 25 Cal.4th 926, 975 citing to *People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

However, as stated above, the ambiguity and conflict must exist within the context of the juror's responses to questioning. "Ambiguity" does not refer to a potential juror who can follow the law in spite of a personal bias against the death penalty. In *People v. Stewart* (2004) 33 Cal.4th 425, 446, this Court explained that "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled-indeed, duty bound-to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror."

Stewart pointed out that "decisions of the United States Supreme Court and of this Court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for

excluding that person from jury service in a capital case under *Witt* [citation omitted.] (*Stewart, supra,* 33 Cal. 4th at 446.) This Court further cited to *Lockhart v. McCree* (1986) 476 U.S. 162, 176, in which the Supreme Court clearly stated that "[n]ot all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *(Ibid.)*

This Court's holding is not of recent vintage. Twenty years ago in *People v. Kaurish* (1990) 52 Cal.3d 648, 699, this Court made a similar observation. In referring to the conditions under which a trial court can excuse a "life-leaning" prospective juror for cause, *Kaurish* referred to both *Witt* and *Witherspoon* stating;

> Neither Witherspoon (citation omitted) nor Witt (citation omitted) nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty. The real question is whether the jurors attitude will " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "

The *Stewart* Court cited to its decision in *Kaurish, supra,* 52 Cal.3d 648, recognizing that since California law "contemplates that jurors will take into account their own values" in determining the penalty, the fact that

such beliefs would make it very difficult to impose the death penalty is not equivalent to the "substantial impairment" standard of *Witt.* (*Stewart*, *supra,* 33 Cal.4th at 447.)

Regarding the burden of proof for such an excusal, in *People v. Stewart* (2004) 33 Cal.4th 425, 445, in citing to *Witt*, this Court stated that the prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors.

Relying on the rulings of the United States Supreme Court, this Court has held that a trial court's error in excluding even a single juror who was not "substantially impaired" pursuant to the above law requires reversal of the death penalty, "without inquiry into prejudice." (*People v. Stewart, supra,* 33 Cal.4th at 454, citing to *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667.) Hence, any such error mandates reversal of the death judgment.

In this case, as set forth more fully below, appellant contends that nine jurors were improperly recused for cause.

B. THE DISMISSAL FOR CAUSE OF THE FOLLOWING PROSPECTIVE JURORS WAS A VIOLATION OF THE ABOVE LAW

1. PROSPECTIVE JUROR GERARD PFEFER -JUROR # 2644

a. Answers to Questionnaire (CT7371-7418.)

Prospective Juror Gerard Pfefer was a sixty-six year old Jewish male. (26 RT 7374,7380.) After reading the summary of the case facts Mr. Pfefer indicated that he could be fair in this particular case.[4] (26 CT 7410, Q 177.) He also stated that the death penalty "was appropriate in some cases" (*Ibid.* Q 178), indicating that he was neither strongly in favor of it or against it. (*Ibid.,* Q 179.) Mr. Pfefer also stated that at one point in his life he was more strongly in favor of the death penalty, but his attitude was somewhat affected by reports of verdicts overturned because of DNA evidence. (*Ibid.*, Q 181,182.) He further stated that he felt that the death penalty was applied "too randomly" but was not part of any group that advocated any position on the penalty. (*Ibid.,* Q 183.)

Mr. Pfefer stated that the death penalty should not be abolished, and the state should have the death penalty as "in some cases it is called for."

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4. There was a short summary of the charges in this case placed immediately before the questions in all of the questionnaires that related to the imposition of the penalty. (See 26 CT 7409)

(26 CT 7411, Q 186-187.) While he opined that life in prison without parole is the "worse" penalty ("to be locked up for 20-30 years or more years would be worse") and he recognized that it is "difficult...to have someone's life in your hands," he could "set aside religious, social, or philosophical convictions and decide the penalty question based solely upon the aggravating and mitigating factors presented to (him) about defendant's crime and his background and the law as given by the judge." Mr. Pfefer stated that "all facts should be presented" before he would impose either of the two penalties. (26 CT 7412-7413, Q198, 200, 203.)

In describing a hypothetical case in which death would be the appropriate penalty, Mr. Pfefer stated it was where "someone has without any thought taken another's life to gain money, property or hunted down another to kill them." (26 CT 7414, Q 209.) Mr. Pfefer further stated that he would not automatically vote for either penalty. (26 CT 7415, Q 214-217.) While indicating that he was "torn" between the two penalties and recognized the seriousness of his responsibility, he believed that he could do his duty. (26 CT 7417, Q 228, 231.)

b. Oral Voir Dire[5]

As with all of the prospective jurors, the oral examination began with the court. After advising Mr. Pfefer of the basic process of the weighing of the aggravating and mitigating factors, the trial court informed him that

> ...the weighing of the factors is not quantitative but qualitative in which the jury, in order to fix the penalty of death must be persuaded that the bad factors are so substantial in comparison to the good factors that death is warranted instead of life without parole. (7 RT 1410.)

Mr. Pfefer indicated that he understood. (*Ibid.*) The prospective juror further stated that he would not automatically vote for either penalty. (7 RT 1411.)

In response to questioning from appellant's counsel, Mr. Pfefer indicated that he could evaluate all of the evidence to determine whether appellant should be sentenced to death. (7 RT 1412.) The prospective juror also stated he could consider "any aspect of defendant's character or record, or any circumstance that the defense offers as a basis for a sentence of less than death." (7 RT 1413.)

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5. This Argument contains numerous references to and quotations from the voir dire as it is necessary to demonstrate that this and other jurors were not ambiguous in their responses.

The prosecutor's examination commenced with the prospective juror restating that he was neither strongly in favor of nor strongly against the death penalty. (7 RT 1415.) Pressed for the circumstances in which he could impose a death sentence, the prospective juror replied;

> Well, I think when the case calls for it, as the judge has just said in the penalty phase the mitigating circumstances or the circumstances that would, you know, either defense or prosecution would convince me that it called for the death penalty, I'd have to listen to the different circumstances. And hopefully keep an open mind, but don't, I would not go into a case feeling immediately that, you know, either one way or the other. (7 RT 1415.)

Not satisfied, the prosecutor again asked the prospective juror under what circumstances he could impose the death penalty. (7 RT 1415-1416.) Mr. Pfefer responded as follows:

> Well, I guess if all the evidence pointed to that , I guess, the something that calls for death, the circumstances that the crime was committed, the various things that maybe happened before, prior history, things like that, outweighs whatever good this person has done, then I think I can do it. (7 RT 1416.)

The following exchange between the prosecutor and the prospective juror then occurred:

> Question: You think you could do it?
> Answer: Right.
> Question: You are not sure
> Answer: Well, I have never been in that place before.

Question: Would you believe it that many of the people who sat in that same chair have said the same thing.
Answer: I think it is a big responsibility.
Question: Absolutely. And do you find that it would be too difficult for you?
Answer: I don't think so. I think I am willing to do it. As part of society I have never had to do it. I could live without doing it, but I feel I could do it. I feel I could do what I'm called to do.

The prosecutor then turned to the prospective juror's lack of absolute certainty as to which of the two possible penalties is "worse."

Question: .....on Question 227, it says "Which do you believe is a more severe punishment."? And you did not circle either death or life without the possibility of parole and under the explanation you put "I do not really know."
Answer: No, I don't know, because I have never been there before. I have heard arguments both ways. I have heard argument that keeping a person in prison for 50 years is a terrible thing or putting them to death, here in the State of California that takes anywhere from 15-20 years with all the appeals and so on. I reject the argument about the financial thing that people usually use. In fact, we discuss it in my class but there are a lot of kids that always say it costs too much money to keep a person in prison for that many years. I do not think that's got a point, to the decision the jury has to make.
Question: Okay, but if you don't know which is worse, life without the possibility of parole or the death penalty, how can you
Answer: Well, I think again, I go back to what takes place during the trial, during the penalty phase. I would listen to all the evidence, and I don't know what the, you know what I mean, what we are trying to prove by killing someone or putting him in prison forever. Let me explain a little bit further. Again, if the circumstances surrounding the crime and all the factors leading up to it called for the death

penalty, then I think, I could do that too. (7 RT 1418.)

The prosecutor then referred the prospective juror to Question 228, in which he stated he was "torn between" the two penalties and asking if this were the case "how will we know you are able to impose the appropriate punishment." (7 RT 1418-1419.) The following exchange then occurred.

> Juror: Well, I don't know how you would know. I really don't. Again, you have to take my word that I would listen to all the evidence and make the decision I think is right. And since you are on the prosecution side, you would have to convince me, not maybe convince me like I was resisting it, but show me that this man deserves the death penalty in this case.
> Question: Okay. What is that I would have to do to convince you of that?:
> Answer: Possibly show me a history of cruelty and maybe committing other crimes. I don't know what you will offer in evidence because I have never been on a trial like this. In fact, I have never been on a trial. Showing something that he has done this before.
> Question: If I'm unable to show you that he has done anything like this before are you going to vote for life without possibility of parole.
> Answer: I don't know. There may be other evidence there, one crime maybe because of the circumstances surrounding it and all of the different charges, maybe that would be enough to impose the death penalty. (7 RT 1419.)

After the prospective juror assured the prosecutor that he would not require more than one victim to find for the death penalty (7 RT 1419-1420), the prosecutor once again asked the prospective juror what he would

need the prosecutor to present for the prospective juror to vote for the death penalty. (7 RT 1420.)

> Juror: I think what I just said about the circumstances, the type of crime that it was. We were read the charges. And it sounds like it may have been a cruel thing to do, but again, until I hear the evidence, I don't know. I don't know anything about the case itself.
> Question: Are you going to require me to prove all the charges that were listed in order to vote for the death penalty.
> Answer: Well, I'm not sure. I think the judge said there were six charges that led to the special circumstances. I am not sure. Maybe only one is bad enough. We will probably find out, the judge or the attorneys will tell us that it only takes one of the circumstances to require the death penalty. 7 RT 1420-1421.)

Mr. Pfefer declined to say that for certain special circumstances standing alone he could not impose the death penalty. (RT1421-22.) The prosecutor endeavored to put words in the prospective juror's mouth, asking "isn't it true that you believe that (life) would the better punishment." The prospective juror again denied holding this view.

> Juror: I do not think the better punishment. I think it could be used. I know we are one of the few countries in the world that still uses the death penalty. A lot of industrialized countries feel like life imprison (sic) is good enough punishment for somebody.
> Question: Do you feel the same way?
> Answer: No, I go back to thinking that the circumstances surrounding the crime call for the death penalty.
> Question: What circumstances can you think of call for the death penalty?

> Answer: Maybe in case like this case, possibly, the charge the way the charges were read with torture and things like that rape with using the foreign object, the cruelty of the crime, possibly assuming that all this took place, and the defendant committed these crimes, then it could call for the death penalty. (7 RT 1423.)

The prosecutor then asked Mr. Pfefer to state that he believed the death penalty to be the "worse" penalty. (7 RT 1424.) However, the prospective juror clearly that he only thought that it "might be," stating that when he said that it might be in the questionnaire he was thinking of his own perspective. (*Ibid.*)

Ignoring Mr. Pfefer's thoughtful reply, the prosecutor pressed the prospective juror to agree that he could not say whether he could impose the death penalty;

> Question: And since you don't know how you feel about the death penalty, how are you able to determine whether or not your could impose the death penalty, if the circumstances warrant it?
> Answer: If the circumstances warrant it, I would be able to impose it. (7 RT 1424.)

The prosecutor then told the prospective juror that up to this point he had not been able to tell her what circumstances might warrant a death sentence when in fact the prospective juror had answered this question several times before. (7 RT 1425.) The prosecutor then asked the prospective juror if he was the prosecutor on this case, would the

prospective juror want himself on the jury. Mr. Pfefer stated he would. In response, the following exchange occurred;

> Question: Even though in your frame of mind you are torn between life without the possibility of parole and between the death penalty.
> Answer: No, I think in my frame of mind, I'm willing to listen to all the circumstances from both sides and make up my mind then about whether to impose the death penalty on someone or life in prison. (7 RT 1425.)

After the prosecutor gave Mr. Pfefer a synopsis of the weighing process and how a verdict is reached, she yet again asked whether he could follow the law and reach a verdict on the penalty. The answer was an unequivocal "Could I? Yes, yes." (7 RT 1427.)

In spite of multiple unambiguous statements from Mr. Pfefer that he could follow the court's instructions, the prosecutor was unremitting in trying to force some sort of ambiguous statement from the prospective juror.

> Question: Okay. Do you have an question in your mind? Do you have a question. (7 T 1427.)

Mr. Pfefer once again made it perfectly clear that he can perform his duties under the law.

> Answer: Well, I was thinking of the aggravating and mitigating and that's what I think I have been saying. That if I, in my mind, feel that the aggravating circumstances

outweigh or are more than the mitigating circumstances then, yes, I could impose the penalty. (7 RT 1428.)
Question (by Prosecutor): Could you come back into this courtroom and tell the defendant you are going to kill him? Can you look him in the eye and say "I'm going to kill you."
Answer: Well. I don't think so, I'm not killing him, but the State is killing him.
Question: But by coming back with a verdict of death, you are going to kill him.
Answer: Well, I could say it if the circumstances surrounding the crime, yes, that the crime deserves that punishment.
Question: I'm going to hold you to that.
Answer: That's why I'm here. (7 RT 1428.)

The prosecutor then posed a hypothetical question in which one man held a victim while the other beat him,[6] and asked if Mr. Pfefer believed that the two men were "equally guilty"; the prospective juror said he did. (7 RT 1428.) In response to the prosecutor's additional questioning, Mr. Pfefer stated that there was "no doubt" in his mind that he could impose the death penalty on the person holding the hypothetical victim, if that victim died. (7 RT 1428-1429.)

Although, this prospective juror had enunciated numerous times that he understood the process and could find for death should the circumstances warrant, the prosecutor once again asked "[s]o what are your ideas about the use of the death penalty?" (7 RT 1429.)

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6. This hypothetical was employed by the prosecutor in the individual voir dire of the jurors improperly excluded by the court . It will henceforth be referred to as the "assault" hypothetical.

Mr. Pfefer stated that the death penalty was not a deterrent because it wasn't consistently enforced. (7 RT 1429-1430.) The prosecutor seized upon this rather self-evident statement, and accused the prospective juror of not being able to impose the death penalty because of his feeling about deterrence. (7 RT 1430.) The prospective juror responded, "[w]ell, I don't think that just because my idea is that death penalty is not a deterrent it doesn't keep me from imposing the death penalty." (7 RT 1430.)[7]

The prosecutor followed up with yet another misleading, provocative question: "But that's what you said here "[i]f the facts do not meet my ideas of the death penalty then I will not impose it."

Mr. Pfefer rejected this interpretation, stating "[w]hat I said if the circumstances surrounding the crime call for the death penalty, I can make that decision. (7 RT 1431.)

Unable to convince Mr. Pfefer that he was conflicted regarding the imposition of the death penalty, the prosecutor referred to a question on the questionnaire.

> Question: Okay, you wrote here on that same question where it days "describe the circumstances that would be an appropriate case to impose life without possibility of parole " and you put "Someone who may have been with others in

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7. Deterrence is not, of course, the only justification offered for capital punishment.

> murder." So are you saying if someone was just an accomplice that they deserve life without possibility of parole without the death penalty?"
> Answer: Well to go back to your example one person holding someone and the other person doing whatever and/or killing than person, yes, I think that they are equally guilty.
> Question: But my question...here in the questionnaire you indicated that the circumstances that would be appropriate for life without the possibility of parole is someone who may have been with others in the murder.
> Answer: Right, maybe they didn't take place, maybe they were with them, maybe they were driving in the car, maybe they were standing over someplace and watching the crime take place.. They were there, maybe you could convict then of being an accomplice and so on and so forth, maybe they don't deserve the death penalty. (7 RT 1432.)

The prosecutor then proffered yet another hypothetical to Mr. Pfefer. This one consisted of three people involved in a bank robbery; one goes into the bank to rob it, one stands at the door as a look-out and one waits in the car. The person in the bank kills somebody while he was in there.[8] (7 RT 1432.)

In response to the prosecutor's questioning by saying he thought that all were equally guilty (7 RT 1432) the following exchange then occurred:

> Question: And would you be able to impose the death penalty on the person in the car, if the aggravating circumstances substantially outweigh the mitigating circumstances.
> Answer: Well, when you put it, if it outweighs.

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8. This hypothetical was employed by the prosecutor in the individual voir dire of the jurors improperly excluded by the court . It will henceforth be referred to as the "bank robbery" hypothetical.

Question: That is the only situation in which you can impose the death penalty.?
Answer: Right

The prosecutor then continued with this scenario which had absolutely nothing to do with the facts of this case, pressing Mr. Pfefer to state in that hypothetical, he would impose the death sentence. The prospective juror responded, "I probably wouldn't impose the death penalty." (7 RT 1433.)

The prosecutor again returned to the prospective juror's views that life in prison might be worse and in spite of Mr. Pfefer's repeated assurances that his opinion would not affect his obedience to the law, she again challenged him. To this, an obviously frustrated Mr. Pfefer stated, "I don't know how many times I can say I would go back to the circumstances of the crime and whatever. I don't think, I would not go into this case saying I'm not going to impose the death penalty, which, I think, is what you are asking me.

(7 RT 1433.)

Rejecting the prospective juror's honest and reasonable answer, the prosecutor then instituted the following exchange.

Question: ... I'm asking if you would impose what you think is the worse possible punishment for the worse possible crime.
Answer: What I think is the worse possible punishment, I

don't think has anything to do with it. It depends on the case.
Question: You believe that the worse possible punishment can be imprisonment for life.
Answer: For me, I am not talking about someone else. (7 RT 1433-1434.)

The prosecutor then engaged in what can only be described as an attempt to confuse the prospective juror, trying to convince Mr Pfefer, in spite of all that he said, that he could only impose life in prison. (7 RT 1434-1435.) The prosecutor then confronted the him with the "fact" that the he didn't know how he "felt" about the death penalty. The prospective juror stated, "Well, I really don't know what I'm supposed feel about the death penalty...that's all I can say. I don't know how I feel about the death penalty." (7 RT 1435-1436.)

In response to defense counsel's follow up questions, the prospective juror again made it crystal clear that he would be fair and objective, listen to the court's instructions, and be able to impose the death penalty in the event the aggravating circumstances substantially outweighed the mitigating. (7 RT1436-1437.)

c. Prosecutor's Challenge and Court's Ruling

The defense passed this prospective juror for cause. (7 RT 1438.) The prosecutor challenged on the following grounds:

Ms. Locke-Noble: He has indicated he doesn't know how he feels about the death penalty. There is no way we can

> determine whether or not he is for against or whether or not he will impose the death penalty. He says he will impose the death penalty, but on the other hand he says he feels that life without the possibility of parole is a replacement for the death penalty. He also believes that the death penalty is not a deterrent and yet if the facts don't meet his idea of the use of the death penalty, then he feels that life without the possibility of parole is what he is going to use. He is torn between life without the possibility of parole and the death penalty and on all of the special circumstances, he indicated he thought so, probably, he was reluctant, possibly. He couldn't give me any circumstances in which he would impose the death penalty, not even to say for example, mass murder, 911. He couldn't come up with anything. He doesn't know how he feels about it. (7 RT 1438.)

When asked to respond, defense counsel stated, "Your Honor, I believe the key to this inquiry is his statement based upon the charges read, this would call for death. And it's quite fact specific this case, based on the charges, is such a case that would call for death." (7 RT 1438.)

The trial court granted the challenge, stating the following;

> People's challenge for cause granted. I'll explain to you why. With respect to the state of mind under People v. Cox and Bradford, he teaches trial advocacy. He wants to serve on this jury, sort of like his laboratory to be able to serve. He indicates that most civilized industrial countries there is no death penalty. There is only life without parole and they seem to be functioning well. If it does meet his ideas of the death that he is not going to impose the death penalty of the (sic) And he indicates the death penalty does not deter. If it does not occur neither idead (sic) of logic ipso facto, you could infer that he could not impose, but that's the inference that has to be drawn based on the state of mind. He also indicated there is one other thing, when asked about the special

> circumstances, under which special circumstances would he consider as a potential for the death penalty. He is ...he waivers each one of them. Robbery, "I think I could," Kidnap for rape, same answer, "I think I could," rape with a stake, "probably but," and then he made a qualifier kidnaping for torture, probably there is not one. He said, yes, this is a special circumstance, I could consider as a factor. And we are talking about factor a issue here. He believes that life without is a replacement for the death penalty, I think intellectual. It's an intellectual thinking on his part because we have had quite a few jurors, pretty smart, and the way they answer the questions I consider to be some kind of intellectual sophistry. In this particular case, based even on the aider and abettor theory, he indicates he could not, based on the aider and abettor theory, the person driving the car with the...if the aggravating circumstances substantially outweigh the mitigating circumstances, he indicates that he could not impose the death penalty. He flat out said he could not. And if the theory of the People in this case is an aider and abettor theory that would preclude consideration of a potential penalty. Therefore based upon Wainwright versus Witt, and the California case that follow after this, in this court's view, based upon his state of mind, and the way he answers questions, he is a substantially impaired person of his duties, the court–and I'm going to grant the cause.

d. Application of the Law to the Challenge

The voir dire of Prospective Juror Pfefer represented a complete breakdown in the process set up by the United States Supreme Court to assure a capital defendant a fair penalty phase jury. The judge misunderstood the law and failed to listen to the responses of the prospective juror. The prosecutor's questioning was driven by her zeal to purge this obviously thoughtful, intelligent and independently-minded man

from the jury. The only person involved that seemed to have any inkling of what constituted a properly qualified juror in the penalty phase was Mr. Pfefer. Mr. Pfefer instinctively understood that it was irrelevant how *he* felt about deterrence or how *he* felt about the meaning of the death penalty to him in his personal life, or how *he* felt about giving the death penalty to an imaginary person, sitting in an imaginary car, in the vicinity of an imaginary bank; a scenario that was concocted only to confuse the prospective jurors.

Mr. Pfefer sensed what this Court knows. The only relevance of a juror's personal beliefs is whether they substantially impair his ability to follow the law. (*Witt, supra.*) As will be discussed below, it is highly questionable if Mr. Pfefer ever stated or inferred any personal views in opposition to the imposition of the death penalty, at all. He repeated over and over again that his respect for the law was such that he could follow it to the letter.

The reasons for the court's granting the challenge were factually incorrect. It is almost as if the court was paying no attention, whatsoever, to what the prospective juror said. Mr. Pfefer never said that he could not impose the death penalty in an aider and abettor situation. He certainly never suggested that the life penalty should replace the death penalty regardless of the circumstances. To the contrary, he stated repeatedly that

the appropriate penalty depends on the circumstances of the case.

As stated in Section B 1 a of this Argument, there was absolutely nothing in the questionnaire that even suggested that Mr. Pfefer did not qualify under the law to sit on this jury. In fact he specifically stated that he could "set aside religious, social or philosophical convictions and decide the penalty question based solely upon the aggravating and mitigating factors presented to (him) about defendant's crime and his background and the law as given by the judge." (26 CT 7412-7413, Q 200.) When asked for a hypothetical case in which he would impose the death penalty, he stated it was where "someone has without any thought taken another's life to gain money, property or hunted down another to kill him." (26 CT 7414; Q 209.) Such a scenario is very similar to the facts of this case.

The oral voir dire by the prosecutor was hostile and provocative. It was clearly designed to intimidate the prospective juror into saying something that the prosecutor could use to dismiss this man from the case. She repeated the same questions multiple times, hectoring the prospective juror that his answers were inconsistent when clearly they were not.

However, Mr. Pfefer was not intimidated. He would not bow to the prosecutor's attack on his unambiguous assertions that he could follow the law in imposing the penalty. The prosecutor's challenge for cause was based on falsehoods and complete mischaracterization of what Mr. Pfefer

said. The claim that there was no way to determine whether the prospective juror would vote for death because he allegedly did not know how he "feels" about the death penalty is specious. This man made it clear on occasion after occasion that he believed that the death penalty was appropriate in certain cases, including situations where a defendant was charged as an aider and abettor. He stated that he understood the way the process worked and was willing to subjugate his personal beliefs to it.

Further, the prosecutor's argument that the prospective juror could not serve because he did not feel that the death penalty was a deterrent has no legal basis. Nowhere in the law is there any requirement that a juror must be a zealous advocate of the death penalty before he can sit on a capital case. Mr. Pfefer's comments about deterrence were based upon an accurate observation of the state of affairs in California; the death penalty takes so long to be executed that it is not a credible deterrent to would be murderers. However, the prospective juror also stated that this would not prevent him from following the law and servings on this case.

The prosecutor's claim that the Mr. Pfefer could "not come up with" any scenarios in which he would vote for the death penalty is nothing less than an outright prevarication. The prospective juror gave several scenarios on the type of case in which he could impose the death penalty, including a scenario very similar to this case. (7 RT 1428-1423.)

In granting the prosecutor's challenge, the trial court speculated without any factual basis that the prospective juror was a teacher who fancied himself some sort of social scientist whose motivation for sitting on this jury was to use it as a "laboratory" and subvert the process. The court characterized Mr. Pfeffer as an "intellectual" and like other "intellectual" prospective jurors he practices "some kind of intellectual sophistry." (7 RT 1440.) It was on this completely baseless and inexplicable characterization of Mr. Pfefer, that the trial court analyzed the challenge.

The trial court was as inaccurate as the prosecutor in its characterization of Mr. Pfefer's answers. Contrary to the court's statement, Mr. Pfefer did not "waiver" in what he said about the death penalty. He repeatedly refused to commit himself to as penalty before he heard all of the facts. However, he said that he would listen to all the facts and apply the law as the court gave it.

The court further cited to the prospective juror's answers regarding whether he could execute a hypothetical wheelman in a robbery, stating that the prospective juror indicated he could not, and that since the States case was based on an aiding and abetting theory, the prospective juror was unfit to serve.

In fact, Mr. Pfefer plainly stated that he could impose the punishment on the hypothetical driver "if the circumstances surrounding

the crime...deserves the punishment." (7 RT 1428.) The prosecutor accepted this answer stating to the prospective juror "I am going to hold you to that," to which Mr. Pfefer answered "[t]hat's why I am here." (*Ibid.*) However, in spite of this rare concession by the prosecutor, and the actual answers provided by the prospective juror, Mr. Pfeffer was disqualified.

As stated many times by this Court, the real question that must be answered through the use of voir dire in a capital case is "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.* " (emphasis added) (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 citing to *People v. Bradford* (1997) 15 Cal.4th, 1129, 1318; *People v. Hill* (1992) 3 Cal 4th 959,1003; *see also People v. Heard* (2003) 31 Cal 4th 946, 958.)

The prosecutor's repeated use of this bank robbery hypothetical throughout the voir dire clearly was not intended to answer this question, as it had only the most peripheral connection to this case. While the facts of appellant's trial invoked an aiding and abetting instruction, unlike the prosecutor's hypothetical, they involved an allegations of direct, hands on, violent conduct by appellant. In the simplistic, misleading hypothetical given by the prosecutor, the "person in the car" had no direct part in any of the activity leading up to the killing. He was in a remote location, presumably knew nothing of any plan to harm anyone, never saw the

victim, did nothing to aid in the killing. This hypothetical criminal is what was once referred to as a "wheelman." The prosecutor chose this example because the imposition of the death penalty on such an uninvolved criminal, while legally possible, would give pause to most citizens. This hypothetical person's relative lack of involvement is factually so removed from the facts of the instant case that the use of this hypothetical is useless in predicting a juror's attitudes in this case.

However, there is yet another problem with the use of such a hypothetical. Not only is the "wheelman" hypothetical factually irrelevant to this case, it was legally defective because it was incomplete and impossible to answer. The felony-murder special circumstance is applicable to a defendant who is not the actual killer, only if the defendant acted with the "intent to kill" or "with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [one of the eleven enumerated felonies]." (California Penal Code section 190.2, subd. (d); *People v. Estrada* (1995) 11 Cal.4th 568, 572.)

> The portion of the statutory language of section 190.2(d) at issue here derives verbatim from the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (hereafter *Tison*). In *Tison*, the court held that the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a

> defendant convicted of first degree felony murder who was a "major participant" in the underlying felony, and whose mental state is one of "reckless indifference to human life."[citation omitted] (*People v. Estrada*, *supra,* 11 Cal.4th at 575.)

Therefore, even if Mr. Pfefer had personal scruples against imposing the death penalty upon the hypothetical driver who had no suspicion that anyone's life many be in danger[9], his hesitancy would find very good company in Justice O'Connor who wrote for the *Tison* majority.

Obviously, it was not in the prosecutor's interest to fully explain the legal underpinnings of sentencing an aider and abettor to death. Nor did the trial court feel it necessary to correct, or forbid, this factually and legally flawed hypothetical. Perhaps it was Mr. Pfefer's "intellectual" character that instinctively sensed that there was something wrong with the prosecutor's simplistic and misleading hypotheticals. This prospective juror was wrongfully dismissed on the basis of a prosecutorial misstatement that the he was not able to sentence to death a hypothetical defendant, in a completely unrelated fact scenario, in a situation where the United States Supreme Court itself might well preclude such a sentence.

Appellant has not found any case that directly discusses the prosecutor's use of irrelevant hypotheticals to challenge an otherwise *Witt*

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9. As stated in this Argument, Mr. Pfefer plainly stated that he could impose the death penalty on such an imaginary person.

qualified juror. However, much can be learned *People v. Butler* (2009) 46 Cal.4th 847, which discussed how much a prospective juror should be told about the facts of the case in an effort to ascertain whether said juror's personal beliefs create a substantial impairment under *Witt.* The *Butler* Court stated that while questions about the specific facts of the case that invite prejudgment or educated the jury as to the facts of the case should be avoided. (*Butler, supra*, at p. 859), the trial court "must probe prospective juror's death penalty views to the general facts of the case." (*Butler,* supra, at p. 860 citing to *People v. Earp* (1999) 20 Cal.4th 826, 853.)

> Reconciling these competing principles dictates that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation omitted] In deciding where to strike the balance in a particular case, trial courts have considerable discretion. [Citations.] ; *People v. Cash, supra,* 28 Cal.4th 703, 721-722; *People v. Zambrano,* supra, 41 Cal.4th at 1120-1121: see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1285-1287.)

This Court did make it clear that the decision as to whether a juror can sit as a juror on death cases must be based upon the general facts of the case in question. In the instant case, the prosecutor urged the court to make its decision on the facts of some hypothetical situation that had nothing to

do with this case. The trial court erroneously obliged, ignoring all of the prospective juror's unambiguous answers indicating his qualification to serve.

Along these same lines, in *People v. Cash* (2002) 28 Cal.4th 703, 720, this Court stated that regarding *Witt* challenges "a challenge for cause may be based upon a juror's response when informed of facts or circumstances likely to be present in the case being tried." The Court's logic was that this sort of questioning enables the trial courts to ascertain if the juror "harbors bias" as to some fact or circumstance that would cause them not to follow the penalty phase instructions.(*Ibid.*)

This prospective juror unambiguously and repeatedly stated that he could apply the law as set forth by the court as to the imposition of the penalty. If the court felt that there was any ambiguity –the record shows there was not– it was its affirmative duty to clear up any misunderstanding by making appropriate inquiry using the only approved standard: whether this prospective juror could set aside any personal beliefs and could carry out his duty without "substantial impairment." (See *People v. Martinez* (2009) 47 Cal. 4th 399, 425-427.) As stated by the High Court in *Morgan v. Illinois;*

> The adequacy of voir dire is not easily the subject of appellate review (citation omitted) but we have not hesitated,

> particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections. [Citations omitted.] (*Morgan v. Illinois* (1992) 504 U.S.719, 730.)

This trial court did not make such inquiry. It simply ratified the legally and factually flawed rationale of the prosecutor by improperly dismissing Mr. Pfefer.

A representative survey of this Court's cases affirming the dismissal of prospective jurors on *Witherspoon/Witt* grounds reveals nothing that even resembles what occurred in this case. In *People v. Ochoa*, supra, *26 Cal.4th* at 428-430, the answers to the controlling *Witt* question by the jurors that were properly excluded were that the death penalty was "state sanctioned murder," that the juror "would never be able to vote for the death penalty," and that the prospective juror would never be able to impose the death penalty regardless of the evidence.

In *People v. Pinholster* (1992) 1 Cal.4th 865, 916, which involved a felony-murder charge, the dismissed prospective juror made it "unequivocally"clear that her opinions about the death penalty would effect her vote at the guilt phase. She further stated that she could not vote for death regardless of the circumstances. In *People v. Bradford* (1997) 15 Cal.4th 1229, 1319, the dismissed prospective juror said it was "very unlikely" that she could ever vote for the death penalty and that the only

crime in which she could do so would be one involving the death of a child or if defendant was a commandant of a concentration camp.

In *People v. Hill* (1992) 3 Cal.4th 1004, 1005, the dismissed prospective juror, after a good deal of thought, eventually told the court that he could not vote for the death penalty. In *People v. Viscotti* (1992) 2 Cal. 4th 1, 45, the dismissed prospective juror was so against the death penalty he stated that he could not even impose it on Adolph Hitler.

All of these examples are cases in which the prospective jurors in question expressed an "unalterable preference" against the death penalty. (*Morgan v. Illinois, supra,* 504 U.S. at 734-736.) None of the first eight dismissed jurors in this Argument gave answers remotely like those in the above. None of them had any fundamental personal reservations against the death penalty.

Regarding the burden of proof for such an excusal, in *People v. Stewart, supra,* 33 Cal.4th at 445, in citing to *Witt*, this Court stated;

> Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties (as defined by the court's instructions and the juror's oath (citations omitted)...The prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors.

The prosecutor did not even come close to sustaining her burden.

Mr. Pfefer was improperly excused from the jury panel. There was absolutely nothing in his voir dire that could justify a trial court excusing him from service on a capital jury according to the law stated above. According to the highest court in the land, no further prejudice need be shown. (*Gray v. Mississippi, supra,* 481 U.S. at 659-667.) The death judgment must be vacated.

2. PROSPECTIVE JUROR LEONARDO BIJELIC- #6179

a. Questionnaire Responses

Mr. Bijelic was a fifty-four year old man was born and raised in Croatia, who moved to California when he was twenty-three years old. (53 CT 15433, 15435.) Nothing in the answers on his questionnaire hinted at any *Witt*-disqualifying answers. When asked his general feelings about the death penalty he answered "I am for it." (53 CT 15469, Q 178.) He further stated that the death penalty is used "too seldom." (*Ibid,* Q 183.) He further stated that "[i]f very violent crime is comited (sic) death penalty is justified." (53 CT15470, Q 186.) He further stated that the imposition of the death penalty depended on the facts. (53 CT 15471, Q 196.)

Mr. Bijelic also stated that he had no personal beliefs that would

make it difficult for him to impose the death penalty and he would be able to impose it based on the facts and the law that the judge would give. (53 CT 15471-15472, Q 199-200.) He expressed concern that a person who received a sentence of life without parole might eventually be freed. (53 CT 15473, Q 208.) Mr. Bijelic stated he would not automatically vote for either penalty. (53 CT 15474, Q 215-218.) He also indicated that death is the worse of the two possible penalties. (53 CT 15476, Q 227.)

b. Oral Voir Dire

In response to the trial court's standard introductory questioning, Mr. Bijelic made clear that he understood the legal process involved in the jury's determination of the penalty and would not automatically vote for either penalty. (11 RT 2108-2111.)

Further, in response to the questioning by appellant's counsel, Mr. Bijelic stated that he did not favor one penalty over the other. He also said he had an open mind to both penalties and could follow the law as explained by the judge. (11 RT 2111-2115.)

After listening to the prosecutor's explanation of the weighing process, Mr. Bijelic stated that he could impose the death penalty if the aggravating circumstances substantially outweighed the mitigating. (11 RT 2115-2117.) The prosecutor then referred the prospective juror to his answer on questionnaire question 191, in which he wrote that the death

penalty should be imposed for cases that were "premeditated and brutal." (11 RT 2118.) In order to ascertain what the prospective juror meant by this answer the prosecutor gave the following hypothetical and received the following answer.

> Question: Someone is walking down the street. He has gun with him. He is not planning on doing anything. He is just walking down the street. He goes by a liquor store. It's got big glass window. He looks inside and sees the cash drawer open. It's piled high with cash. He wants that cash. He has not planned anything. He goes inside the liquor store. He takes the cash out of the drawer, and he kills the cashier, in your mind, is that sufficient to impose the death penalty...would that be sufficient in your mind to impose the death penalty, if the aggravating circumstances substantially outweigh the mitigating circumstances....
> Answer: If aggravating factors substantially outweigh the good ones, yes, I would be able to.
> Question: Even though --
> Answer: Even if it's not like I said, premeditated. (11 RT 2118-2119.)

In response to the prosecutor's additional questions, Mr. Bijelic stated that even though he was concerned that the law might change and life without parole prisoners may be released, he could vote for the life penalty where warranted. (11 RT 2119.)

When queried as to what types of crimes would warrant life without parole, the prospective juror stated "self-defense and sickness." (11 RT 2119.) The prospective juror described "sickness" as a situation where a

defendant was an adult but had a mind like a five or six year old. (11 RT 2120.) Mr. Bijelic also stated that intoxication did not excuse a person's criminal actions. (11 RT 2121-2122.)

The prosecutor then posed the "assault" hypothetical to the prospective juror. (11 RT 2123.) Mr. Bijelic told the prosecutor he would be able to impose the death penalty on the person who was doing the beating but the penalty as to the holder would largely depend on his intent. (11 RT 2123-2124.)

In response to the robbery hypothetical, the prospective juror stated all three participants were not necessarily equally guilty. However, if the hypothetical defendant in the car knew that the defendant was carrying a gun and might possibly kill the victim, he could impose the death penalty. (11 RT 2124-2127.)

c. Prosecutor's Challenge and Court's Holding

Appellant passed this prospective juror for cause, but the prosecutor challenged on the ground that Mr. Bejelic could not impose the death penalty in aiding and abetting cases.

> Yes, your honor, I don't believe this juror can apply the law with regards to aiding and abetting. He is the only juror we have had so far that has had the opposite response of the two hypotheticals that I have given.
> The Court: And a very good response and very interesting one. This is a very smart juror.

Ms. Locke-Noble: That's the basis of my challenge for cause.(11 RT 2127.)

The discussion continued:

The Court: Ms. Locke-Noble is saying as a matter of law the person cannot impose based on aiding and abetting circumstances that, that is a proper basis for cause and your response is?
Mr. Patton: In the circumstances proposed by the people in terms of the robbery situation, he indicated he would impose death.
The Court: That's assuming that there has a weapon, but if there is no weapon used, no gun, because of the issue of a gun there is no gun used. I usually call guns weapons, if there is no gun use, he cannot impose even if it is aiding and abetting
Mr. Patton: I don't mean to bring this up again, is the court saying my continuing objection, we are pre-judging what the evidence would show.
The Court: I have no evidence. I don't know what the evidence is. Every case is unique. I try every case with a clean slate. I don't pre-judge anything, but if the case law, certain circumstances, aiding and abetting. In this case, it appears that on the aiding and abetting theory, he could not impose the death penalty. If that is the theory, that the people have. I don't know if it is, but that's the direction wouldn't they be at a disadvantage because at the get-go because we can't have a person or that person would be substantially impaired from performing his duties with the oath and in accordance with oath and instructions.
Mr. Patton: I don't think so, your honor, submitted.
The Court: Ms. Locke-Noble?
Ms. Locke-Noble: Submitted. (11 RT 2127-2129.)

In granting the challenge the court stated "[t]he challenge for cause is granted. You know, I'm reading from Ms. Locke-Noble's stance if one of the jurors on the aiding and abetting theory, that the

aiding and abetting theory is none (*sic*) weapon or none (*sic*) gun aiding and abetting theory and therefore that seems to be the predominate hypothetical that this court will be considering." a(11 RT 2129.)

d. Application of the Law to the Challenge

The removal of this prospective juror follows the pattern previously established by the prosecutor and the court. The prosecutor again employed legally incorrect and factually irrelevant hypotheticals to remove a prospective juror, the totality of whose voir dire clearly reveals a person qualified to sit on a capital jury. Again, the court's granting of the challenge has nothing to do with *Witt/Witherspoon* and their progeny, but rather resulted from a misreading of answers to hypotheticals.

From the record, it appears, like Mr. Pfefer, this prospective juror was the only person involved in his voir dire process that fully understood the law. The "assault" hypothetical was even more legally flawed and deceptive as the "robbery" hypothetical. As stated by this Court several times;

> To prove that a defendant is an accomplice ... the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [citations omitted] When the offense charged is a specific intent crime, the accomplice

> must 'share the specific intent of the perpetrator' this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' (Ibid.)" [Citations omitted] What this means here, when the charged offense and the intended offense-murder or attempted murder-are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)

This was precisely what the juror was trying to explain to the prosecutor in his voir dire, when he stated he was assuming that the person holding the hypothetical victim did not know that the victim was going to be severely beaten. (11 RT 2124.) Mr. Bijelic wisely sensed that he could not possibly answer the "assault" hypothetical because he did not know the intent of the hypothetical person holding the victim. Unless the "holder" had a specific intent to kill, he could not be convicted of first degree murder under California law, let alone be subject to the death penalty.

The judge was correct when he stated Mr. Bijelic was smart.[10] He was smart enough not to be lured into an easy answer to a hypothetical that was nothing less than a trick question, impossible to properly answer on the facts given. This is not a proper basis for excusal for cause.

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10. Unlike with Mr. Pfefer, this time the judge did not paint Mr. Bijelic's intellegence in perjorative terms, but still ultimately dismissed him from service.

The court also settled upon the prosecutor's other argument in granting the challenge; that the prospective juror stated that he could not impose the death penalty on a hypothetical wheelman if that person had no idea that the robber in the bank had a gun. As with Mr. Pfefer, this hypothetical was legally defective because it was incomplete and impossible to answer. The prosecutor's simplistic and misleading hypotheticals therefore served as a platform from which to argue for excusal when no legal cause was shown. The prosecutor continued to rely upon a tactic of positing a hypothetical completely factually removed from the facts of this case and wording this hypothetical in such a way that virtually any prospective juror would have a great deal of trouble finding for death. If prospective jurors could be eliminated from capital trials because they would not impose the death penalty in the hypothetical that the prosecutor presented, the only people left on the jury panel would be jurors so enthusiastic about the implementation of the death penalty that they would truly be a tribunal "uncommonly willing" to condemn a man to death. (*Witherspoon v. Illinois*, *supra,* 391 U.S. at 520.)

The removal of Mr. Bijelic for cause violated both the letter and spirit of the law set forth by High Courts of the United States and California. There was no ambiguity on Mr. Bijelic's part that needed to be resolved by the court. The dismissal of this prospective juror for cause

violated appellant's rights to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and corollary provisions of the State Constitution. The unconstitutional dismissal of but one prospective juror who qualified to sit under the law is cause for reversal of the death judgment.

3. PROSPECTIVE JUROR SAM RUTIGLIANO # 3489

a. Questionnaire Responses

Sam Rutigliano was a thirty-one year old male of Italian descent (40 CT11633.) He felt that the death penalty is "a big deterrent to many others who may wish to kill." (40 CT11669, Q 178.) For this reason, he felt that California should continue to have the death penalty. (40 CT 11670, Q 186.) He further stated that the death penalty should be imposed in "extremely cruel cases." (*Ibid*, Q 191.)

Mr. Rutigliano also made it clear that each case should be determined on its own facts, and that death was the worse of the two possible penalties. (40 CT 11671, Q196-198.) He also indicated that he could set aside any personal beliefs and decide the case on the facts and the law as set forth by the court, indicating that his "duty as a juror (is) to be fair and unbiased." (40 CT 11671-11672, Q 200.)

Mr. Rutigliano stated that in a case that involved acts such as mutilation and torture he could find for death. (40 CT 11673, Q 209.) He

further stated that he would not automatically refuse to vote for either penalty. (40 CT11674, Q 215-218.) He also stated that he would like to sit on the case because "I know I am a fair person. I have always been one to listen to both sides of an argument. I also know people that have done good things, and people who have done bad things. A defendant/prosecution deserve jurors that are not one-sided and biased." (*Ibid.*, Q 231.)

b. Oral Voir Dire

The oral voir dire again began with preliminary questioning by the court in which it described the special circumstances, the two phases of the trial, the general nature of aggravating and mitigating factors and the basic weighing process. The court also explained the finding that the jury must make before reaching a verdict of death. (8 RT1562- 1565.) Mr. Rutigliano informed the court that he understood this law (*Ibid)*, and stated that he did not have any personal beliefs that would cause him to automatically vote for either penalty. (8 RT 1564-1565.)

In response to questioning from defense counsel, Mr. Rutigliano stated that going into the trial, he had an open mind about which of the two penalties to impose. (8 RT 1565.)

The prosecutor commenced by asking about the prospective juror's response to questionnaire question 210, in which he stated that an example of a crime for which life without parole was the proper sentence was one

which was "accidental or not premeditated." (8 RT 1566.) The prospective juror made it clear that he could follow the court's instructions and impose a death sentence for felony murder;

> Question: Let me add one more thing. As the court has told you, the only way you can impose the death penalty is if he's found guilty of first degree murder. And a murder in the course of a robbery is a special circumstance, which is what happened in this factual situation I gave you, and the aggravating circumstances substantially outweigh the mitigating circumstances. Would you be able to impose the death penalty then?
> Answer: Yes. I mean, if that's what the judge says.[11](8 RT 1169.)

The prosecutor gave her own explanation of the weighing process, and Mr. Rutigliano's responses made it clear that he could find for death if appellant was found guilty of murder and at least one of the special circumstances was found true. (8 RT 1572-1574.)

The prosecutor then employed the "assault" hypothetical, where on person is holding someone's arms and the other is beating on the victim.

> Question: Okay. Do you believe that the person holding the arms is as equally guilty as the person doing the hitting?
> Answer: Maybe not equally, but close.
> Question: Okay. Why don't you think he's equally guilty?

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11. By this simple statement, Mr. Rutigliano made it clear that he would follow the law as given by the court.

Answer: He's not actually doing the hitting, I mean, so it depends on what the charges are, if you're saying he's hitting him, he's not hitting him or her, which ever, it all depends on what you're being accused of doing.
Question: Okay. If the person holding the victim's arms, if the victim is unable to escape or defend themselves, do you believe they're equally guilty?
Answer: Yes.
Question: Okay. So now looking at that, person is holding the arms of the victim and the other person is beating them, are they both equally guilty? If you don't believe they are, that's fine.
Answer: It's something I'd really have to think about.
Question: But we have to know your answer today.
Answer: You know, I would still kind of say probably not equally.
Question: Okay. So let me ask you this additional fact. The victim, the person that was being beaten, dies. It's first degree murder and there is a special circumstance that's been found true. Would you be able to impose the death penalty on the person holding the arms?
Mr. Patton: Objection. Incomplete hypothetical.
Ms. Locke-Noble: -- if the aggravating circumstances substantially outweigh the mitigating circumstances?
Prospective Juror No. 3489: Yes.
Question: Now, why can you impose the death penalty on that person, but yet you don't believe that person is equally guilty?
Answer: You just said that the aggravating is more than the mitigating, so -- I mean, when we were talking earlier I said right now I kind of didn't weigh it equal, but when you stated it that way, you're saying that the aggravating was far more than the mitigating, so that kind of is tipping the scale more.
(8 RT 1574-1576.)

Even though Mr. Rutigliano made it perfectly clear that he could impose the death penalty on both persons, the prosecutor took the position that he was hypocritical when he stated he could impose the death penalty

on someone who was not as "equally guilty" as another hypothetical participant. However, in spite of the prosecutor's attempts to put words in the prospective juror's mouth, Mr. Rutigliano again made it clear that his mind was open to the death penalty.

> Question: But the court has said that you do not have to impose the death penalty when the aggravating circumstances substantially outweigh the mitigating circumstances, so I don't understand what you are telling me. If you find that someone is not as guilty, how can you impose the death penalty on them?
> Answer: Actually, you asked if I could, if that was possible, if it was more. I could. I'm not saying I would, you know, you're saying could I.
> Question: But what I don't understand is if you don't think that the two people are equally guilty, wouldn't you give them different punishments, because they weren't equally guilty?
> Answer: Well, when we were saying they weren't equally guilty, that was before you started saying the mitigating and the aggravating was outweighing it. But now, I mean, if there was more stuff to it than what you've just said, you know, and you start saying they did this, they did this and this, that's starting to bump it up more than just holding on. That, to me, it's like raising the scale more than from being equal, from wherever, that would possibly be life. Now you're talking about it being far worse.
> Question: I just said substantially outweighs, I didn't say that it was far worse. I just said it substantially outweighs. And the court says even if it substantially outweighs, you can still impose life without the possibility of parole.
> Answer: Yes.
> Question: So in your mind, because the person holding the arms is not as guilty as the person actually doing the punching, wouldn't you impose life without the possibility of parole on him and give the other guy, the one actually doing the punching, the death penalty?

Answer: I could do both in that. Like I said, you asked could I do either, so - -(8 RT 1576-1577.)

Not succeeding in her attempts to disqualify this prospective jury by leading him into saying he could not impose the death penalty, the prosecutor then used the same completely factually unrelated, legally flawed hypothetical she used on prospective juror Pfefer, the "bank robbery" hypothetical. This hypothetical included the "fact" that neither the lookout nor the driver had any idea that the hypothetical man in the bank had any intention of shooting anyone. (11 RT1578.) In response to the prosecutor's questions, Mr. Rutigliano stated that he did feel that the lookout or the driver were as guilty as the shooter, and would "probably" not impose the death penalty on them if they did not know that there was going to be a shooting. (11RT 1578-1579.)

However, when given the opportunity to explain the type of case in which he would impose the death penalty, Mr. Rutigliano described a situation just like the instant case. He stated that it would be a "horrible crime" (11 RT 1579) where "you would have to really be trying to really hurt that person, I guess, make it far -- you know, more pain." (11 RT 1580.)

Obviously not content in being told by the prospective juror that he could impose the death penalty in a case such as the one actually being

tried, (*People v. Cash, supra,* 28 Cal.4th at p.720), the prosecutor again busied herself in unearthing some hypothetical set of facts under which Mr. Rutigliano could not impose death. However, she had little success, with the prospective juror unambiguously stating that he could find for death in a robbery felony murder and that he could go into such a case with a "clear" mind. (11 RT1580-1581.)

Having failed several times to ferret out some set of facts under which Mr. Rutigliano could not impose death, the prosecutor tried yet again. This time, she parsed the individual special circumstances, and presented them in a factless vacuum.

> Question: Let me ask you this. If the defendant was convicted of first degree murder and the special circumstance was only the rape, would you be able to impose the death penalty, if the aggravating circumstances substantially outweighed the mitigating circumstances?
> Answer: Could I or would I?
> Question: Would you?
> Answer: I'm not sure.
> Question: If the only special circumstance proved to be true was the kidnap for rape, would you impose the death penalty if the aggravating circumstances substantially outweighed the mitigating circumstances?
> Answer: Possibly.
> Question: And assume the same hypothetical for the rape with a stake.
> Answer: Possibly.
> Question: And the same circumstances, the same hypothetical for just a plain kidnaping.
> Answer: I'm not sure.
> Question: And the same circumstances for a torture.
> Answer: Probably. (11 RT 1582-1583.)

c. Prosecutor's Challenge and the Court's Ruling

As soon as the voir dire ended and before the prosecutor even made her challenge for cause, the court actually encouraged the prosecutor make such a challenge, pointing out to her that she previously challenged another prospective juror who gave similar responses. (8 RT 1584-1585.)

The prosecutor, taking her cue from the court's improper suggestion that a challenge was warranted, stated inaccurately stated that Mr. Rutigliano answered that he "could not" impose the death penalty on the persons serving as the lookout or the driver in the bank hypothetical. She further argued that the juror was "inconsistent" in saying he could impose the death penalty on the holder in the beating example, even though the holder was not "equally guilty" to the person who did the beating. (8 RT 1585-1586.)

Appellant's counsel reminded the court that he had a standing objection to the hypotheticals that the prosecutor was using. (8 RT 1587.) Further, counsel argued to the court that Mr. Rutigliano's answers made it clear that he was not substantially impaired under *Witt.* (8 RT 1586-1589.)

Counsel expanded upon his objections to the aiding and abetting hypotheticals that the prosecutor had been proffering.

I think jurors, without any law being given to them with

respect to aiding and abetting, really are left kind of to fend on their own. They're not trained as lawyers, that is the point that I'm trying to make. They're not trained as lawyers. If the court was to tell them, like in a preliminary fashion, we could probably avoid this by giving an aiding and abetting instruction, giving an instruction with respect to when a person who is not the actual slayer can be held responsible for the special circumstances, and that is when he's aware that his conduct involves a grave risk of harm or of death. And this particular prospective juror, he said, "well, was the guy aware that the guy was going to go in the bank and shoot him, you know?" So I would just ask you to allow me one more opportunity to, you know, put this on the record. okay? If the court, perhaps, would tell them the law with respect to aiding and abetting is such and such, the law with respect to a non-slayer -- see, that's a complicated matter. (8 RT 1589-1590.)

The court responded to this request by asking if not giving the instruction was not a better way to test a juror's views on capital punishment.

The Court: By not giving the instruction, wouldn't that be a better view, wouldn't that be a better way to test their mind, a true test of their mind, as to whether or not they would be able to impose the penalty of death, whether they could on an aider and abettor?
Mr. Patton: I don't believe so, your honor. because I think if they are aware of what the law is – you see, and I think I learned in law school years ago, and I think even in the media right now, some people – there is a divided point of view about to what extent should a person who assists another in a crime --
The Court: Well --
Mr. Patton: -- be responsible.
The Court: honestly, you don't believe everything you see in the media, do you?
Mr. Patton: I'm speaking about, you know – this is -- I am saying, your honor, that the lay public, the non-trained

> lawyer, feels that the accomplice rules sometimes, as well as the felony murder rules, are very harsh. But they realize that's the law, and they will follow the law and hold each person responsible. (8 RT 1591-1592.)
>
> The prosecutor then stated her views on this issue.
>
> If a juror knew the law, the juror would then frame his question in accordance with the law. A true test of the juror's state of mind with regard to aiding and abetting, and accomplices, is to find that out without pre-instructing them, because then we know what their true views are. If they know what the law is, in advance, we can not find out what their true views are, because they want to follow the law. (8 RT1593.)

The court essentially adopted the prosecutor's argument and refused to give further generalized instructions as to the aiding and abetting theory. (8 RT 1597-1598.)

> ...based on this court's look at (juror No.)3489 and his state of mind that this court is required to assess, based on Bradford and Cox, in applying Witt versus Wainwright, this court sees, in part, (juror no.)3489 in the same way as (juror no.) 2644. He picks and chooses the special circumstances that he believes he would be able to consider the penalty of death on, and that shifts and changes the burden of the people, because, you know, you have to fit the special circumstances for him. The second thing is that in terms of an accomplice, or an aider and abettor, it is his true state of mind that they're not equally guilty, and even if they are guilty, they're not equally guilty. In other words, in these folks' eyes, the person is guilty, but there's a degree of guilt. And that is really the true test of whether or not they would be able to consider the penalty of death or automatically vote for life without parole.

> And this person is honest. He says probably not on the getaway driver and the lookout person, probably not, giving the state of mind to this court that that's really the right way we do aider and abettor questions. I didn't really know, and perhaps now I do, that the people's theory in this case probably is an aider and abettor theory. I didn't realize that, because I sit tabla rosa -- I'll give you that spelling later, madam reporter. Now this court is being educated as to how this case probably will be presented, so that is a fair way to ask the questions. the challenge for cause is granted as to (juror no.)3489. (8 RT 1598-1599.)

d. Application of Law to the Challenge

The court and prosecutor were right about one thing. Mr. Rutigliano was very similar to Mr. Pfefer. (Juror #2644.) They were both improperly excused. Both the prosecutor and court mischaracterized the jurors' statements to create the impression that this juror's personal belief would impair him from imposing the death penalty in a case such as this. In reality, there was nothing in the juror's answers to suggest that. In fact, as with all of the dismissed jurors, this particular question, critical to the *Witt* process, was never even asked of Mr. Rutigliano. Instead, once again the prosecutor spent her time trying to get the prospective juror to state that in some hypothetical case, that has absolutely no connection with the instant case, he would be reluctant to impose death.

Even though this juror made it clear in the oral voir dire and in his questionnaire that he would follow the law as stated by the court, it would

have been understandable that the prosecutor might want to test these statements by the juror by asking pertinent and relevant questions as to the general fact pattern of *this* case. However, it is clear from the voir dire that the prosecutor sought only to extract from the prospective juror anti-death statements by the use of confusing and irrelevant hypotheticals.

Once again, the prosecutor argued that Mr. Rutigliano's statement that he "probably" would not impose the death penalty on a hypothetical wheelman or lookout person if they didn't know that the man in the bank intended to kill disqualified him. However, again this hypothetical was completely irrelevant as to whether Mr. Rutigliano could impose the death penalty in *this* type of case, where the theory of the prosecution was that appellant was directly and intimately involved in the events that caused the victim's death.

The prosecutor also relied upon her confusing incomplete hypothetical as to one person holding a murder victim while the other beat him to death. The prosecutor argued that the juror was inconsistent when he stated that, while he did not believe that the two perpetrators were "equally guilty," he could impose the death penalty upon the holder if the aggravating circumstances substantially outweighed the mitigating. However, it was not the juror who was "conflicted'" it was the hypotheticals themselves.

Again, the prosecutor introduced the legally meaningless and ultimately misleading phrase "equally guilty" into the voir dire. The implication that there are different gradations of guilt is obviously wrong. One is either guilty or is not. As discussed previously, aa assault is not a predicate felony for felony murder. The only way that the holder could be convicted of murder is if he shared the striker's intent to kill. In the hypothetical the prosecutor gave, it is impossible to tell if the holder is guilty of the murder, as his guilt obviously rests upon sharing the intent of the person actually doing the striking.

Therefore, given the juror's lack of legal knowledge and the legally flawed suggestions that there are degrees of guilt, the prospective juror's answer that he could impose death on the holder even though he was not "equally" guilty was quite reasonable.

The prosecutor and the court vetoed any attempt to clear up the confusion that these aiding and abetting hypotheticals invariably created. Appellant's counsel rightly informed the court under *Witt* the question that had to be answered was whether a juror could bend his own beliefs to the will of the law and the only way to ascertain this answer was to inform the prospective jurors as to the nature of the law that they would have to follow. (*Witt, supra,* 469 U.S. at 420.)

Counsel correctly explained this law to the court and asked that the prospective jurors be instructed, to permit a determination of whether their personal beliefs would substantially impair them in doing their duty. Instead, both the prosecutor and the court again relied upon the jurors' uninformed answers to irrelevant and confusing hypotheticals.

Mr. Rutigliano had no personal beliefs against the use of the death penalty. His dismissal was based upon factually irrelevant and/or legally flawed and confusing "hypotheticals." The court explicitly precluded any attempt to explain the law upon which these hypotheticals were based. A prospective juror's uninformed personal opinion of the law is irrelevant in the *Witt/Witherspoon* equation. It is whether that juror can follow the *actual* law that controls.

The dismissal of this prospective juror for cause violated appellant's rights to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution according to the interpretation of both the United States Supreme Court and this Court. The trial court's error as to this prospective juror alone mandates reversal of the death judgment.

4. PROSPECTIVE MAXINE MORALES- #2442

a. Questionnaire Responses

Maxine Morales was a sixty year old Hispanic female. (24 CT 7324.) In her questionnaire, she made it clear that while she had no real feeling about the death penalty (24 CT 7361, Q 178-179), California should have it and she could personally impose it. (24 CT 7362, Q 186, 188.) She further stated that any decision between life and death should be made based upon the individual case. (*Ibid,* Q 189-192; 24 CT 7396, Q 196; 24 CT 7365, Q 209-210.) She also stated that she could set aside any personal beliefs and decide the case on the facts and the law, further stating "I would do the best that I could to have justice served." (24 CT 7363-64, Q 200.) Ms. Morales also stated that the two penalties are equally severe. (24 CT 7368, Q 227.)

b. Oral Voir Dire

After advising her of the basic process of weighing of the aggravating and mitigating factors, the court informed Ms. Morales that the "weighing of the factors is not quantitative but qualitative in which the jury, in order to fix the penalty of death must be persuaded that the bad factors are so substantial in comparison to the good factors that death is warranted instead of life without parole." (7 RT 1444.) The juror indicated that she understood and that she would not automatically vote for either penalty. (8

RT 1445-1445.)

Ms. Morales stated that she was "equally open" and "neutral" to both penalties and that she could follow the court's instructions and consider the factors she was given in determining the penalty. (7 RT 1445.) She also indicated that she could take appellant's childhood into consideration but could impose death if the aggravating circumstances substantially outweighed the mitigating, even though the law never requires the imposition of the death penalty. (7 RT 1446-1448.)

The prosecutor attempted without success to use Ms. Morales' fairness and lack of pre-determined attitudes as a factor *against* her ability to sit as a juror. However, Ms. Morales neutralized the prosecutor's attempt to misstate her most reasonable and balanced views as to the imposition of penalty.

> Question: You indicated that you are neutral. You are not more in favor of the death penalty nor more in favor of life without the possibility of parole, correct?
> Answer: That's correct.
> Question: So how can I determine whether or not you would impose the death penalty, if it was an appropriate case?
> Answer: I don't know that you can determine that at this point. I think that determination or decision would be made after the information was given to me or any other juror. At this point, I don't have a say one way or the other, because I haven't heard anything. So at this point that's why I say I'm neutral. I'm not leaning one way or the other.
> Question: Are you for the death penalty?
> Answer: I'm not for or against it.

Question: Now, you indicate on question 178, "What are you general feelings about the death penalty?" you put, "none."
Answer: You know, I'm going to say something that may be good for the court to hear, just is as a juror filling out the that form. When I was filling that form from 11:00 until 4:30 that I turned it in. It was very taxing. It was, I felt the important part of the gist of that question was left to the end which in some respects me, personally, felt should have been more at the beginning. If you look at my writing the beginning of my writing, I write very neatly, trying to be very concise and accurate. As I got further into the form, I was like so exhausted that you could even tell by my handwriting, it is haphazardly done. It's done quickly. At that point I was interested in getting the information completed, but I also was concerned with completing it appropriately. So when I said, I have no opinion, at that point I go back to what my original statement was. I feel that this is a very high responsibility would be placed on me.
Question: In your hands.
Answer: And I certainly would want to do the right thing by the defendant or by the other side. I would want to do whatever the evidence or the information warranted. And I -- at this point I couldn't say that I have a decision one way or the other or I feel one way or the other way. I don't. I don't feel one way or the other about it. I feel like I would have to have it proven to me and that the information would be concise and the information that I would take away from it to help me make the decision. It would be a very difficult decision if I had to decide that it was a death penalty. I don't think anybody would walk away feeling great about doing that, but I feel I have to do what was warranted by the case. (7 RT1448-1450.)

By any definition, this was a prospective juror who took her responsibility very seriously, understood it, and was able to follow it. However, dissatisfied with the juror's answer, the prosecutor continued to relentlessly pursued the juror, asking "[h]ow can you impose the death

penalty if you don't even know what your feelings are regarding it?" (7 RT 1450.)

Yet again, Ms. Morales informed the prosecutor that while she did not have a personal opinion on the death penalty, she was very neutral and if the facts of the case warranted death she could vote for that penalty. (7 RT1450-1452.)

In response to further prosecutorial questioning, Ms. Morales stated:

> I'm sure that you form opinions as you go through life, but this isn't forming an opinion. This is real. This is happening so in other words, I would have to walk away from this situation with a clear conscious. If I was selected as a juror, I would want to weigh all of the facts, the good and the bad, and what the other jurors would have to say before I could make a decision. Things that I have formed as opinions in my life time, I think are -- they have no consequence as it deals with the real life. This is the real life being approached about sitting on jury for a death case or a murder case. (7 RT 1452.)

To this reasonable, fair and legally qualifying statement, the prosecutor once again repeated the same legally irrelevant question; how the juror "could possibly impose a death sentence if you have no feelings toward it one way or other you have no opinion." (7 RT 1452-1453.) Ms Morales remained consistent in her answer.

> I think the feelings that I have, if it's appropriate for the case. If the evidence, the bad things outweigh the good things, and it's decided consistently with the other jurors involved that I would be comfortable with going with the death penalty. (7 RT 1453.)

Unable to discredit Ms. Morales legal qualifications to sit on appellant's jury, the prosecutor turned to her hypotheticals. Regarding the "assault" hypothetical, Ms. Morales indicated that she could sentence both to death. (7 RT 1455.)

Regarding the "bank robbery" hypothetical, when asked if all of the three participants were "equally guilty" (7 RT 1456.) Ms. Morales stated that she thought that the men standing lookout outside of the bank and the driver were less guilty that the man who pulled the trigger. (*Ibid.*) The prosecutor then asked if the juror could impose the death penalty on the wheelman if the aggravating evidence outweighed the mitigating, and the juror said "yes." This followed:

> Question: Now, why? How could you impose the death penalty on that person when you said he wasn't as guilty as person who did actual shooting?
> Mr. Patton: Objection, your honor that's improper.
> The Court: The objection is noted and it is sustained. I think that she did not say it's not guilty it's not as guilty.
> Question Ms. Locke-Noble: I believe she said he was less guilty.
> The Court: I'll let you follow up on that.
> Question Ms. Locke-Noble: You indicate that the person waiting in the car was not as guilty as the person who pulled the trigger, correct?
> Answer: Right.
> Question: so how can you impose the death penalty on the person who is waiting out in the car, when you believe he is not as guilty as the person who pulled the trigger?
> Mr. Patton: Objection, it is not complete, the factors are -- it's not complete.

Answer the court: Okay. The objection is that it is an incomplete hypothetical. That's overruled. I understand the hypothetical. Answer, please.
Answer: Why would I feel comfortable in saying that he should get the death penalty as well as the one that pulled the trigger because he is less guilty?
Question: Right.
Answer: Because you said that the bad -- mitigating. I get that word confused, the bad issues about him were more than the ones that weren't bad.
Question: But the law says that you do not ever have to impose the death penalty. You always have the option of imposing life without the possibility of parole. It is only when the bad factors substantially outweigh the good factors that you can impose the death penalty. The law never requires you to impose the death penalty. Knowing that, would you impose the death penalty on the person waiting in the car?
Answer: No. (7 RT1457-1458.)

c. Prosecutor's Challenge and Court Ruling

Appellant passed this juror for cause. The prosecutor made the following challenge.

> Well, I think this is the same situation that we had on the previous juror. She indicated under aiding and abetting, she would not be able to impose the death penalty. And I think that would substantially impair her ability to be a juror in this particular case. Along with the fact that she doesn't know what her feelings are, whether she is for or against the death penalty. (7 RT 1460.)

The challenge was opposed by appellant. (RT1461.) The court granted the prosecutor's challenge stating;

> Challenge for cause is granted, same as the last one. The law does not require the imposition of the death penalty, that is a correct statement of the law. And in this particular case even Mr. Patton trying to rehabilitate the second time around this juror is adamant that since the law does not require in an aider and abettor, the person outside whether that person is, I assume, is the getaway driver or the one keeping the car warm for the getaway, less guilty but still guilty. And she understood the concept of guilt or guilty versus not guilty, but just the same guilty, but will not impose the death penalty, will not consider that as an option and believes that life without parole is a sufficient penalty. This is the exact same situation as the previous juror, and based on the Wainwright, which is Witt and Cox and Bradford. She is substantially impaired from performing her oath and duties as a juror in this case and I'm going to excuse her based upon people's challenge. (7 RT 1461-1462.)

d. Application of the Law to the Challenge

Once again, a juror who several times made it perfectly clear that she was fair and open minded and would follow the law as given by the judge was prohibited from serving because she couldn't impose the death penalty on a hypothetical wheelman in the car, a hypothetical far removed from this case. Once again, this chimera of the prosecutor's imagination is allowed to stand in the place of the people and events involved in this case. Once again, the court accepted the prosecutor's legally insupportable theory that if one cannot impose the death penalty in every conceivable situation that it could technically be imposed, you can't sit as a death penalty juror.

What makes this so troublingly disingenuous is that appellant's counsel requested that the prospective jurors be instructed as to the law regarding aiders and abettors before they answered voir dire questions, and the prosecutor and judge refused to do so. The prosecutor much preferred her own court approved approach in order to purge this jury of anyone who wasn't a true death penalty enthusiast, eager to impose the death penalty for whatever offense the law may theoretically allow. Even if it could be said that there was some sort of ambiguity in Ms. Morales answers, the court made no attempt to resolve it.

The dismissal of this prospective juror for cause violated appellant's rights to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution according to the interpretation of both the United States Supreme Court and this Court. Regardless of how this Court finds as to the dismissals of any other of the prospective jurors presented in this argument, the trial court's error as to this prospective juror alone, mandates reversal of the death judgment.

5. PROSPECTIVE JUROR ORLANDO SALAZAR JUROR-# 5849

a. Questionnaire Responses

Mr. Salazar was a sixty-two year old male of Columbian descent.

(20 CT 5926.) In the questionnaire, when asked how he felt about the death penalty, he stated that he "[must] follow the law." (20 CT 5962, Q 178.) He said that he didn't know how he felt about the death penalty or whether he could personally vote to enforce it. (*Ibid,* Q 187-188.) He also wrote that life in prison was worse for a defendant because death was quicker. (20 CT 5964, Q 198.) However, he also stated that he could set aside any personal beliefs and decide the case based on the facts presented and the law given by the court. (20 CT 5964-5965, Q 200.)

Mr. Salazar could see himself voting for the death penalty, stating again that he "must follow the law." (20 CT 5966, Q 209.) He would not automatically vote for either penalty. (20 CT 5967, Q 215-218.) Mr. Salazar also stated "I have a duty to my country and community, I have the time now and I will do my best to be fair and help bring a fair trial." (20 CT5969, Q 231.)

b. Oral Voir Dire

After advising him of the basic process of the weighing of the aggravating and mitigating factors, the court informed Mr. Salazar that,

> the weighing of the factors is not quantitative but qualitative in which the jury, in order to fix the penalty of death must be persuaded that the bad factors are so substantial in comparison to the good factors that death is warranted instead of life without parole. (6 RT 1208.)

The juror indicated that he understood (*Ibid.*), and that he would not automatically vote for either penalty. (6 RT 1206-1210.)

Mr. Salazar confirmed that he could impose the penalty based on the facts of the case and the law and stated that his personal opinions would "have nothing to do with it." (6 RT 1210.)

In response to the prosecutor's questions, Mr. Salazar indicated that he did not have any opinions about the frequency of the use of the death penalty nor whether California should have it as a penalty for murder, indicating that was a decision for the "authorities," not him. (6 RT1211-1212.) The prospective juror indicated that he wasn't aware that California still used the death penalty and that he didn't feel that he was qualified to say whether California should have the option of death. (6 RT 1212-1214.)

Mr. Salazar then stated that although his church's dogma opposed the death penalty, this would have no affect on him and he could follow the law. (6 RT 1214.)

The prosecutor then asked a series of questions in an attempt to confuse the juror into stating he could not impose the death penalty. Mr. Salazar would not be fooled.

> Question: The law says you do not have to impose the death penalty.
> Answer: The law says what?
> Question: You do not have to impose the death penalty. The law doesn't say that –

Answer: No, it doesn't.
Question: The law says that you can impose the death penalty, so you're telling me that you will follow the law? Well, the law says you can always impose life without the possibility of parole, so will you always impose life without the possibility of parole.
Answer: No, ma'am. That's why you go into deliberations with the rest of the 12 or 11 members.
Question: But this is you. I'm talking about you, not the other 11 people, just you.
Answer: If I feel like it should call for the death penalty and if I am satisfied that it is appropriate, yes, I would.
Question: Okay. How are you telling me that you could vote for the death penalty, when you said that what you're going to do is follow the law, and the law says you don't have to impose the death penalty?
Answer: Because at this point, ma'am, at this point I don't have anything to go by. I don't have any hatred. I don't have any bad feelings against anybody, to be able to say, yeah, I'm going to vote for that. I have to sit through the whole thing and analyze it, and have at least a feeling of what's going on before I even -- I'm able -- before I'm able to have any idea that I might want to go for the death penalty. I need to have enough -- something to substantiate that decision you're asking me something without knowing anything, and at this point I only believe that the person being charged is innocent, as far as our law says. Up to this point, that's it. Now, it's up to the district attorney or the state to prove differently, and then that's when you become aware of -- okay, then it merits it. (6 RT 1214-1216.)

Unwilling to accept Mr. Salazar's assurances that he could indeed follow the law, the prosecutor renewed her attempt to get him to say something that would disqualify him. However, the prospective juror continued to assure the court that he could impose either penalty if the facts of the case and the law warranted it. (6 RT 1218-1222)

The prosecutor then referred Mr. Salazar to jury questionnaire question 198, in which he indicated his opinion that life without parole is the worse penalty because "death is quick" and "life is long" with prison being "hell." (6 RT 1222-1223.) The prosecutor then attempted to convince Mr. Salazar that because of this opinion, he could not impose the death penalty if the aggravating circumstances substantially outweighed the mitigating. (6 RT 1223.) However, Mr. Salazar distinguished his personal opinion from the law and gave no indication that he would not be able to follow said law. (6 RT 1223-1226.)

Mr. Salazar made it clear that, before hearing the facts, he could not say if he would impose the death penalty. (6 RT 1226-1227.) The prosecutor then proffered the "assault " hypothetical and Mr. Salazar indicated the punishment as to the holder would depend on whether the aggravating circumstances substantially outweighed the mitigating. (6 RT 1227-1228.) Mr. Salazar then reiterated that he needed additional facts to make any decision but that by the end of the case he would be able to do so. (6 RT 1228-1229.)

c. Prosecutor's Challenge and Court Ruling

Appellant passed this juror for cause (6 RT 1230.) The prosecutor challenged this juror for cause stating the following;

> Ms. Locke Noble: Yes, your honor. I'm challenging him for cause for the following reasons: first of all, he thought the death penalty was abolished. He has no feelings, one way or the other, concerning the death penalty. He can't tell me whether or not life without the possibility of parole is -- actually, he did tell me it was a worse sentence, and then he said, well, death is final. So I'm not sure that he meant that was worse, but he kept saying life without the possibility of parole is worse. He indicated pretty much that he had to have hatred or bad feelings about the defendant, personally, in order to impose the death penalty, although he backed off on that a little while later. I truly don't know where he stands. It appears to me that he is going to impose life without the possibility of parole, because he believes that life without the possibility of parole is the worse punishment, and someone should have to live with it, which is what he said on his questionnaire. It's question no. 227, which is, "which do you believe is a more severe punishment, death or life without the possibility of parole?" And he put, "life without the possibility of parole. He'll live in hell for the rest of his life." He said he doesn't even want to think about it. He doesn't want to think about the penalty. He's not qualified to say what the penalty should be. It's something ugly and I don't want to think about it. And he also said that he follows the doctrines of the catholic church, in which they believe that you should not impose the death penalty, to a point. He couldn't tell me what point. He says he doesn't want to think about it. He can not decide. He went back and forth. And I think he falls under Cox. (6 RT 1230-1231.)

Appellant's counsel objected to the challenge but the court granted it stating;

> The Court: People's challenge for cause is granted. I'll explain to you why. Let me invite any reviewing court, should there be any review, particularly to the question area on question 198, when asked whether or not if there's a first degree plus special circumstances, plus aggravating outweighs mitigating, whether or not he could make an election between the death penalty or life without parole, or would he automatically vote for life without parole. I remember that his answer is "Death is quick. Life is long. Prison is hell." He then, when asked directly in open court, he said he'd prefer not to say "prefer death." And then, in fact, I emphatically seen him with his right fist waving, he said, "I'm not for death. Death. death. Death." He says that's his own feeling. He's got to have a lot more. He just simply did not want to answer the question. I think that he is very conflicting in his answers in this case. One of the other things also that concerned me is that he wanted to interject his own personal feelings into the case, in order for him – because, I understand, based on his state of mind, to even consider the issue of capital punishment he has to have hatred or bad feelings for the defendant. He said, "I have no hatred or bad feelings for the defendant." I heard that explicitly, it rung my ear as I turned around. And I think that is not the standard that would be appropriate. Based thereon, this court believes that he's substantially impaired in the performance of his duties, in accordance with his instructions and the oath. (6 RT 1232-1234.)

d. Application of Law to Challenge

It is hard to imagine a more intellectually dishonest challenge by a prosecutor or response from a court as was the case with this juror. Mr. Salazar was an honest, thoughtful juror, prepared to do his duty to his country. He was deprived of this opportunity, not because he could not

impose the death penalty, but because he did not fit the profile of a juror predisposed to blindly impose the death penalty.

As with the other prospective jurors discussed in this argument, Mr. Salazar was subjected to prosecutorial questioning designed not to discover whether the juror could follow the law and consider both penalties, but to elicit an answer that could be twisted to suggest the opposite. Both the prosecutor and the court completely mischaracterized his answers in the oral voir dire. Mr. Salazar never stated that his religious beliefs would substantially impair him from imposing the death penalty. In fact, he specifically stated that in spite of his religion's teachings, he realized that it was his "duty to follow the law." (6 RT1214-1215.)

Further, the juror never indicated that his personal preference of penalties for himself would be life without parole meant that he could not follow the law and impose the death penalty on appellant. Again, he indicated the contrary. (6 RT RT1223-1226.) The trial court's statement that he saw Mr. Salazar in "open court"...emphatically...with his right fist waving, (saying), "I'm not for death, death, death, death." (RT1233) might establish ambiguity except for one thing: nowhere in the record does such an utterance by Mr. Salazar ever appear. The only words similar to these appeared as Mr. Salazar was trying to explain his neutrality on the penalty.

> What I'm trying to feel in my conscience is not that I'm going to be a -- what can I say -- a person that will go for the death, you know. Some people are like, no, I don't even want to think about that much, because I take it very serious. But if it's called for and if it is one of the options, and if I sat on the case long enough to understand what's going on, I think that I am more equipped to have a very good answer at that time. I'm not going to sit here and tell you, yeah, death, death, death; I'm not. I'm not for that. I'm for justice. And after sitting through the whole case and analyzing the situation, then I'd be better equipped to say, yeah, death or life imprisonment. At this point I couldn't -- I don't feel like -- death, to me, is final, it's something that I'm not going to answer readily, just because somebody wants me to answer that way. (6 RT 1224-1225.)

This comment by the juror represents a careful, neutral thought process, well aligned with the law of *Witt* and *Stewart.* However, both the prosecutor and court either ignored or intentionally misconstrued what Mr. Salazar actually said.

Both the prosecutor the court made much of the "fact" that the prospective juror said that he needed to have "bad feelings or hatred" before he could impose the death penalty, concluding as he did not have such feelings he was disqualified from sitting on the jury. Once again, Mr. Salazar's words were taken out of context and twisted. The prospective juror never said this. What really was said was as follows:

> Question: Okay. How are you telling me that you could vote for the death penalty, when you said that what you're going to

do is follow the law, and the law says you don't have to impose the death penalty?
Answer: Because at this point, ma'am, at this point I don't have anything to go by. I don't have any hatred. I don't have any bad feelings against anybody, to be able to say, yeah, I'm going to vote for that. I have to sit through the whole thing and analyze it, and have at least a feeling of what's going on before I even -- I'm able -- before I'm able to have any idea that I might want to go for the death penalty. I need to have enough -- something to substantiate that decision. You're asking me something without knowing anything, and at this point I only believe that the person being charged is innocent, as far as our law says. Up to this point, that's it. Now, it's up to the district attorney or the state to prove differently, and then that's when you become aware of -- okay, then it merits it. (6 RT 1216)

The juror then made it perfectly clear that he could follow the law.

Juror: Perhaps I wasn't understanding that I had already sat through the whole case and they had already proven that the defendant was guilty. Okay. So he's guilty. Now, we're in the final phase, in deciding the sentence --
Ms. Locke-Noble: Correct.
Juror: And if it is what the law says it should be, yes, of course (6 RT1217-1218)

Mr. Salazar never said that he "couldn't think about" the death penalty in the context that he could not impose it. He simply informed the prosecutor that he did not think much about it as a part of his daily life. (6 RT 1213.)

The dismissal of Mr. Salazar was based, *in toto*, on an intellectually dishonest process. There was no ambiguity in his voir dire that indicated that he could not be able to be impartial and follow the law. Even if there

was some ambiguity in Mr. Salazar's answers, the court did nothing to resolve it but simply decided that a refusal to pre-judge amounted to a disqualification. As with the above four jurors improperly challenged by the prosecutor and dismissed by the trial court, there was no follow up questioning by the court. As stated in *Witt*;

> [T]he trial court has a serious duty to determine the question of actual bias, and a broad discretions in its rulings on challenges therefore...In exercising its discretion, the trial court must be zealous to protect the rights of an accused. (*Wainwright v. Witt, supra,* 469 U.S. at 429-430 citing to *Dennis v. United States* (1950) 339 U.S. 162, 168.)

The court's discretion bears the concomitant responsibility of an affirmative and proactive duty to ascertain the true state of mind of the prospective juror, and protect a defendant against a jury "stacked" to impose the death penalty.

The dismissal of this juror was not based upon serious questions of the law as to close issues vis a vis *Witt* or its progeny. It was based upon what appears to be the prosecutor's deliberate misquotations of Mr. Salazar and the court's unquestioning acceptance of the prosecutor's specious arguments. It simply did not matter what Mr. Salazar said. He was a marked man by the prosecutor. This sort of bending of the truth and twisting of the law to deprive a citizen of this country an opportunity to do his duty has no

place in any American courtroom. The fact that a man's life was at stake only made the conduct of the prosecutor and court that much more chilling.

For yet a fifth time, a perfectly acceptable, intelligent and thoughtful prospective juror was culled from this jury panel in violation of the United States Constitution. This dismissal was based wholly upon distortions of Mr. Salazar's words. Again, a single dismissal mandates reversal of the death judgment.

6. PROSPECTIVE JUROR MILA HANSON - #9961

a. Questionnaire Responses

Ms. Hanson was a fifty-five year old woman born and raised in Russia, who immigrated to the United States when she was thirty. (22 CT 6378). She did not have any strong opinions but was for the death penalty in "some cases." (22 CT 6412, Q 179, 182.) She stated that the penalty that a person receives "depends on the facts" (22 CT6414, Q 196), and also felt that death was the worse of the two possible penalties. (*Ibid*, Q 198.)

Ms. Hanson had no personal convictions that would make it difficult for her to impose the death penalty, and said could decide the penalty on the facts according to the law given by the judge. (22 CT 6414-6419.) Further, she could "see herself" voting for death. (22 CT 6416, Q 209.) She also

stated she would not automatically vote for either penalty. (22 CT 6417, Q 215-218.)

b. Oral Voir Dire

The juror understood the court's explanation of the death penalty scheme and the weighing process and again stated she would not vote automatically for either penalty. (6 RT 1249-1252.)

In response to questioning by appellant's counsel, Ms. Hanson indicated that she has an open mind to the penalty and if the facts warranted she could impose the death penalty. (6 RT 1253.)

In response to the prosecutor's questioning, Ms. Hanson professed to have little personal opinion as to whether California should have the death penalty or whether it should be abolished. (RT1254-1255.)

> Q: Okay so. Here is my hard question.
> If you have no thoughts, no opinions and it's not for you to judge, how could you possibly impose the death penalty on someone?
> A: It depends on the circumstances and the facts, if I think if it's really horrible crime and deserves probably deserves, it's every juror will probably judge the way they feel how it will affect them.
> Q: Well, you have to base your decision on the facts not how you feel, but on the facts.
> A: On the facts.
> Q: And if you feel that the aggravating circumstances substantially outweigh the mitigating circumstances, it is at that point in time in which you could impose the death penalty and what I'm hearing, you don't want to be involved. You don't want to make a decision. You don't feel qualified to judge in this

particular situation.
A: I don't feel that I am less qualified than any other person. And if I have to make a decision, I will. I don't think anybody wants to make decisions like that so.
Q: I agree with you. No one would want to make that decision, but what I'm trying to find out, along with counsel, is if you can impose the death penalty, can you come out here look the defendant in the eye and say I'm going to kill you?
A: I think I can. I can. (6 RT 1255-1256.)

Having failed to convince the juror that she could not impose the death penalty, the prosecutor then commenced her oft used attempt to confuse the prospective juror as to which was the "worse" penalty.

Q: You indicated on your questionnaire, that you thought death was the worse punishment, but for you personally life without the possibility on of parole would be the worse punishment?
A: No. I indicated that I would prefer life without possibility of parole.
Q: So I misunderstood what you were saying.
A: Uh-huh.
Q: Okay the question is 227, "which do you believe is a more severe punishment death or life without the possibility of parole?" You circled death and then you put the question is, "why do you think that is the more severe punishment?" You circled is more severe punishment you did not circle and you put, "I prefer life for myself. So as I understand what you are telling me, and tell me if I'm wrong, death is the worst punishment and death would be worse for you, but if you were in this situation, you would rather have life without the possibility of parole, am I correct?
A: Right.
Q: Now, I understand what you are saying, because you personally would prefer to have life without the possibility of parole. Are you going to put yourself in the place of the defendant and give him the punishment that you want?
A: No. (6 RT 1256-1257.)

In response to the prosecutor's continuing questions, the prospective juror indicated that while she is concerned that "sometimes innocent people are convicted" this would not play a role in her deliberations. (6 RT 1257.) The prosecutor presented the "assault" hypothetical asking if the two perpetrators were equally guilt. As with many of the other jurors, she was confused by this question as she did not know the intent of the holder. (6 RT 1260-1261.) When the prosecutor asked if both perpetrators should get death, the prospective juror wisely stated that "it should be more to it than holding." (6 RT 1261.)

> Q: So are you saying, "no, I cannot. I impose the death penalty on the person who is holding the arms"?
> A: If it's all the information I have.
> Q: This is the information you have.
> A: No.
> Q: And is that because you don't believe that he as guilty as the person who is doing the beating?
> A: Maybe he is guilty, but he is not the one who the is doing beating and he is probably not such a bad person compared to the other who was doing the beating.
> Q: So do you think that someone has to be bad in order to have the death penalty imposed upon them?
> A: It usually is...
> Q: If the aggravating circumstances substantially outweigh the mitigating circumstances, do you believe that life without the possibility of parole would be the punishment that you would give to the person who was holding the person who died?
> A: No.
> Reporter: Excuse me?
> Ms. Locke-Noble: She said "no."

Q: Would you be able to impose the death penalty on that person the person holding the arms?
A: Yes.
Q: You just changed your mind.
A: You said aggravating circumstances.
Q: Do you remember when I posed the hypothetical to you the person that is holding the arms? Do you recall that?
A: Yes, that's the one information you gave me from the beginning.
Q: No. Listen. When I first gave you the hypothetical, the first thing I asked you is the person that is holding the arms is equally guilty as the person who punched. You said, no, because there should be more because the other person is doing more. Do you remember
that?
A: It's not exactly the way I answered. Well –
Q: Is that correct? Is that how you feel?
A: The way I answered the person who did the beating is probably leader. He probably influenced the other people. Maybe they did it just to please him. There are lots of different reasons could be, and if at the end you say anyway aggravating circumstances are outweigh mitigating.
Q: We are just talking about the first part of the hypothetical. We will get to the other part.
A: I think he is less guilty.
Q: And that's what you said before.
A: He might be less guilty.
Q: Now I added they facts. I said now let's consider the person that is being beaten died, it's murder in the first degree and the special circumstances have been found to be true, then I said with the -- if the aggravating circumstances substantially outweigh the mitigating, would you be able to impose the death penalty on the person holding the arms?
A: Yes.
Q: You said, "no."
A: Maybe I don't remember,
but I think you did not mention the comparison of circumstances before.
Q: I did.
A: Or I just missed it, sorry.
Q: Okay. Because I did ask you that and

you have now changed your mind.
A: No, I didn't change my mind, probably I didn't hear you.
Q: And you also said that someone has to be bad in order to impose the death penalty upon them, do you recall saying that?
A: Yes.
Q: Are you changing your mind with respect to that?
A: No.
Q: You still believe somebody has to be of bad character and have some history or some person who can do it to another person.
A: Yes, it's a bad person.
Q: And that person, in order for you to impose the death penalty, you have to believe that that person is bad, correct?
A: Absolutely. (6 RT 1262-1266.)

c. Prosecutors Challenge and the Court's Ruling

Ultimately, the prosecutor challenged Ms. Hanson stating that she could not sit because "she had no opinion" as to the imposition of the death penalty or whether California should even have the death penalty. (6 RT 1270.) The prosecutor also challenged on the grounds that Ms. Hanson could not be relied upon to impose the death penalty because she gave confusing answers to the "assault" hypothetical. The prosecutor further stated that the juror could not sit because she would only impose death on a "bad" person. (6 RT 1270-1271.)

Counsel opposed the challenge. (6 RT 1271.) The court granted the challenge on the grounds that she gave conflicting answers, that she could only execute a bad person, interpreting that to mean that the juror would

only execute a person of prior bad character. The court also said that the juror failed to speak audibly. (6 RT 1271-1272.) The court held "she is not an appropriate juror for this case." (6 RT 1273.)

d. Application of the Law to the Challenge

This was yet another perfectly qualified juror who was wrongly excused despite being able to impose either penalty.

As stated, the "assault" hypothetical is fatally flawed. It misstates the law and is inherently confusing. The guilt of the holder depends on his intent. If the prospective juror does not know the holder's intent, she cannot answer the question. Not only did the prosecutor once again refuse to expand the hypothetical so it made legal sense, she directly told the juror that she must give an answer without further information about the intent of the holder. (6 RT 1262.)

This voir dire was yet another cynical exercise in which the prospective juror was asked an inherently unanswerable question and was dismissed for not blindly answering it to the satisfaction of a prosecutor with an agenda that went far beyond the selection of a fair jury. Ms. Hanson did her best to try to answer a series of deliberately confusing questions from the prosecutor as to these "hypotheticals." However, she had no real knowledge of the law and how the aiding and abetting law actually operated. Instead, the prosecutor forced her to guess. Neither the prosecutor

nor the court had any intention of informing the jurors as to what aiding and abetting actually signified in the hypothetical given. (8 RT 1589 et seq.)

By doing so, the court missed the entire purpose of the *Hovey* voir dire. The purpose of this process is not to probe a juror's misconceptions about the law. Obviously, very few jurors in our system of jurisprudence understand much about the law before they arrive at the courthouse door and fewer still understand the intricacies of California's death penalty scheme.

The trial court's role in this process is to inform them of the pertinent law. In a death penalty case, this responsibility acquires an additional significance, as the law of *Witt* requires that the court determine whether the prospective juror could set aside any of her personal beliefs and follow the statutory death penalty scheme. Therefore, it is essential for the prospective juror to understand that law so that the key determination under *Witt* may be made.

In this case, the court and prosecutor deliberately kept the prospective jurors in the dark, then asked them to opine on the legal meaning of inaccurate, confusing and extreme hypotheticals. The court never once intervened to disabuse a prospective juror of any legal misconceptions and ask said juror if he or she could follow the law as it was written.

The questioning regarding whether a person would have to be "bad" before Ms. Hanson could impose the death penalty was not only misleading, it was based upon the utterly absurd premise that a juror who cannot execute a "good" person should be dismissed under *Witt*. Ms. Hanson was perfectly content to follow the law. She framed the issue of guilt and punishment in terms of the word "bad," which was exactly the term that the court used in describing aggravating factors.

The prosecutor's statement that Ms. Hanson should be dismissed because she didn't have any fixed beliefs as to the death penalty again shows how far this prosecutor would go to remove open-minded people from this jury. There is absolutely nothing requiring that a prospective juror must have an opinion about the legislative wisdom of the death penalty to be allowed to sit. Ms. Hanson said she could remain open minded and follow the instructions of the court. The fact that she really had not given much thought to the death penalty was irrelevant.

The court's apparent frustration that the juror did not speak as audibly as he would have liked while having absolutely nothing to do with the constitutional fitness of Ms. Hanson to sit on appellant's jury, was indicative of the trial court's fundamental misunderstanding of its duty to provide appellant with a fairly constituted jury. It was yet another specious reason to cast off yet another open-minded, intelligent prospective juror.

Ms. Hanson and the other prospective jurors had the constitutional expectation that if they could follow the law and subrogate their personal feelings to it they could sit on this most solemn tribunal. Jamelle Armstrong had that constitutional expectation as well. Instead, yet another juror was subjected to sophistic, cynical, confusing and at times hostile questioning by the prosecutor, questioning intended from the outset to dismiss a prospective juror that the prosecutor thought might question a clear, unobstructed path to the death chamber.

Another qualified, open-minded and intelligent person was sent home for all the wrong reasons. Appellant was once again deprived of a constitutionally constituted jury to decide whether he lived or died. The judgment of death must be reversed.

7. PROSPECTIVE JUROR LORRAINE MENDOZA- #3058

a. Questionnaire Responses

Lorraine Mendoza was a thirty year old woman of Spanish descent. (26 CT 7474.) She stated that she has always been "open-minded" to the death penalty, (26 CT 7510, Q 178-179) and that she supports the ultimate penalty. (26 CT 7511, Q 188.) She also indicated that death was the worse penalty. (26 CT 7512, Q 198.) Ms. Mendoza further stated that she had no personal convictions that would make it difficult for her to impose the death penalty and she could decide the penalty on the facts according to the law

given by the judge. (26 CT 7521-7522, Q 199-200.) She could impose the death penalty depending on the case and would not vote automatically for either penalty. (26 CT 7514-7515 Q209, 215-218.) She also indicated that life without parole was the worse penalty. (26 CT 7517, Q 227.)

b. Oral Voir Dire

Ms. Mendoza clearly stated that she favored neither penalty and would be able to follow the court's instructions in determining which one to impose. (6 RT 1062-1064.)

The prosecutor accused the juror of not being able to impose the death penalty because the prospective juror did not have any strong opinions about it. (6 RT 1068.) Ms. Mendoza summarily rejected this illogical presumption and assured the prosecutor that her determination of penalty would depend solely on the evidence. (*Ibid.*) Ms. Mendoza was then presented the "assault" hypothetical to which she responded by stating that she could impose death for the holder. (6 RT 1072.) Trying to provoke the juror into changing her answer, the prosecutor told Ms. Mendoza that she noted a hesitancy in her answer. Ms. Mendoza explained her answer was reflective of the time she needed to picture the question in her mind. (*Ibid.*)

In her questionnaire, Ms. Mendoza stated that life without parole could be the worse of the two penalties because the defendant would have

to carry the guilt his entire life. The prosecutor then asked a series of objectionable questions in the vein that if a life without possibility of parole prisoner appealed his sentence it meant that he was not living with guilt. (6 RT 1080-1081.)

The prospective juror said that if the bad evidence substantially outweighed the good she would vote for death. However, the prosecutor then told her that you never have to give the death sentence, and the juror then stated that she would give it in the worst cases. (6 RT 1083-1084.) Upon further questioning by appellant's counsel, Ms. Mendoza stated that if the bad evidence substantially outweighed the good she would impose the death sentence. (6 RT 1087.)

c. Prosecutor's Challenge and Court Ruling

The prosecutor challenged Ms. Mendoza on the ground that her personal belief that life without parole is the worst of the two sentenced left her substantially impaired. (6 RT 1088) Over counsel's objection , the court granted the challenge for this reason. (6 RT 1089.)

d. Application of the Law to the Challenge

The crux of voir dire was not whether the prospective juror believed that life in prison was the worse of the two penalties. It was whether Ms. Mendoza could set aside her personal beliefs and follow the law. There was nothing at all in her voir dire that indicated she could not do so. Ms.

Mendoza plainly told the prosecutor that she could impose the death penalty if the aggravating circumstances substantially outweighed the mitigating. (6 RT 1071-1072.) Ms. Mendoza stated once again that she could impose death on the "holder" in the assault hypothetical. (6 RT 1072.) She also specifically stated that she could put her personal feelings aside and listen to the court's instructions and follow the law. (6 RT 1075.)

Further, Ms. Mendoza stated that if the bad outweighed the good she would have to vote for the death sentence. (6 RT 1082-1083.) It was only then after a series of leading and suggestive questions by the prosecutor that Ms. Mendoza stated that it was her "opinion" and "belief" that life without parole might be the proper sentence in such a situation, because, to her it was the worse of the two sentences. (6 RT 1083-1084.)

There was nothing at all in this exchange to suggest that Ms. Mendoza was unable to aside any personal feelings and follow the law. Her responses indicated she could do just that. Even if there was an ambiguity, it was the responsibility of the trial court to resolve it. Yet, the court left possible ambiguities simply hanging in the air, resolving them in favor of the prosecution. It is well accepted that trial court must make a good faith attempt to resolve any ambiguities. (*See People v. Heard, supra,* 31 Cal.4th at p. 985.) While great deference is shown by the appellate courts to this resolution, the resolution must be "fairly supported by the record." (*Ibid.*)

This was not a question of resolution based on a juror's "demeanor" or non-verbal cues. (See *People v. Bramit* (2009) 46 Cal.4th 1221, 1235.) Up to the prosecutor's leading questioning, the prospective juror seemed quite comfortable in her assessment that she could follow the law. It should come as no surprise that a trained lawyer, left uncontrolled by the court, can get an inexperienced prospective juror to state something slightly contradictory. What was a surprise was the court's consistent refusal to attempt to clear up ambiguities by asking some impartial common-sense questions. It is of note that there wasn't a single occasion where the court asked any follow-up questions to any of the dismissed prospective jurors discussed in this Argument.

The burden was on the prosecution to justify their challenges. As with all of the other jurors referenced in this Argument, the burden was not met. Reversal of the death judgment is the only remedy.

8. PROSPECTIVE JUROR KIBIBI GREEN -#5354

a. Answers to Questionnaires

Kibibi Green was a twenty-four year old African American woman. (54 CT 15882.) Her answers to the death penalty related questions showed absolutely no constitutional infirmity as to her service. She stated that the death penalty was appropriate "if the nature of the crime permits that." (54

CT 15917, Q 178.) She stated that her death penalty views had not changed over the years. (*Ibid.*, Q 182.) She felt that California was right to have the death penalty (*Ibid.*, Q 186) and indicated that she could impose the death penalty depending on the case. (*Ibid.*, Q 186-193.) She also stated that death was the worse of the two penalties. (54 CT 15919, Q 197.) She said that the purpose of the death penalty was "to serve justice on the criminal." (54 CT 15918, Q 192.)

b. Oral Voir Dire

After hearing the court's explanation of the sentencing process, Ms. Green unambiguously stated that she would never vote automatically for either penalty. (11 RT 2212-2214.) She then stated that if the aggravating factors substantially outweighed the mitigating factors, she could return a verdict of death and would do so based upon the legal instructions given by the court. (11 RT 2214.) She was personally neutral as to the penalty and could be fair to both sides.

In response to the "assault" hypothetical, Ms. Green stated that she could impose the death penalty on both perpetrators. (11 RT 2217-2218.) She also stated that she could impose death for crime like the ones which appellant stood accused. (11 RT 2224.)

After the prosecutor re-explained the sentencing procedure, Ms. Green confirmed that she could follow the law and find for death where

appropriate. (11 RT 2221.) Then the prosecutor presented her with the "bank robbery" hypothetical. Ms. Green indicated that while the people serving as the lookout and the wheelman were guilty of robbery, they were not guilty of murder under her rather limited knowledge of the law. (11 RT 2242-2245.)

The following exchange then occurred concerning the burden of proof.

> Q: (By prosecutor) Okay, question no. 44, it says, "what are your opinions in general about criminal defense attorneys?" And you put, "there to prove innocence."
> Answer: Yes.
> Question: Are you going to require the defense to prove their client to be innocent?
> Answer: Yes. (11 RT 2245-2246.)

No further inquiry would be made about Ms. Green's above statement which was completely out of character with the rest of her written and oral voir dire.

Follow up questioning by appellant's counsel better explained the felony murder concept as it pertained to the bank robbery hypothetical. Once the juror better understood what the law required, she stated that she could hold all three participants liable as required by the law. (11 RT 2246-2253.)

c. Prosecutor's Challenge and Court's Ruling

Appellant passed Ms. Green for cause. The prosecutor challenged the juror for cause on the basis that the prospective juror would make the defense prove the innocence of appellant. (11 RT 2254-2255.) The prosecutor stated that even though Ms. Green's misapprehension of the law would not prejudice the prosecution, she could not sit as a juror. (11 RT 2255.)

Appellant's counsel argued that Ms. Green's response to the burden of proof question was appropriate and understandable and did not signify that she didn't believe in the presumption of innocence. (11 RT 2256-2257.) Counsel then requested that the court allow him to reopen the questioning. (11 RT 2260.) The court refused to do so. The court instead granted the challenge solely on the presumption of innocence grounds stating;

> One of the important things, of course, in assessing jurors in this case. If I don't grant the cause now, I'll grant the cause at the general voir dire. But we the question I keep coming back to, specifically, is when Ms. Locke-Noble asked question no. 44, on whether or not the defense would have to prove the innocence of their client, and she said, "yes." And that was after the court gave the instruction of reasonable doubt and the defendant's presumption of innocence. If I retain this juror, what will happen is one of two things, assuming an adverse decision is with Mr. Armstrong; either they will argue that this court kept a juror that it should not have kept, because justice demands or in the alternative, they will argue that that is what is going to happen, and I can't let it happen, because then we will have to do this all over again.

> In fairness to Mr. Armstrong, he is presumed innocent in my eyes until 12 people say otherwise, and he is presumed innocent. The burden is on the people. This juror sees it differently, that the burden is on the criminal defense attorney to prove the innocence of their client. even after I instructed 2.90, at the very beginning, and this questionnaire was filled out on the day that I gave that instruction, which is fresh in her mind. I will grant the cause in the interest of Mr. Armstrong's presumption of innocence. (11 RT 2262-2263.)

d. Application of Law to the Challenge

Ms. Green passed all of the prosecutor's tortured tests as to her fitness under *Witherspoon/Witt*. This juror was excused because she thought that a defense attorney's job was to prove defendant's innocence. The word "innocence" is used interchangeably with "not guilty" by a large segment of the public. This did not mean she had a set view as to the burden proof that would preclude her from sitting as a juror. Only a few questions of the oral voir dire were addressed to this subject, as well as a single written question. There was nothing else in either the oral or written voir dire that would suggest that this prospective juror in any way rejected this fundamental axiom of American jurisprudence. She had never sat on a jury before (26 CT 15889), and likely was not aware of the burden of proof.

Appellant's counsel realized he should have probed further and after the questioning was over, he asked the court to be allowed to reopen the

voir dire on this subject. For some completely inexplicable reason the court refused to allow this area to be further explored.

It was not as if this court was placing strict time and content limits of the voir dire in this case. To say that the jury selection process in this case was exhaustive is a grand understatement. The prosecutor was allowed to spend endless hours on irrelevant hypotheticals, trick questions, and outright deception and argument with the prospective jurors. Yet the court could not take a few moments to personally inquire into whether this juror could obey the law of presumption of innocence. If the court was truly interested in protecting Mr. Armstrong's constitutional interests, it would have personally conducted an impartial voir dire into Ms. Green's brief statements as to the presumption of innocence and role of counsel.

It is of note that none of the eight prospective jurors discussed up to this point had any fundamental problem with the imposition of the death penalty. They all unequivocally stated that they could impose it if the aggravating circumstances substantially outweighed the mitigating. Yet, all were dismissed.

Once again, another qualified prospective juror was removed for cause; a "cause" that most likely was far less of a cause than a moment of confusion by a twenty-four year old young woman inexperienced in the workings of the criminal justice system. A few instructions and questions

by the court would likely have cleared up any ambiguity as to Ms. Green. The court could have carefully explained the law to the juror and asked if she could follow it. The court's error requires reversal.

9. PROSPECTIVE JUROR CHRISTINA CLARK #9432

a. Questionnaire Responses

Christina Clark was a twenty-five year old Afro-American woman. (18 CT 5175.) In response to the questionnaire, Ms Clark indicated that she thought the death penalty to be cruel. (18 CT 5211, Q 178.) She also stated that she thought that the death penalty should be abolished. (18 CT 5212, Q 187.)

However, Ms. Clark stated that she could impose the death penalty "depending on the facts." (18 CT 5213, Q 196.) She had no personal beliefs that would preclude or make it difficult for her to vote for the death penalty and could decide the penalty on the facts and law as given by the court. (18 CT 5213-5214, Q 199-200.) She also indicated she would consider the evidence in deciding which penalty to impose. (18 CT 5215, Q 209-210.) Further, she stated that she would not automatically vote for either punishment. (18 CT 5216, Q215-218.) She did express concern that imposing the death penalty is "in a sense playing God." (18 CT 5217, Q 222.)

b. Oral Voir

Upon being questioned by appellant's counsel, the prospective juror stated that if a person was convicted of murder with special circumstances she could vote for either penalty with an open mind, and that her decision would depend on the evidence. (4 RT 685-686.) After the prosecutor spent a good deal of time trying to convince Ms. Clark that her personal dislike for the death penalty would prevent her from following the law (4 RT 687-690), the juror made clear that if she had no doubt that a defendant committed the crime, she could impose the death penalty but it would have to be demonstrated that the defendant planned it. (4 RT 691-694.)

Appellant's counsel then directly addressed the only relevant area of inquiry;

> Q:... if you're selected to be on this case,
> the court is going to give you certain jury
> instructions, which is the law.
> A: Okay.
> Q: No matter how you feel about the death penalty and in playing god, if the instructions called for a decision, either life without parole or he death penalty, can you follow that law?
> A: Yes.
> Q: And is it your mind set that in every single case where a juror is to decide the punishment, that you're, in every case, automatically going to vote for life without parole?
> A: No.
> Q: All right. There are some situations, depending on the circumstances, that you would vote for death?
> A: I believe so; yes.

Q: And one of the things, in your mind, is having it proven to you that the defendant committed those crimes, number one, correct?
A: Uh-huh. That's correct.
Q: And something else you've talked about is it being planned?
A: Uh-huh.
Ms. Locke-Noble: Is that yes?.
A: Yes.
Q: Are you saying that it was intentional on the defendant's part, something that was thought about beforehand?
A: Yes. (4 RT 696-697.)

The prosecutor then confirmed that Ms. Clark could indeed follow the law.

Q: Okay. You indicated that --
when counsel asked you if you could vote for death, you indicated that you believe so. You hesitated, and then you said, "I believe so," and you nodded your head in the affirmative. Do you recall that?
A: Yes, I do.
Q: Okay. Now, we need to know for sure whether or not you could impose the death penalty, not whether or not you believe or don't
believe, but whether or not you could.
A: Yes, I could.
Q: Now, taking that into
consideration, all of the questions and answers on the jury questionnaire -- because you personally believe that imposing the death penalty would be playing god, correct?
A: That's what you --
Q: That's what you put in your questionnaire, correct?
A: That is what I put in my questionnaire, yes.
Q: And that's what you believe, correct?
A: Yes.
Q: So do you believe you could play God?
A: Yes. (4 RT 698-699)

c. Prosecutor's Challenge and the Court's Ruling

The prosecutor challenged Ms. Clark for cause because he did not believe that she was telling the truth. The prosecutor referred to the prospective juror's "mannerisms," hesitations," "shrugging of the shoulders," and the fact that she stated on the questionnaire that she knew people who had been arrested but did not list them by name. (4 RT 704-706.)

Over appellant's objection, the court granted the prosecutor's challenge. It stated that while Ms. Clark's statements were truthful, they were inconsistent. While she expressed a feeling that the death penalty was cruel, she indicated that she could impose it. The court further indicated that the juror stated that she would prefer that California not have the death penalty and at one point she said that "in a sense" only God can take life although she agreed that in this capacity she could play God. Based on the above, the court held that it could not be sure that the juror would follow the law. (4 RT 710-713.)

d. Application of the Law to the Challenge

Appellant will not restate the law that has been discussed at length above. However, it is clear from that law that this was yet another improperly excused juror. Ms. Clark came to the courthouse to do her duty as a juror. Like every other prospective juror who heeds the summons to

serve, she came with far more knowledge as to how she generally "felt" about certain issues than she did of the substance of the law that she would have to follow if she was chosen to sit.

Ms. Clark came to the court with a certain sense of personal discomfort about imposing the death penalty. She personally thought it was a cruel thing to do and a little too close to playing God for her liking.

However, Ms. Clark came to the courthouse with something else; a fundamental and very American sense that we are a nation of law and that the law must be followed. This is exactly what Ms. Clark said she would do. Ms. Clark understood that her reluctance to casually impose the ultimate penalty on a fellow human being must be subrogated to the need to follow the law. While she did not fully articulate this view at the outset of the questioning, after she came to the understanding of her obligation under the law, she indicated that she could indeed follow the law, and for this one instance "play God."

Under the law of *Witherspoon*, *Witt,* and *Stewart,* Ms. Clark said absolutely nothing that disqualified her to sit. As was her wont, the prosecutor did not seem to acknowledge the unambiguous words spoken by Ms. Clark. Instead, she fixated on the prospective juror's "shrugs," "hesitancy" and "mannerisms." As seen over and over again in this argument, this prosecutor was satisfied with nothing less than a juror who

could state without the slightest human pause or sense of the magnitude of the question that he or she would gladly and without hesitancy sentence a man to death. Any juror who showed any sense of the solemnity of the process was deemed inconclusive or untruthful.

The prosecutor's characterization of Ms. Clark as being untruthful was rejected by the court. She could set aside her personal feelings to the greater imperative of the law. She unambiguously stated on several occasions that she could impose the death penalty if the actions of appellant were "planned." The entire theory of the prosecution was that the attack on the victim was planned and that appellant knowingly participated in the attack.

The fact that the court could not be "sure" Ms. Clark could follow the law is simply a part of the human condition. Without first hearing the evidence no one can ever be one hundred per cent "sure" that they can say "death" to a fellow human being until the time comes to do it. However, there was nothing in this voir dire to suggest that Ms. Clark could not. Any ambiguity could have been clarified by additional questioning.

Yet another prospective juror, whose only failing was that she was not an enthusiast about the death penalty, was improperly excluded from this jury. Ms. Clark clearly was one of those jurors discussed in *Witt* and *Witherspoon* who qualified to sit in spite of her personal opinions because

she was able to subrogate her likes and dislikes to the greater good of the law.

There is no other remedy than to reverse the judgment of death.

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S *WHEELER/BATSON* MOTIONS AND MOTION FOR A MISTRIAL VIOLATED STATE LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DEMANDS REVERSAL OF THE ENTIRE JUDGMENT

INTRODUCTION

As stated in Argument I, and incorporated herein, appellant was unconstitutionally deprived of his right to a properly constituted penalty phase jury by the improper exclusion in the *Hovey* stage of the voir dire of prospective jurors who clearly stated they could follow the law regarding the imposition of penalty.

In addition to the trial court's ninefold error vis a vis the law of *Wainwright v. Witt, supra,* 469 U.S. 412 and *People v. Stewart, supra,* 33 Cal.4th 425, a pattern arose as to those prospective jurors who the prosecutor wanted excused from the jury. Of the nine improperly excused prospective jurors excused in the penalty qualifying voir dire, six were either black, Hispanic or Jewish. Two others were born outside of the United States and immigrated to this country.

This case was racially charged to an extraordinary degree. Appellant and his two co-defendants were young African-American males. The victim was a lone middle-aged white woman. Further, appellant testified that the woman instituted the attack by calling appellant and his friends "niggers." (23 RT 4926-4928.) There can be absolutely no doubt that it was in the prosecutor's interest to cull from the jury as many African-Americans and other minorities as possible.

The prosecutor's intention to create a jury virtually devoid of any minority groups was clearly demonstrated during the peremptory challenges. A total of six black prospective jurors, four of them male, survived the *Hovey* process. Of these, all four black male jurors were peremptorily challenged by the prosecution. One of the prospective black jurors, a woman, was seated on the jury, and the seated jury and alternates were empaneled without the sixth black prospective juror being called to the jury box.

The end result was that fifteen of sixteen jurors and alternates were white.[12] There were no African-American males. The following analysis will clearly indicate that the final composition of the jury and alternates thereto was not a result of chance or proper application of the law. It was

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[12] One of the alternates identified herself as "white/Hispanic"

the result of a deliberate attempt by the prosecutor to have Mr. Armstrong's fate decided by a jury carefully molded by the prosecutor to deprive him of the constitutionally mandated benefit of an impartial jury drawn from a representative cross section of the community.

As such, no conviction resulting from a jury so composed can be allowed to stand without violating both the law of the State of California and the Sixth, Eighth and Fourteenth Amendment to the United States Constitution. The entire judgment against Mr. Armstrong should be reversed.

A. GENERAL LAW AS TO THE DISCRIMINATORY EXERCISE OF PEREMPTORY CHALLENGES

It is indisputable that the United States Supreme Court has held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution prohibit the prosecution from discriminatorily exercising its peremptory challenges on the basis of a juror's race or membership in a cognizable group. (*Batson v. Kentucky* (1986) 476 U.S. 79, 84-87; *Miller-El v. Dretke* (2005) 545 U.S. 231, 238 ("*Miller-El II.*".) In addition, this prohibition also rests upon a defendant's state and federal constitutional right to an impartial jury drawn from a representative cross-section of the community. (*Batson, supra,* 476 U.S. at

p. 89; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-273; *People v. Lenix* (2008) 44 Cal.4th 602, 612.; Calif. Const., art. I, sec. 16; U.S. Const., Amend. VI.)

Moreover, as this a capital case, appellant's Eighth Amendment right to a reliable and non-arbitrary finding of guilt, death eligibility, and the appropriate punishment were violated as was his right to be tried by an impartial jury under the Sixth Amendment. (See *Turner v. Murray* (1986) 476 U.S. 28, 35.)

Citing to cases of long standing, the High Court in *Batson* set forth the constitutional rationale for the above law.

> Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder v. West Virginia* (1880) 100 U.S. 303, 308; see *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330, 90 S.Ct. 518, 524, 24 L.Ed.2d 549 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968) (*Batson, supra,* 476 U.S. at pp. 86-87.)

Referring again to *Stauder,* the *Batson* Court stated the "venire must be 'indifferently chosen,' to secure the defendant's right under the

Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'" (*Batson, supra,* 476 U.S. at pp. 86-87 citing to *Strauder, supra,* 100 U.S., at 309.)

By the above, *Batson* made clear that the rational for its holding went far beyond pigmentation or the chance place of national origin. Its holdings were fundamental to the very essence to the founding principles of this country; that the primary function of the United States Constitution is to protect the people from an over aggressive sovereign who abuses the power that has been granted to it by the people.

Batson further made it clear that the ban on this sort of racial discrimination not only rests upon the constitutional rights of the accused. With an emphasis on the founding principles of this nation the *Batson* Court stated, "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (*Batson, supra,* 476 U.S. at p. 87.) As stated in *Miller-El v. Dretke, supra,* 545 U.S. at p. 238 "...the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting in the jury's neutrality.'" [citation omitted.]

This Court in *People v. Wheeler* (1978) 22 Cal.3d 256, 266-267 set forth why a "cognizable group" is so defined and the rationale behind their designation in the law.

> In a series of decisions beginning almost four decades ago the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from "a representative cross-section of the community." The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

A similar definition was set forth in *People v. Estrada* (1979) 93 Cal.App.3d 76, 90, citing to *United States v. Guzman* (S.D.N.Y.1972) 337 F.Supp. 140, 143-144, affirmed 468 F.2d 1245 (2d Cir.), *certiorari* denied 410 U.S. 937.

> A group to be "cognizable" . . . must have a definite composition . . There must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the

> group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. That is, The group must have a community of interest which cannot be protected by the rest of the populace.

However, even in the light of the above, it is clear that the prosecutor has the right to peremptorily challenge any prospective juror for non-discriminatory purposes, even of that prospective juror is a member of a "cognizable group." It is the balancing the interests of the prosecutor, the defense and the court system as a whole that has occupied the attention of both the United States Supreme Court and this Court over the years. As stated by the *Miller-El II* Court

> The rub has been the practical difficulty of ferreting out discrimination in selections discretionary in nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the penal from which jurors are selected. (*Miller-El v. Dretke, supra,* 545 U.S. at 238.)

To this end, the High Court established the now familiar formula that the trial court must follow in its determination as to whether the prosecutor has engaged in prohibited discrimination in the exercise of a peremptory challenge or whether that challenge was based upon "race-

neutral" reasons. The formula is comprised of a three part inquiry. First, the defendant is initially burdened with establishing a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference that the peremptory challenges are being used for a discriminatory purpose." (*Johnson v. California* (2005) 545 U.S. 162, 168 citing to *Batson, supra,* 476 U.S. at 93-94.)

Second, "once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." (Johnson, supra 545 U.S. at p. 168 citing to *Batson, supra,* 476 U.S. at 94.) The third step is "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson, supra,* 545 at p. 168.)

In *Johnson v. California, supra,* 545 U.S. 162, the High Court specifically set forth how these three steps interacted in the final resolution of the issue of the discriminatory exercise of peremptory challenges. *Johnson* made it clear that in order to meet the first step, the defendant did not have to prove that it was "more likely than not" that the prosecutor's challenge was discriminatory. (*Johnson, supra* at p. 168.) The Court made clear that in *Batson*

> We did not intend for the first step to be so onerous that the defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson* at p. 170.)

Further, the defendant could make this prima facie showing by reliance on the "totality of relevant facts about a prosecutor's conduct during defendant's own trial." (*Batson v. Kentucky supra,* 476 U.S. 94, 96.) It is at this point that the prosecutor must present an explanation for the strike. This step does not represent a "shift in burden" to the prosecutor, as the ultimate burden always remains with the challenger of the strike. (*Johnson, supra,* at p. 170.) This step is merely a procedural device to get to the court's determination of whether there was a discriminatory exercise of the challenge. (*Ibid.*) "It is not until the third step that the persuasiveness of the justification becomes relevant - the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Ibid.*)

It is the third step that ultimately involves the trial court. At this point, it is not sufficient for the trial court to take the prosecutor's explanation at its face value. (*Miller El- II, supra,* 545 U.S. 545 U.S. at p.

248; *People v. Fuentes* (1991) 54 Cal.3d 707, 720; *Williams v. Rhoades* (9th Cir 2004) 354 F.4th 1101, 1108.) Instead, the trial court must conduct a determination as to whether the reason tendered for the challenge was race-neutral or simply pretextual for racial discrimination. As stated in *Miller-El II, supra,* 545 U.S. at 239,

> Although there may be any number of bases on which a prosecutor reasonable [might] believe it is desirable to strike a juror that is not excusable for cause...the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge...The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

B. QUESTIONNAIRE RESPONSES AND "*HOVEY*" VOIR DIRE OF THE FOUR IMPROPERLY CHALLENGED "*BATSON*" JURORS

Prior to analysis of the peremptory challenges of the above mentioned four black male prospective jurors along the guidelines of the above stated law, it is necessary to examine both who these people were and the nature to their responses to both the questionnaire and the *Hovey* voir dire questioning.

1. Shawn Leonard- # 3385

a. Questionnaire

Mr. Leonard was a 34 year old African-American male who had two minor children. (VI CT 1442.) He served his country in the United

States Navy and was decorated for his service in the first Gulf War. (VI CT 1444-1445.) At the time of the trial, he was working for the United States Postal Service. (VI CT 1445.)

Mr. Leonard felt very positively about the jury system, feeling that it was "part of our democratic process." (VI CT 1449, Q 30.) He felt that sitting on the jury was a "civic obligation" that he would be glad to fulfill (VI CT 1450 Q 37; CT 1469, Q. 137.) He also specifically rejected the concept that Black-Americans are usually unfairly treated in our society. (VI CT 1468, Q 133.)

Regarding his opinion as to the imposition of the death penalty, Mr. Leonard felt that in the proper circumstances death would be a just punishment. (VI CT 1478, Q 178-179.) Although he stated that he thought that life without parole was worse than death for a defendant (VI CT 1480, Q. 198), he stated that it would depend on the facts whether he would impose the death penalty. (*Ibid.*, Q 196.; VI CT 1482, Q 209.) He further stated that he would not automatically vote for or against either penalty. (VI CT 1483, Q 214-215.) He believed that the death penalty was a proper penalty to keep a defendant from killing again. (CT 1484 Q 223.)

b. Hovey Oral Voir Dire

After the trial court explained the relationship of aggravators and mitigators and the weighing process in a death penalty case, Mr. Leonard

clearly stated that he would not vote automatically for either penalty. (9 RT 1725-1728.) In response to questioning by appellant's counsel, Mr. Leonard again made it clear that he could impose the death penalty "depending on the evidence and the background..." (9 RT 1728-1730.) Further, Mr. Leonard told counsel that he would only vote for life if he felt that appellant could be "rehabilitated" in prison. (9 RT 1730.)

Mr. Leonard stated that he thought that life in prison was a worse penalty than death because "the person would have the rest of their life to pay for what they did." He further stated his decision would be controlled by the "good vs. bad" as described by the judge. (9 RT 1732). Mr. Leonard further explained "[i]f the person has a history of just hateful decisions, I think it all comes down to the decisions people make and I think the background will show some indication, you know, where that person lies and you know, right or wrong the way that person feels about things right or wrong." (*Ibid.*)

The prosecutor then departed completely from the facts of the case and instituted the following misleading and fundamentally dishonest exchange:

> Prosecutor: What if this was the first time a hateful decision was ever made, would you be able to impose the death penalty if the aggravating circumstances substantially outweigh the mitigating circumstances, first time?
> Leonard: The first time, people make mistakes. It is a horrible mistake to make, but if there was something in his

background. Prosecutor: No, no, there is nothing in the background. This is the first time.
Leonard: First time.
Prosecutor: First time, no history.
Leonard: Yeah, maybe life in prison would be better then.
Prosecutor: So are you saying you would be unable to impose either penalty if this was the first time somebody made a hateful decision.
Leonard: I'm not sure. I mean a lot of details. I would have to consider
Prosecutor: But there are no details. This is the first time, no details...[13]
Leonard: I guess I would be swaying towards life in prison, so I guess that would be my answer. (9 RT 1732-1733.)

After having forced this misleading answer from Mr. Leonard, he was then given both the "assault" and "bank robbery" hypotheticals. Mr. Leonard stated that he could impose death on all individuals in these hypotheticals. (9 RT 1733-1735.) Further, Mr. Leonard stated that he would not require more than one victim before he could impose the death penalty. (9 RT 1735-1736.)

The prosecutor then embarked upon a very confusing series of questions as to which of the special circumstances Mr. Leonard could impose the death penalty. (9 RT 1736.) It took several iterations of these questions before Mr. Leonard was able to understand what was being asked. However, once the prospective juror understood that the murder of the victim was required for all of the special circumstances, he answered that he

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13. Of course, in reality there were "details." In fact the prosecutor's penalty case was replete with evidence of alleged other violent and "hateful" acts of appellant.

could. (9 RT 1736-1739.) Further, Mr. Leonard stated that he would be able to impose the death penalty in a hypothetical in which a person was walking down the street and impulsively decided to rob a liquor store, killing the cashier in the process. (9 RT 1742-1743.)

Unable to otherwise show that Mr. Leonard could not impose the death penalty, the prosecutor once again got him to say that if the instant crimes were appellant's first bad acts he would impose life without parole. (9 RT 1745-1746.) However, upon further consideration, Mr. Leonard stated that he could impose death. (9 RT 1747.)

The prosecutor requested that the court excuse Mr. Leonard for cause in that his answers to the death penalty questions indicated that he was substantially impaired because the prospective juror hesitated in some of his answers and gave inconsistent and disqualifying answers to some of her questions. (9 RT 1771-1754.) The court denied the cause challenge. (9 RT 1755.)

2. Roscoe Cook - #3654

a. Questionnaire

Mr. Cook was a 64 year old married African-American man. (VI CT 1492.) He had worked in education for the past thirty years and at the time of the trial was employed as an assistant principal. (VI CT 1495, Q 7.) He also possessed a doctorate in education. (VI CT 1497, Q 19.) Mr. Cook also

served on a prior murder jury and pledged that he would do the best that he could to be a good juror, having no personal beliefs that would prevent him from judging another. (VI CT 1499, Q 30-32.) When asked about his feelings about sitting on a jury he stated "It is my duty as a citizen!" and that he would pay attention and be honest. (VI CT 1500, Q 37-38.)

Mr. Cook harbored no animus against the criminal justice system, feeling that it was doing the best that it could and that it was the criminals themselves that were responsible for the crime problem. (VI CT 1515, Q 112; VI CT 1514, Q 103.) He also strongly believed in "innocent until proven guilty." (VI CT 1516, Q 116.)

Mr. Cook stated that he had been exposed to racial prejudice and had been called "nigger." (VI CT 1518, Q 129.) However, he indicated that he did not bear any hard feelings toward non-blacks because of this (*Ibid.*, Q 133), and reiterated that he could be an impartial juror because he was a "fair person" and would do his "best no matter what."(VI CT 1519, Q137-138.)

Regarding the death penalty, Mr. Cook stated that there was nothing about the charges that would prevent him from being fair and impartial. (VI CT 1528.) He also stated that he had no "general feelings" about the death penalty (VI CT 1528, Q 178), and was neither disposed for nor against its imposition. (*Ibid.*, Q 186.) Instead, Mr. Cook believed that "each case

should be weighed on its own" and neither life without parole nor death should be a mandatory punishment. (VI CT 1529, Q188-189.)

Further, Mr. Cook made in clear that depending on the facts, a person who intentionally kills another without justification should receive the death penalty (VI CT 1530, Q 196) and that all evidence should be considered. (VI CT 1531, Q 206.) In addition, Mr. Cook indicated that he could not possibly give an opinion on which was the "worse" of the two penalties. (VI CT 1530, Q 198.) However, he clearly stated that in the appropriate case he could and would vote for either penalty."depending upon info(sic) garnered at trial." (VI CT1532, Q 209-210.) When asked whether he could impose the death penalty for a felony-murder, Mr. Cook stated that "evidence will dictate the sentence." (VI CT 1533, Q 219.)

b. Oral Voir Dire

Mr. Cook's answers to both the court's and appellant's counsel's questions were very consistent with his questionnaire. After being informed of the penalty weighing process by the court, Mr. Cook affirmed his understanding and acceptance of the law. He also stated that he would not automatically vote for either penalty. (11 RT 2265-70.) When asked by counsel whether he had made up his mind as to what penalty would be appropriate, Mr. Cook answered as any thoughtful, educated person would in his position. He stated, "Oh, no. How could I," clearly mirroring his

previously stated opinion that all facts must first be considered. (11 RT 2271.)

However, as set forth in Argument I, the prosecutor was not interested in relevant *Witt* related inquiry. She began by noting that Mr. Cook had been a vice-principal at the Juvenile Hall and asked him if he had ever seen appellant there. (11 RT 2272.) Having begun her questioning with improperly telling Mr. Cook that appellant had a juvenile record, she then seized upon a tactic she frequently used in trying to dismiss qualified jurors. (See Argument I, *supra.*) From the outset, the prosecutor entered into an adversarial posture with a prospective juror that she did not want on the jury. She engaged Mr. Cook in a hostile, confrontational manner interrupting and chastising Mr. Cook for allegedly not fully answering the questionnaire inquiry as to jury service. (11 RT 2272-2275.)

Eventually, she turned her attention to Mr. Cook's answer to question 200, in which he stated that he would not set aside his personal belief system when he was a juror. (11 RT 2276-2277.) The prosecutor then stated that the juror was going to follow his personal belief system and not the law. (11 RT 2278.) Mr. Cook proceeded to clear up any misconception about his attitude by informing the prosecutor that his belief system included his adherence to the law and that he would indeed follow the court's instructions. (11 RT 2279.)

The prosecutor then intensely questioned Mr. Cook as to his questionnaire statements that he had no opinion as to the death penalty. Mr. Cook reiterated that indeed he had no personal feelings about the death penalty. (11 RT 2279-2280.) The prosecutor then commenced the same type of intentionally confusing and ultimately spurious exchange.

> Prosecutor: Okay. Here's my question to you. If you don't have an opinion regarding the death penalty, how will I know you will be able to impose it, should it be appropriate?
> Mr. Cook: You may not know.
> Prosecutor: Because you do not know what your opinion is regarding the death penalty, right?
> Mr. Cook: No, I didn't say that. I said "I don't have a disposition about that." (11 RT 2280-2281.)

Dissatisfied with the fact that Mr. Cook was not going to allow himself to be drawn into the prosecutor's attempt to mischaracterize his attitudes, the prosecutor continued with her attempt to get Mr. Cook to say something disqualifying.

> Prosecutor: Okay. Do you have an opinion on the death penalty.
> Mr. Cook: Are we talking about the same thing? I said I didn't have an opinion about the death penalty–
> Prosecutor: Okay.
> Mr. Cook: - - one way or the other.
> Prosecutor: I said to you, "I wouldn't be able to know whether or not you'd be able to impose the death penalty, because you don't know what your opinion is on the death penalty." Do you recall that..
> Mr. Cook: Yes.

> Prosecutor: And then you said that you wouldn't know. And I'm asking you how can you impose the death penalty, if you didn't know what your opinion is. And you said you had an opinion. And I said , well, what is it? And you said, well are we talking about the same thing? It's kind of confusing. (11 RT 2281.)

Being an educated, accomplished and logical man, Mr. Cook began to express some exasperation as to what had suddenly become a completely disingenuous process.

> Mr. Cook: Not to me I just don't know what you are talking about part of the time. (11 RT 2281.)

The following exchange then occurred.

> Prosecutor: Okay. What part is confusing?
> Mr. Cook: Oh man, this is- - you're asking me questions and it seems like your asking me the same question in order, and I don't always- - I'm not clear on what it is you're saying. I didn't know that this was going to be this kind of exchange or this kind of questioning and that. But had I known, I would feel the same, I'd feel exactly what I am saying to you now. (11 RT 2282)

In response to Mr. Cook's plea to get the voir dire back on some sort of rational track, the prosecutor completely departed from any semblance of proper questioning and turned this voir dire into a personal confrontation with Mr. Cook by asking "Do you feel threatened or something." (11 RT 2282.) Mr. Cook responded by saying that he did not feel threatened but felt that the prosecutor was "coming after" him. (*Ibid.*)

The prosecutor responded that she was "coming after him" because she needed to know the answer as to how he could impose the death penalty if he did not have an opinion as to its general application. (11 RT 2282-2283.) Once again, Mr. Cook responded to this same question again, essentially telling the prosecutor that without more facts he could not possible say what he would do. (11 RT 2283.)

For some reason, the prosecutor then questioned Mr. Cook about his earlier career in teaching. The following exchange then occurred.

> Prosecutor: You were a teacher?
> Mr. Cook: Yes.
> Prosecutor: Okay. What did you teach?
> Mr Cook: Everything
> Prosecutor: You taught history?
> Mr. Cook: I taught all subjects.
> Prosecutor: Okay. Well, what are all subjects to you? Because see, I don't know what you taught, because I don't know you, and all subjects to you could just be math and English.. So that's why I am asking, what subjects did you teach? (11 RT 2284.)

Exasperated once again at the prosecutor's refusal to accept his plainly stated answers, Mr. Cook stated,

> You're amazing. You're amazing. I taught history, English, art- - I taught all of the classes that are taught in a regular curriculum on an elementary level and most of them on a secondary level.(11 RT 2284.)

The prosecutor then asked for a side bar conference where she complained to the judge that Mr. Cook was hostile to and prejudiced against her. (11 RT 2285.) She claimed that she had never had a prospective juror demonstrate this sort of attitude. (11 RT 2286.) She then stated that it was necessary to ask further questions about Mr. Cook's attitude about her. Counsel objected because this sort of questioning was outside the *Hovey* purview but the court decided to allow this questioning to continue. (11 RT 2286-2288.)

The prosecutor's questioning about Mr. Cook's "attitude" continued. After once again sparring with Mr. Cook and justifying her own conduct[14] (11 RT 2289-2290), the prosecutor yet again returned to the same oft answered question, as to how Mr. Cook could impose the death penalty if he had no ethical opinions as to the penalty itself. (11 RT 2290.) Having already answered this question as best as he could, Mr. Cook had nothing further to add. (11 RT 2290-2291.) He did state that he was simply a citizen doing his duty and responding to jury duty. (11 RT 2291.) The prosecutor yet again asked Mr. Cook how could she be sure he could impose the death penalty as Mr. Cook had no opinion as to the death penalty. Mr. Cook only could reiterate his prior answer. (11 RT 2291) The

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14. The prosecutor provocatively and cynically accused Mr. Cook of simply not wanting to be in the courtroom.

prosecutor then asked Mr. Cook whether if he was in her shoes, would he want a juror such as himself on the jury. (11 RT 2292.) Mr. Cook stated that he did not have the educational background to answer such a question. (*Ibid.*)

The prosecutor then turned her attention to the hypotheticals discussed in Argument I. Mr. Cook told the prosecutor that he could impose the death penalty on the person holding the victim's arms in the "assault" hypothetical. (11 RT 2294.) Instead of accepting this answer as a sign that Mr. Cook could impose the death penalty, the prosecutor immediately went back to asking the same ultimately meaningless question. "Now, based on your answers, would you say that you are for or against the death penalty?" (11 RT 2295.) Mr. Cook's response was once again one of predictable and justifiable weariness "Lady, I keep telling you the same thing. I don't understand why you keep asking me the same thing." (11 RT 2295.)

The prosecutor yet again asked the same question, how Mr. Cook could impose death if he had no opinion as to the death penalty. Again, Mr. Cook tried to explain to his inquisitor that he would have to hear all of the facts before he could make a decision as to the penalty. (11 RT 2296.)

The prosecutor then posited the "bank robbery" hypothetical to Mr. Cook, who without hesitation indicated that he could impose the death

penalty on all three of the individuals involved, including the person who was serving as the "wheelman." (11 RT 2296-2297.) In spite of the fact that it was abundantly clear by this time that Mr. Cook was willing to impose the death penalty even on an abettor who had no direct role in killing, the prosecutor returned to the same exact irrelevant and provocative question she had been harassing Mr. Cook with from the outset of the voir dire. (11 RT 2297.) Counsel objected to the question but the court overruled the objection. (*Ibid.*) The prosecutor, for at least the fifth time, refused to accept that Mr. Cook was willing to impose the death penalty (11 RT 2300) and once again continued to focus on how could the juror impose death if he had no opinion as to the penalty itself. (11 RT 2300-2301.)[15]

During the balance of the prosecutor's questioning, Mr. Cook made clear that he was a open minded person who could follow the law and not be biased for or against one side or the other. (11 RT 2302-2316.)

The prosecutor ultimately challenged Mr. Cook for cause stating that Mr. Cook could not tell her whether he was for or against the death penalty. (11 RT 2318.) The court denied the challenge for cause, stating that Mr. Cook's responses to the questioning indicated that he could follow the

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15. This repeated fall-back to this question had absolutely no purpose. Time and time again, Mr. Cook made it clear that in any number of situations he was willing to impose the death penalty. Yet the persecutor continued to seek an answer to what had long since become a moot question.

law. (11 RT 2320-2322.) The court made it clear that while Mr. Cook did not answer the prosecutor's abstract questioning they way that she would have liked, his answers to the more practical questions was adequate to show that he qualified under *Witt*. (11 RT 2321.)

3. Ethan Walters - #5883

a. Questionnaire

Mr. Walters was a 28 year old, single African-American male. (VI CT1542.) He had a degree in mechanical engineering and had almost earned his Masters in astronautics. (VI CT1547.) He was working as an engineer for Boeing at the time of the trial. (VI CT 1545.) He was also a member of the National Society of Black Engineers. (VI CT1551, Q 48.) Mr. Walters made it clear that he did not have any feelings one way or the other as to his jury service, indicating that he would be a very neutral juror. (VI CT1549, Q 30.) However, he stated that the criminal justice system worked too slowly. (VI CT 1565, Q112.) He also stated that, as an African-American, he had been exposed to racism. (VI CT1568, Q 129; VI CT 1569, Q 136.)

Regarding the imposition of the death penalty, Mr. Walters stated that while he was for the death penalty in principle, he felt that it its current form it served no purpose as the process was so slow. (VI CT 1578, Q 178-179.) He further stated that the death penalty was not used often enough.

(*Ibid* Q 183.) Mr. Walters also stated that if death were executed in a timely fashion it would deter crime. (VI CT 1579, Q 186.) He also stated that the death penalty should be imposed for crimes of extreme violence and/or where rehabilitation seemed unlikely. (*Ibid* , Q191.)

While Mr. Walters stated that he would personally prefer death to life in prison (VI CT 1580, Q 198; VI CT 1585, 227), he stated depending on the facts he could vote for either penalty. (VI CT 1579-1583, Q 194-197, 209, 214-215.)

b. Oral Voir Dire

There was nothing in Mr. Walters oral voir dire that indicated in any way that he would not be a fair and impartial juror who could follow the law. After the court explained the penalty phase, Mr. Walters stated he would not automatically vote for either penalty. (12 RT 2394-2398.) He also stated that there was nothing about the nature of this case that would preclude him from being a fair juror. (12 RT 2398.) He also stated that while he indicated on the questionnaire that he would personally prefer a death sentence for himself, he would follow the law as to the imposition of the death penalty on appellant. (12 RT 2399.)

In response to counsel's questioning, Mr. Walters indicated that he understood the law of aiding and abetting and could follow it vis a vis the

imposition of death. (12 RT 2400-2401.) He further stated that he would consider all factors before he imposed a sentence in this matter. (12 RT 2403.)

The prosecutor then reviewed the basic penalty decision process with Mr. Walters, explaining how ultimately each individual juror must assigned his or her own particular weight to each "bad" or "good" factor and arrive at a penalty, under the law. (12 RT 2405-2408.) Mr. Walters made clear that he could follow the law, look a defendant in the eye and "say 'death'." (12 RT 2408.)

In response to the prosecutor's "assault" hypothetical, Mr. Walters indicated that he could sentence the person holding the victim to death. (12 RT 2409.) In addition, he stated that while he would personally prefer a death sentence as opposed to spending his life in prison, he would not impose his personal beliefs on anyone else or upon the system. (12 RT 2410.) Mr. Walters further stated that he would be able to base his verdict solely upon the evidence. (12 RT 2411.) He further said that he could impose the death penalty even if only one person died. (12 RT 2413.)

In response to the prosecutor's "bank robbery" hypothetical, Mr. Walters stated that all three participants would be guilty of murder. (12 RT 2417-2418.) Regarding the penalty, he stated that he would lean against the imposition of death for the person or persons outside the bank because of

their lack of participation and intent. (12 RT 2418-2420.) However, Mr. Walters stated that if the person in the car gave the shooter a loaded gun he might be able to impose the death penalty on the driver of the car. (12 RT 2419-2420.) After some further discussion with the prosecutor on this subject, Mr. Walters stated that he could see the persecutor's point and perhaps could impose death on all of the three participants after considering all of the facts. (12 RT 2421.)

Both parties passed Mr. Walters for cause. (12 RT 2424.)

4. Reginald Payne-#8871

a. Questionnaire

Mr. Payne was yet another accomplished African-American male. He was 56 years old, married with eight children, all of whom were either working or in school. (VI CT 1592.) He was employed as a plant operator for the Los Angeles County Sanitation District. (VI CT 1597, Q 5.) Mr. Payne served his community by serving as a juror on four cases, two of which were murders. (VI CT 1599, Q 32.) His son was a victim of an armed robbery (VI CT 1608-1609),and he was personally the victim of attempted intimidation by local gang members, causing him to start a Neighborhood Watch program. (6 VI 1611, Q 95.)

Mr. Payne also made clear that he fully understood that his obligation as a juror required that he neither favored the defense nor the

prosecution. (VI CT 1616, Q 116.) However, he did say that he was biased against gang members because of their "chilling effects on a community." (VI CT1618, Q 130.) He also stated that he could follow the law as the judge gives it without reference to any personal beliefs of his own. (VI CT 1624-1625, Q 170.)

Regarding the death penalty, Mr. Payne indicated that while it may be used too much, and should never be "used lightly," it does have its place in the criminal justice system. (VI CT 1628 Q 178-179.) He also stated that "our system of justice is not prepared to operate without it at this time" and "until we can find a viable alternative we can not abolish it." (VI CT 1629, Q 186-187.) Mr. Payne also stated that he could impose the penalty, and that the circumstances of the victim's death would have "great bearing" on the punishment. (RT 1630, Q 196.)

Mr. Payne also stated that he thought that life in prison was much worse than death given the conditions at California prisons. (VI CT 1629-1630, Q 193, 199.) However, he also stated that he could set aside his own beliefs and follow the law that the judge gives to the jury. (VI CT 1630-1631, Q 200.) He also stated that he would impose the death penalty when "a proven set of circumstances constitutes (its) imposition." (VI CT 1632, Q 209.) Mr. Payne also stated that he would not automatically vote for either

penalty. (VI CT 1633, Q 214-215.) He also stated that he would abide with society's rules in deciding whether to impose death. (VI CT 1634, Q 223.)

b. Oral Voir Dire

After the trial court explained the relationship of aggravators and mitigators and the weighing process in a death penalty case, Mr. Payne indicated that he understood the court's explanation and would not automatically vote for either penalty. (12 RT 2870-2874.) Appellant's counsel passed the juror for cause without any further questioning. (12 RT 2874.)

The prosecutor questioned Mr. Payne as to the armed robbery of his son and Mr. Payne's problems with certain gangs. (12 RT 2875-2877.) She also questioned him about a disagreeable incident that he and his other son had with the Long Beach Police. (12 RT 2876-2879.) However, Mr. Payne indicated that this would not affect his judgment in this case. (12 RT 2879.) In regard to his statement in the questionnaire that the death penalty was sometimes "overused," Mr. Payne stated that what he meant was that before imposing the death penalty it was necessary to "look at the facts" and not "rush to anything." (12 RT 2880.) Mr. Payne further stated that in other jurisdictions "some... mistakes have been made so I think we should be very careful about what we do." (12 RT 2881.) However, Mr. Payne also made it clear that his decision in this case would be based only upon the evidence

that was produced in the courtroom (12 RT 2884), and that he could live with himself after he imposed a penalty of death. (12 RT 2885-2886.)

Mr. Payne also stated that in spite of his personal feelings that life was a worse penalty that death, he could follow the law. (12 RT 2892-2893.) He also stated that while he felt that the death penalty was disproportionately imposed upon blacks, this experienced juror clearly stated that he would not consider this in the instant case as "that's not my job." (12 RT 2894-2896.) The prosecutor also made inquiry as to whether Mr. Payne believed that some people could have a productive life in prison. Mr. Payne agreed that is was possible but also stated that he would follow the law that defined the most serious penalty as death. (12 RT 2899-2901.)

Regarding the prosecutor's "assault" and "bank robbery" hypotheticals, Mr. Payne stated that he would be able to impose death on all defendants if the aggravating circumstances substantially outweighed the mitigating. (12 RT 2897-2899.)

The prosecutor then asked Mr. Payne whether he would inform the court if at any time either he could not follow his oath and the law or that he felt another juror was not doing the same. Mr. Payne responded in the affirmative. (12 RT 2901-2902.) Mr. Payne was then passed for cause by both counsel. (12 RT 2903.)

C. THE PEREMPTORY CHALLENGE VOIR DIRE

1. Procedural Review

Fifty-eight prospective jurors survived the *Hovey* voir dire. The above four black men were among them. The process for the selection of the jury was twelve prospective jurors were randomly selected from the *Hovey* qualified group of 58. These twelve were assigned seat numbers and seated in the jury box. Counsel were then allowed to conduct a voir dire on these jurors and exercise peremptory challenges. Once a prospective juror was peremptorily excused, another prospective juror was called to replace him in the jury box. This process continued until a jury was selected. Appellant exercised 19 of his 20 available challenges and the prosecutor 18 of hers before the jury was empaneled. After the impanelment of the sitting jury, the court undertook the selection of 6 alternate jurors. Of the original panel of 58 *Hovey* qualified jurors, 4 remained after the impanelment of the sitting jury. Of these, there was one black female juror (# 3383).
(7 CT 1836; 17 RT 3556.)

The selection of the alternates was done in the same fashion as the selection of the sitting jury. However, the selection of the 6 alternates was ultimately done by counsel stipulating as to which prospective jurors they found acceptable. The black female juror was never questioned, nor was she designated as one of the alternate jurors.

2. Peremptory Challenge to Shawn Leonard

As part of the above process, Mr. Leonard was randomly called by the court to replace an excused prospective juror in the seventh juror seat. (15 RT 3181.) In response to questioning by appellant's counsel, Mr. Leonard affirmed that he could judge this case fairly and indicated that after listening to the other prospective juror's being questioned, he would have no different answers. (15 RT 3182.)

In response to the prosecutor's questions, Mr. Leonard stated that he felt more sure that he was in favor of the death penalty than he was at the *Hovey* voir dire. (15 RT 3183.) Mr. Leonard stated that at the time of the *Hovey* voir dire he hadn't thought much about the death penalty but since that time he had time to consider his position. (*Ibid*)

In response to questioning by the prosecutor, Mr. Leonard stated that he had had no previous bad experiences with law enforcement. (15 RT 3183-3185.) The prosecutor then asked if Mr. Leonard knew anyone who had been convicted of a crime and he stated that his brother was convicted for a drug offence and that he visited him in prison. (15 RT 3183-3184.) He also stated that he would follow any instructions that the court may have regarding judging the credibility of witnesses. (15 RT 3184-3185.) Both sides then passed Mr. Leonard for cause. (15 RT 3185.)

It was at this point that appellant's counsel Patton asked for a sidebar conference (15 RT 3185), and stated that from the prosecutor's questioning he believed that she was about to exercise a peremptory challenge against him. (15 RT 3186.) He further referred the court to the case of *Miller El v. Cockrell,* 537 U.S. 322. (*Ibid.*) Mr. Patton also wanted it put on the record that Mr. Leonard was the only African -American seated on the jury at that time. (*Ibid.*)

The prosecutor's reaction to this could only be described as feigned righteous indignation.[16] She stated "I am extremely offended. I am extremely offended." (15 RT 3186.) She further stated that she needed a recess because she was so angry. (15 RT 3187.)

The trial court quite reminded all counsel that as no challenge had been made by the prosecution, the matter was not ripe for consideration. (15 RT 3188.)[17]

After a few other jurors were questioned, the prosecutor did exactly what Mr. Patton predicted she would; she peremptorily challenged Mr. Leonard. (15 RT 3221) Mr. Patton objected on the ground that there

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16. It was feigned because only a few minutes after the prosecutor's passionate remonstration about how "offended" she was over counsel's suggestion, she did indeed remove Mr. Leonard from the jury. Her disingenuity was fully confirmed when the only other black male jurors soon followed Mr. Leonard home.

17. The fact that Mr. Patton prematurely raised the issue is irrelevant to the determination of whether these challenges were constitutionally appropriate.

was nothing on the record to even suggest that Mr. Leonard would not be a qualified juror and maintained that the challenge was racially based. (15 RT3222.) Counsel then asked that the trial court to make a prima facie finding that there has been an exclusion on the basis of race stating that even the exclusion of a single person could be sufficient for such a finding. (15 RT 3223.)

The court bluntly told counsel that he was wrong in this assertion and the prosecutor gratuitously added that it was unethical to miscite the law to the court.[18] The court then denied the "*Wheeler*" motion stating that it had reviewed the *Hovey* voir dire and from the answers could see why the prosecutor would want to challenge Mr. Leonard. The court, in spite of Mr. Leonard clearly stated position, further stated that the peremptory challenge was not race based but rather based upon the "juror's inability to be able to impose death at the penalty phase." (15 RT 3224.)

The prosecutor then stated that Mr. Leonard was "not participating in the cooperative sense that all of the other jurors- -they are watching counsel, they're listening to questions, he's just looking straight ahead. I found that kind of unusual, because no one else is doing that out there." (15 RT 3225.) The trial court responded to this by stating that Mr. Leonard had

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18. Mr. Patton did not miscite the law. As will be later shown in this argument, it was the court and the prosecutor who were wrong.

his eyes on the court "throughout the questioning of the remainder of (sic) counsel." (15 RT 3225.)

3. Peremptory Challenge to Roscoe Cook

As part of the above process, Mr. Cook was randomly called by the court to replace an excused prospective juror in the ninth juror seat. (16 RT 3296.) In response to appellant's counsel, Mr. Cook reiterated that he could be fair. (*Ibid.*) Mr. Cook voluntarily offered that he wished to correct an unintentional misstatement he made in the *Hovey* voir dire. He corrected his *Hovey* questioning about his jury service to state he never actually sat on a murder jury. He had been called to the box but had been excused. (16 RT 3297-3298.)

Pursuant to the prosecutor's questioning, Mr. Cook indicated that 35-40 years ago, he was stopped often by police officers. In the vicinity of the Watts riots, a policeman pointed a shotgun at him. (16 RT 3299.) However, Mr. Cook readily stated that this long past incident would have no effect on him in this trial. (16 RT 3300.) In response to the prosecutor's further questioning, Mr. Cook stated that he could "always" follow the court's instructions and if the prosecutor proved the case beyond a reasonable doubt he would return a guilty verdict. (16 RT 3301-3302.) Both side passed Mr. Cook for cause. (16 RT 3302.)

After further discussion about other jurors, the trial court addressed the prosecutor. "And just to remind counsel...I know that Ms. Locke-Noble's favorite amazing friend is now seated in seat no. 9, and that is going to be a challenge again that we'll have to take a break for again. But I don't know, they have made up, I don't know." [19] (16 RT 3306.)

The prosecutor did indeed exercise a peremptory challenge on Mr. Cook. (16 RT 3319.) Counsel again objected to the challenge on *Batson* grounds, stating that along with the exclusion of Mr. Leonard, this challenge amounted to a systematic exclusion of African-Americans from the jury. (16 RT 3330.)

The prosecutor replied to this motion by indicating to the court that she had had a "personality conflict" with Mr. Cook at the *Hovey* voir dire and felt that as a result he could not fairly hear the People's case. (16 RT 3320.) She also indicated that Mr. Cook would not set aside his "personal belief system." (16 RT 3321.) She also argued to the court that the juror

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19. While there may be a time and place for levity in a court room, this was not it. Firstly, the court should never have suggested to the prosecutor whom she should challenge. Further, the prospective juror was an extremely well educated, very accomplished 64 year old gentlemen who currently had faith in our legal system in spite of the undeniable racism toward black Americans during the years he was growing up.(VI CT 1515, Q 112; VI CT 1514, Q 103; (VI CT 1516, Q 116.)
As was and will be more fully addressed, any animus between the prosecutor and Mr. Cook was created by the prosecutor's repeated attempts to twist his words at the *Hovey* voir dire.

had been unable to say "whether he was for or against the death penalty. (*Ibid.*)

The court did not find a *prima facie* case of systematic exclusion stating that the conflict between Mr. Cook and the prosecutor was sufficient reason for her to peremptorily challenge him. (16 RT 3322-3323.)

4. Peremptory Challenge to Ethan Walters

As part of the above process, Mr. Walters was randomly called by the court to replace an excused prospective juror in the third juror seat. (16 RT 3350.) The prosecutor began her voir dire with an extensive discussion of Mr. Walter's job. (*Ibid.*) Mr. Walters indicated that he was a satellite engineer, designing and building communication satellites. (16 RT 3351-3352.) Mr. Walters stated that he had a B.A. degree in engineering but was close to getting his Masters. (16 RT 3351-56.)

Mr. Walters also volunteered to the prosecutor that he had a cousin arrested for some sort of assault in Florida. (16 RT 3356-3357.) Mr. Walters got the impression from talking to his cousin that his cousin felt he was being treated unfairly. (16 RT 3358.) Mr. Walters indicated that a few times he felt he was "ticketed" unfairly and on one occasion he went to court and won his case. (16 RT 3358-3359.)

In response to the prosecutor's questions, Mr. Walters indicated that he could follow the law regarding circumstances and the evaluation of witnesses. (16 RT 3360.) Mr. Walters further stated to the prosecutor that if

the People proved their case beyond a reasonable doubt his verdict would be guilty. (16 RT 3361.) Both sides passed Mr. Walters for cause. (16 RT 3361.)

The prosecutor exercised a peremptory challenge against Mr. Walters, yet another American-American male juror. (16 RT 3372.) Counsel objected to this excusal and made another "*Batson*" motion, asking the court to find a prima facie case of systematic exclusion. The court found that a prima facie case had indeed been made and asked the prosecutor to explain her challenge. The prosecutor asked the court to review Mr. Walters' questionnaire before she began her explanation. The court agreed. (*Ibid.*)

After reading the questionnaire, the court stated that it still found a prima facie case of deliberate systematic exclusion. (16 RT 3375.) The prosecutor indicated that what "really bothers (her) about this particular juror" was that Mr. Walters believed that life without parole would be a more severe sentence than death. (16 RT 3375-3376.) The prosecutor stated she was also concerned that because of Mr. Walters' scientific training, she could never prove the case to his satisfaction. (16 RT 3376.) She also stated that on his questionnaire, Mr. Walters indicated that at times prosecutors can be overzealous.(*Ibid.*)

The prosecutor also claimed that the Mr. Walters indicated on his questionnaire that the death penalty needed to be reformed, "just like

affirmative action." (16 RT 3377.)[20] The prosecutor also stated that Mr. Walters stated that he had been pulled over by the police several times for "questionable reasons. (*Ibid.*) The prosecutor's stated that she was troubled Mr. Walters' opinions that the criminal justice was "too slow" and "biased against the economically disadvantaged." (16 RT 3377-3378.)

The prosecutor was also troubled by the fact that in the *Hovey* voir Mr. Walters stated "I don't have any feelings one way or another about (the death penalty.") (16 RT 3378.)[21] The prosecutor then told the court that "if someone cannot say they believe in the death penalty, they cannot impose it." (16 RT 3378.)[22] The prosecutor further stated that she had perempted all prospective jurors who stated they believed that life was a harsher penalty than death. (*Ibid.*)

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20. As will be fully discussed later, the prosecutor once again misstated a prospective juror's opinions to the court. The "reform" of which the prosecutor complained was Mr. Walters feeling that the death penalty was not imposed *often enough* and the system had to have more executions to create a real deterrent.(VI CT1578, QQ178-179, 183.)

21.This yet another misstatement of what was said. Immediately after saying this, he made clear that he was not against the death penalty and that California should have the death penalty (12 RT 2411-2412.)

22. Nowhere in the Mr. Walters' voir dire did he even suggest that he would not impose the death penalty if appropriate. As stated above, he actually was a proponent of rapid trial and exaction where appropriate. This prosecution's attitude toward the concept of "belief" in the death penalty raises executions to almost a religious state of grace, in which all jurors must come to the court room with an unshakable faith in the righteousness of the death penalty. She is not entitled to such a jury.

The prosecutor also was "bothered" by the fact that Mr. Walters "seem(ed) to have a lot of information about the law." (16 RT 3378.) The prosecutor complained that when she asked her questions and hypotheticals Mr. Walters was familiar with terms such as "intent" and "aider and abettor." The prosecutor claimed that Mr. Walters already had more information than the other jurors had. (16 RT 3378-3379.)[23]

At this point, the court interrupted the prosecutor to state that Mr. Walters' statements about "overzealous" prosecutors were coupled with his opinion that defense attorneys manipulate evidence. The trial court stated that Mr. Walters derived these rather vague opinions from television and said feelings should not be given much weight. (16 RT 3379.)

The prosecutor finished her argument by reiterating that her chief concerns about Mr. Walters was that he believed that life was the worse penalty and he stated that because the death penalty causes so much litigation it should be "let go."(16 RT 3380.)[24] The prosecutor also restated that because Mr. Walters was an engineer he would be unable to impose the

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23.As will be discussed further, what "bothered" the prosecutor was that Mr. Walters declined to have his views misrepresented at the *Hovey* voir dire. (See Argument I.) It does not take special legal knowledge for an intelligent, educated person to know that intent is a critical element in the criminal justice system. Further, the fact that he might be better educated or informed than the average juror does not constitute a "race-neutral explanation."

24. Once again, Mr. Walters' statement was taken totally out of context. As stated above, he was an advocate of the use of the dearth penalty and his only complaint about it was that the State did not have their heart into the execution of the imposition of death.

death penalty. She further stated that he was the only engineer on the panel and he is trained to look into all possible doubt. (16 RT 3380.)

Appellant's counsel strongly opposed the prosecutor's characterizations of Mr. Walters. He stated that the fact that a professional strived to do his best at work does not mean he or she cannot be a good juror. He also reminded the court that Mr. Walters made it perfectly clear that he was willing to uphold the law and vote for death where appropriate. (16 RT 3380-3381.)

The court accepted the prosecutor's explanation as race-neutral, stating that while he liked the juror very much, the prosecutor has been consistently excusing prospective jurors who thought that life without parole is a more severe sentence. (16 RT 3382.)

The following exchange then occurred.

> Prosecutor: I believe that as a result holding this hearing concerning *Wheeler,* I have to go now back and justify or state the reasons for the other two jurors who were excused previously
> Court: I was going to ask you to do that at this time. (16 RT 3382.)

The prosecutor responded by stating her "race-neutral" explanations for his challenges of Mr. Leonard and Mr. Cook. Regarding Mr. Leonard, the prosecutor claimed that the life penalty was worse than death. (16 RT 3383.)

She also complained that "he also believed that if the person had (sic) a past of hateful decisions, that would effect whether or not he would impose the death penalty," and he might lean to the life penalty if this was a defendant's first hateful act. (*Ibid.*)[25]

The prosecutor also stated that Mr. Leonard would make her prove all of the special circumstances, as well as intent. In addition, he also thought that rehabilitation was a goal of the penal system. She also was troubled that Mr. Leonard would prefer death over life imprisonment for himself, stating "For myself I couldn't stand to be incarcerated forever." The prosecutor also claimed that Mr. Leonard believed that life in prison was a more severe sentence than death. (16 RT 3384.) She also pointed out to the judge that Mr. Leonard said if he knew a defendant would never "do it again," he'd lean toward life in prison. (16 RT 3385.)

The court accepted the prosecutor's explanation as being race-neutral. (16 RT 3385.)

Regarding Mr. Cook, the prosecutor basically revisited her entire voir dire of the him that resulted in his alleged conflict with the prosecutor. She relied upon the fact that Mr. Cook indicated that he had memory problems (16 RT 3385), that he stated he would not set aside his beliefs (16

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25. From the context of the statement, the word "had" was a misprint. It should read "was."Further, as discussed later, how could Mr. Leonard's statement be construed as an unwillingness to impose the death penalty on *this* defendant, who had a long history of juvenile anti-social behavior.

RT 3386-3387) and alleged that he could not explain to the prosecutor which was the worse of the two penalties, stating "who knows" when the prosecutor asked that question of him. (16 RT 3387.) She also was bothered by the fact that no matter how many times she asked Mr. Cook for an answer he continued to state that he had no personal opinion for or against the death penalty. (16 RT 3387-3388.)

The prosecutor then commenced a long recitation of how poorly Mr. Cook treated her, stating that he made sarcastic remarks to her and essentially making her job that much more difficult by not answering her questions. (16 RT 3387-3393.) She further accused him of stating "I'm not for killing anyone" and that Mr. Cook essentially never said that he could face the appellant and impose the death penalty on him. (16 RT 3393.) She also claimed that Mr. Cook was evasive when she asked the question whether he had been exposed to racial prejudices. (16 RT 3393-3394.)

The court accepted the prosecutor's statement as race neutral stating that Mr. Cook did not answer the questions posed to him and that there was a lot of friction between the Mr. Cook and the prosecutor. (16 RT 3394.)

5. Peremptory Challenge of Reginald Payne

The peremptory voir dire of Mr. Payne was very brief. He made it clear that he would be able to follow all of the court's instructions. (16 RT 3452.) He also stated that if the People proved their case beyond a

reasonable doubt, he would find appellant guilty. (16 RT 3454.) Both sides then passed for cause. (*Ibid.*)

The prosecutor then exercised a peremptory challenge on Mr. Payne. (16 RT 3456-57.) She prefaced the actual challenge by naming some of the white prospective jurors that she had peremptorily challenged and the reason therefore. (16 RT 3445-3456.) She also stated that because the incidents with his sons, Mr. Payne had an animus toward the Long Beach Police Department. (16 RT 3457-3458.)

She also offered to the trial court that Mr. Payne stated that the death penalty was sometimes "overused," referring to other jurisdictions. However, she did admit that Mr. Payne indicated that this would not affect him in this case. (16 RT 3458-3459.) The prosecutor also stated that she found it "disturbing" that Mr. Payne was temporarily affected by the verdicts rendered on the murder cases stating that it wasn't always pleasant to do what has to be done. (16 RT3459-3460.)

The prosecutor then told the court that she was disturbed by Mr. Payne's statement that he believed that the life imprisonment was a harsher penalty than death because of the conditions in California prisons, indicating that she did not believe that Mr. Payne could impose the death penalty. (16 RT 3460-3461.) However, Mr. Payne had made it very clear

that he could impose the death penalty, "Because that would come under the instructions of the judge." (16 RT 3461; see also 16 RT 3463.)

Appellant's counsel opposed the prosecutor's characterizations, stating that this was a forthright and articulate person whose honest answers to the prosecutor's questions in no way indicated an animus toward the police nor that he was unable in good conscious to impose the death penalty according to the court's instructions. (16 RT 3464.) Counsel also reminded the court that Mr. Payne's answers regarding the death penalty reflected his own feelings about the idea of being locked up in a small cell for the rest of his life and was not a general statement that applied to all defendants. (16 RT 3464-3465.)

The prosecutor responded by stating that all that she considered was the position of the jurors on the death penalty, and never considered race, age, marital status or anything else. She further stated that in evaluating the prospective jurors she didn't even know who they were when she reviewed the questionnaires. (16 RT 3465-3466.)[26]

The court then declared a recess to look at the questionnaire and the transcript before rendering a decision. (16 RT 3466 et seq.) After the

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26. This is yet another prosecutorial utterance that is virtually impossible to take seriously. The first question of the questionnaire specifically asks the prospective juror his or her race, martial status, ethnic origin, etc. (See VI CT 1492.) Apparently, the prosecutor was asking the court to believe that she simply chose not to read this part of the questionnaire.

court reconvened, the prosecutor again maintained that she had no idea that Mr. Payne was black when she began reviewing the punishment section of his questionnaire. (16 RT 3471-3472.) She then summed up her reason as to all her peremptory challenges as follows:

> I don't believe that somebody, one, who believed that life without the possibility of parole is a more severe punishment than death can actually impose the death penalty, because they believe that spending the rest of *their life* in prison would be the more severe punishment that could be imposed. (16 RT 3472; emphasis supplied.)

The prosecutor then summarized, somewhat differently that earlier in her argument, her alleged race-neutral reasons for the peremptory challenges.

> ...as I have indicated to you, I have exercised peremptory challenges consistently for certain reasons, those reasons being:
> .Life without the possibility of parole is a more severe sentence than death;
> 2. They believe in rehabilitation. Therefore, in my opinion they would vote for life without the possibility of parole although they say that they could impose the death penalty;
> 3. A bad experience with a police officer, whether it is themselves or a family member;
> 4. Whether or not if they believed both punishments are equal;
> 5. Whether or not somebody would want to judge another person; and
> 6. If they sat on a hung jury.I have excused them as well or if indicated (sic) they indicated they returned a not guilty verdict. (16 RT 3478.)

After hearing the balance of the arguments, the court rejected the race-neutral explanation and informed the prosecutor that he will would not allow her to peremptorily excuse Mr. Payne. (16 RT 3479-3480.)

Predictably, the prosecutor reacted saying she "highly object(ed)" to the court's ruling and claiming that the trial court had just branded her a racist. (16 RT 3480-3481.)[27] She further opined that Mr. Payne "indicated he is not going to vote for the death penalty in this particular case."[28] (16 RT 3487.) After the court failed to be swayed by the prosecutor's argument, the prosecutor, without any basis in fact, bluntly that stated that Mr. Payne "will hang this jury." (16 RT 3488.)

In spite of the trial court having already fully reviewed and considered this matter, the prosecutor again requested that the court re-review the matter and revisit it after lunch break. (16 RT 3489.) The court agreed, citing its desire to be "fair-minded" and that the prosecutor was "very passionate about the decision." (16 RT^ 3490.)

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27. *Batson* and its progeny do not require that it be proven that the prosecutor had "racist" motives. It is sufficient that the prosecutor wants to win badly enough to deprive the defendant of his constitutional rights.

28. Once again, the prosecutor constructs facts to suit her argument. Mr. Payne never said this. If her did, he never would have made it to this point in the jury selection process.

After the break, the prosecutor rehashed her arguments at length, still trying to persuade the court that her reasons for the challenge of Mr. Payne were race neutral. (16 RT 3497-3514.)

She also stated that

> ...even if we get a conviction, I see this juror as ripe for the defense attempting to get him to change his mind and nullify the verdict that we may get in this particular case. He has basically told the defense if I'm on the jury, come see me, because I'm going to be going over it and over it in my mind, and maybe I will find a reason to change my mind. (16 RT 3523.)

The prosecutor then pointed out once again that the Mr. Payne put a certain emphasis on rehabilitation but that California was not a rehabilitation state. The prosecutor interpreted this to mean "that's why (Mr. Payne will impose life without the possibility of parole, because he believes people can be rehabilitated. That's what I see him saying in this instance." (16 RT 3525.)[29]

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29. This is yet another misstatement of the law. It is simply not true that California does not have rehabilitation. As will be seen later in this Argument, the mitigating factors of Penal Code section 190.3 include a defendant's capacity for rehabilitation. Further, the prosecutor's statement that if one believes in rehabilitation, one cannot vote for the death penalty is illogical, it is tantamount to stating that if a juror believes in the presumption of innocence, he cannot be trusted to vote for a conviction.

She also reargued that Mr. Payne's statement that proportionately more African-Americans were on death row and incarcerated, arguing that this precluded him from being a fair juror. (16 RT 3529-3530.)

The prosecutor also reargued that she exercises peremptory challenges against persons who have sat on hung juries because she doesn't want such a person "nullifying this jury." (16 RT 3531.)

After another recess, the trial court abruptly changed its mind and ruled that the prosecutor's explanations were race neutral and denied the *Batson* motion. (17 RT 3535-3536.) The court started that given Mr. Payne's feelings about the conditions in the prisons, the fundamental incarceration of black and overuse of the death penalty created a race-neutral reason for the exercise of the prosecutor's challenge. (17 RT 3537-3538.)

Appellant's counsel moved for a mistrial, stating that the case was highly charged with racial overtones and "from the jury selection process taking place in this courtroom, it is apparent that no black males, no African-American male will or can sit on this panel." (17 RT 3538.)

Without ruling on whether black males are a protected classification for equal protection purposes under state or federal law, the court denied the motion for mistrial. (17 RT 3539-3550.)

D. APPLICATION OF THE LAW TO THE INSTANT CASE

1. African-American Males are a "Cognizable Group" for Equal Protection and Cross-Section of Community Analysis

The word "cognizable" as used in this area of the law is a term of legal significance which goes far beyond the dictionary meaning of "knowable or perceivable." (The American Heritage® Dictionary of the English Language, Fourth Edition Copyright © 2009 by Houghton Mifflin Company.) If such were not the case, then red haired people or people with crossed-eyes would be considered cognizable. Instead, in *People v. Fields* (1983) 35 Cal.3d 329, 342, this Court stated, "It is clear that the groups recognized as cognizable classes are generally relatively large and well defined groups in the community whose members may, because of common background or experience, share a distinctive viewpoint on matters of current concern."

This Court's decisions mirror those of the United States Supreme. In *Castaneda v. Partida* (1977) 430 U.S. 482, 494, the High Court defined a cognizable group as "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."
Under these definitions, it is clear that African-American males are indeed a "cognizable group." This group is large and well defined. Being a group whose history involved, and to some extent still involves, discrimination and

prejudice by long established institutions of authority, they indeed "share a distinctive view point on matters of common concern."

This concern includes the experiences that their group has had with the police, the courts and the prison system. There is also the common experience of being a group frequently targeted for improper police stops and detention. The social, economic and psychological experience of the African-American male in the United States has been long documented and much discussed. This group has indeed been "singled out for different treatment" and its members, for the greatest part, share a common perspective on life.

Further, this court has long held that African-American members of a given sex are considered, by law, to be a cognizable group for *Batson* purposes. (*See e.g., People v. Cleveland* (2004) 32 Cal.4th 704, 735; *People v. Motton* (1985) 39 Cal.3d 596, 605-606.)

2. A Prima Facie Case was Made as to the Systematic Exclusion of African-American Males from this Jury

The test as to whether a defendant has made a prima facie of discrimination is whether he has shown (1) that the prospective juror was a member of a cognizable group, (2) the prosecutor used a peremptory challenge to excuse that juror, and (3) the totality of all of the circumstances raises the inference that the strike was "motivated by race." (*Boyd v.*

Newland (9th Cir 2006) 467 F.3d 1139, 1143.) As stated in section A of this Argument, the systematic exclusion of such a cognizable group as African-Americans males not only runs afoul of the Equal Protection Clause but violates the fair cross-section of the community requirement of the United States Supreme Court.

> ...the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community. A unanimous Court stated in Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940), that '(i)t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' To exclude racial groups from jury service was said to be 'at war with our basic concepts of a democratic society and a representative government.' A state jury system that resulted in systematic exclusion of Negroes as jurors was therefore held to violate the Equal Protection Clause of the Fourteenth Amendment. Glasser v. United States, 315 U.S. 60, 85-86, 62 S.Ct. 457, 472, 86 L.Ed. 680 (1942), in the context of a federal criminal case and the Sixth Amendment's jury trial requirement, stated that '(o)ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government,' and repeated the Court's understanding that the jury "be a body truly representative of the community' . . . and not the organ of any special group or class.' (*Taylor v. Louisiana* (1975) 419 U.S. 522, 527.)"

The exclusion of the four African-American men was a systematic attempt to not just remove persons of a certain skin pigmentation but of a key part of the Los Angeles community, a part that may not be entirely sympathetic with all of the ethos of the prosecution, yet a part whose voice is

constitutionally required to be heard. That voice was silenced by the removal of each and every member of that part of that community. As counsel stated, the prosecutor would allow no African-American man to sit on this jury.

The High Court has held that a defendant can make out a prima facie case of discriminatory jury selection by "the totality of relevant facts" about a prosecutor's conduct in the case being tried. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 239.) That totality clearly includes the number or percentage of prospective jurors from the cognizable group in question. (*Miller-El, supra,* 545 U.S. at p. 240-241; *United States v. Collins* (2009) 551 F.3d 914, 921.) In this case, four African-American males survived *Hovey* and 100% of then were removed by the prosecutor's peremptory challenge.

As stated above, the bar for establishing such a prima facie case has not been set very high by the courts (*Collins, supra,* 551 F.3d at p. 920) and certainly not a "more probable than not test." All that must be shown is that "the totality of the relevant facts gives rise to an inference that the peremptory challenges are being used for a discriminatory purpose." (*Johnson v. California, supra,* 545 U.S. at 168.) Such a showing has been made.

The trial court specifically held that a prima facie case was established as to the third and fourth prospective African-American male

jurors, Walters and Payne. During the challenge of Mr. Walters, the court required the prosecutor to set forth her race neutral explanation for the first two challenges, Mr. Leonard and Mr. Cook. By doing so, the court *de facto* indicated that a prima facie case of discrimination was made as to these first two jurors, as well as the more explicit finding as to the third and fourth challenged African-American jurors, Mr. Walters and Mr. Payne. (*People v. Lenix* (2008) 44 Cal.4th 602, 613, fn 8.; 16 RT 3382.)

3. The Prosecutor's "Race-Neutral" Explanations For Her Challenges Were Pretextually and her Challenges Were Made to Unconstitutionally Exclude African-American Males from the Jury

a. Introduction

As stated in section A of this Argument, after the defendant has established a prima facie case of systematic exclusion by the prosecution, the burden of going forward is "momentarily" shifted to the prosecutor to offer "race-neutral" explanations for the challenge(s) of the given prospective juror(s) in question. (*Johnson v. California, supra,* 545 U.S. at 171.)

After these explanations are tendered, the trial court must decide, by the totality of circumstances whether the challenges to the jurors in question were constitutionally legitimate or made to unconstitutionally exclude one or more members of a cognizable group from the jury for racial reasons.

As previously stated, this was a case that was directly associated with racial perceptions and attitudes. The charges were that a white woman was killed by a group of young black men. Citing to the overruled case of *People v. Johnson* (2003) 30 Cal.4th 1302, the United States Supreme Court in *Johnson v. California* (2005) 545 U.S. 162, 167 stated these type of racially charged circumstances[30] were "highly relevant" to the *Batson* question and that "it certainly looks suspicious that all three African-American jurors were removed from the jury by the prosecutor."

A close examination of the facts surrounding the peremptory challenges of all of the four male African-American prospective jurors reveals the prosecutor's intention to exclude these four men for racial reasons, permitting the trial to proceed with a virtually all-white jury and a completely all-white set of alternates.

The four prospective jurors excluded were all well-established, law abiding, responsible men who had a very real stake in the Los Angeles County community. Mr. Leonard was a decorated veteran who honorably served his country in a war zone. He was currently working for the United States Government and supporting his two children. Mr. Cook was a very

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30. In *Johnson*, an African-American man killed his a young white child. at 162.) The instant case is far more racially charged than this.

well educated individual who has been involved in the education of our youth for many years as both a teacher and an assistant principal. He took his citizenship responsibilities very seriously and considered jury service as his duty to his community and country. Mr. Walters was a very accomplished engineer, so thoughtful and direct in is answers that the judge, himself, stated that he liked him "very much." (16 RT 3382.) Mr. Walters' only concern about the capital punishment laws was that by not executing punishment promptly, the system was losing credibility. Mr. Payne was a sanitation plant operator for the County of Los Angeles. He had raised eight children and actively and courageously opposed the infestation of gangs in his community.

In addition to the above, all of these men were dedicated to our system of justice and swore to uphold the law. None of them indicated in any way that their personal beliefs would hold sway over the law as stated by the judge. Each indicated he would follow the law and decide the case on only the facts and the law. None of them indicated that they had any complaint about the ultimate justice of their country's laws. They were each and every one honorable men.

These four men would make any community proud. They honored the call for jury duty and stood ready to serve in a fair and impartial manner. However, these men also had something else in common. They

were all African-American males. The were dismissed by a win-at-all-costs prosecutor not only because there were the same "color," but because she feared that as a result of "common background or experience, these jurors share(d) a distinctive viewpoint on matters of current concern" that may have not been advantageous to the prosecutor. (*People v. Fields* (1983) 35 Cal.3d 329, 342.)

The prosecutor's stated reasons for removing these four upstanding citizens from the jury were clearly pretextual, both in the light of the voir dire answers of these men, themselves, and the similar viewpoints of white jurors who were approved by the prosecutor to sit on the jury.

As stated above, the foundation of the prosecutor's alleged "race-neutral" explanation for the challenge of all of these men was "all that she considered was the position of the jurors on the death penalty." (3465-3466.) During her challenge of Mr. Walters, she summarized the specific factors she considered in making this determination. (16 RT 3478.)

> 1. A prospective juror who believed life without the possibility of parole is a more severe sentence than death;
> 2. A prospective juror who believed in rehabilitation, because he would vote for life without the possibility of parole although he says that he could impose the death penalty;
> 3. A prospective juror who had a bad experience with a police officer or had a family member with such an experience.

4. A prospective juror who believed both punishments are equal;
5. A prospective juror who would not want to judge another person; and
6. A prospective juror who sat on a hung jury or who had returned a not guilty verdict.

As will be seen in the below analysis, the "race-neutral" reasons as applied to the four American-American male prospective jurors in question were blatant misrepresentations or outright misstatements of their positions. The pretextual nature of these "race-neutral" reasons for challenging the four African-American men were clearly demonstrated by a comparative juror analysis, which revealed the stated "race-neutral" concerns for striking these jurors were not matters of prosecutorial concern as to white sitting jurors who felt the same as the challenged African-American males. These white jurors were allowed to sit in spite of having the same "infirmities" as the four African-American males.

In judging whether a prosecutor's peremptory challenge was truly "race-neutral" or merely pretextual, the "totality of relevant circumstances" must be considered. (*Batson, supra,* 476 U.S. at p. 94.) These facts can, and should, include a comparative analysis of the prosecutor's questions to and the responses thereto of jurors not in the "cognizable group" that were found acceptable by the prosecutor. (*Miller El II, supra,* 545 U.S. at p. 241.) As stated by the United States Supreme Court, when deciding whether or

not the "race-neutral" explanations tendered by the prosecutor were simply pretext.

> More powerful that bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white -panelists were allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as much to an otherwise-similar nonblack that is permitted to serve, that is evidence tending to prove purposeful discrimination at *Batson's* third step. (*Miller-El II, supra,* 545 U.S. at p. 241.)

More recently, in *Snyder v. Louisiana* (2008) 552 U.S 472 , 478-480, the High Court reaffirmed this principle by rejected the prosecutor's "race-neutral" reason for the challenge to an African-American male juror. The person in question was a student whom the prosecutor claimed would be distracted by college obligations. However, as the Court recognized, there was a sitting white juror whose level of occupation and family distraction far exceeded that of the black juror, but who was not challenged by the prosecutor. (*Id* at p. 483-484.) This discrepancy was considered by the Court to be evidence that the prosecutor's "race-neutral" explanation was merely a pretext. (*Ibid; See People v. Lenix, supra,* 44 Cal.4th at 620.)

Even more recently, the Ninth Circuit Court of Appeal in *Ali v. Hickman* (9th Cir 2009) 571 F.3d 902, 916 cited to Miller-El in stating "The fact that [a proffered] reason also applied to [these] other panel members,

most of them white, none of them struck, is evidence of pretext." (*Miller-El, supra,* 545 U.S. at p. 248.)

Further, in comparing the answers of two jurors for this purpose it is only necessary to find that these jurors were "similarly situated" not identically alike. (*Miller-El II, supra,* 545 U.S. at 247 fn 6.) As stated by the Court, "A per se rule that a defendant cannot win a *Batson* claim unless there is an identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." (*Ibid.*)

b. Mr. Leonard

Regarding Mr. Leonard, at the time of the challenge, the prosecutor did not give an explanation for the challenge as the court did not find a prima facie case of discriminatory use of the peremptory challenge.[31] However, in response to appellant's objection to the peremptory challenge, she stated that Mr. Leonard was "not participating in the cooperative sense that all of the other jurors–they're watching counsel, they're listening to questions, he's just looking straight ahead. I found that kind of unusual, because no one is doing that out there." (16 RT 3225.)

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31. The prosecutor and the court effectively stated that appellant could not enter an objection on this ground based on a single peremptory challenge, and along with that the prosecutor chastised counsel for "misciting the law" when counsel argued that he was indeed entitled to make such a challenge. The court was mistaken. (*People v. Silva* (2001) 25 Cal.4th 345, 380.)

However, as the peremptory challenges against the black male prospective jurors mounted, the court compelled the prosecutor to further explain the reason for the challenge to Mr. Leonard. The prosecutor retroactively gave the following specific reasons for excluding Mr. Leonard from the jury, stating that Mr. Leonard believed that life without the possibility of parole was worse than death and stated that "for myself, I couldn't stand to be incarcerated forever." (16 RT 3383-84.) She further complained that Mr. Leonard stated that whether a person had a history of "hateful decisions" would effect his penalty vote and if the defendant didn't have such a history he might lean to the life penalty. (*Ibid.*) She further stated she excused Mr. Leonard because he believed in rehabilitation and would make her prove all of the special circumstances. (16 RT 3384) The court accepted the prosecutor's explanations as a "race-neutral." (16 RT 3385.)

To begin with, the prosecutor's "reason" regarding Mr. Leonard's statement regarding appellant's "hateful decisions" is so logically indefensible that it can only be viewed as an pretext to rid the jury of Mr. Leonard because he was an Afircan-American male. The whole point of the California death penalty law is to focus the jurors' attention on the statutorily stated aggravating and mitigating factors. (See *People v. Frye* (1998) 18 Cal.4th 894, 1015.) Those factors specifically encompass a

defendant's other acts of violence and "hate" (Penal Code section 190.3 (b)) as well as prior convictions (*Ibid.* 190.3 (c). They also encompass a defendant's good acts of charity and kindness or, at the very least, lack of prior "hateful" conduct. (*Ibid.* 190.3 (k).)

Mr. Leonard told the prosecutor that he would want to know something about appellant's history of violence and hate before he came to a decision about the penalty. There would be something terribly wrong with a juror who would not want this information. In addition, the fact that Mr. Leonard would lean toward life if this was appellant's first act of hate or violence would likely put him in the company of most prospective jurors judging the ultimate fate of an eighteen year old.

Just as importantly, this whole line of questioning was yet another cynical "hypothetical" that had absolutely no factual relationship to the case at hand. The charges against appellant were *not* his first acts of violence or evidence of "hateful decisions." The prosecutor knew full well that she intended to introduce penalty phase evidence indicating that appellant was involved in a violent gang culture and personally was involved in violent gang "jumping in" rituals, repeated assaults of innocent persons and violent assaults while in jail. (AOB, *supra,* p. 23 et seq.)

This so-called "race-neutral" reason was extracted from Mr. Leonard only after telling him that there "was nothing in the background.

This is the first time...there are no details." (9 RT 1733.) It was only after this misleading, questioning that Mr. Leonard stated that in such an instance, he would be "swaying towards life in prison." (*Ibid.)*

Seventeen of the eighteen seated jurors and alternates were white. Not a single one of them were questioned about first time "hateful decisions" or presented with the factually irrelevant hypothetical of a defendant whose first and only act of violent or hateful social deviance was capital murder. Further, none were asked how many special circumstances it would take to allow them to vote for death. This sort of contrasting voir dire resulting in a "race-neutral" explanation for the excusal of a member of the cognizable group in question is extremely suspect. (*Miller-El II, supra,* 545 U.S. at p. 255.)

If the prosecutor was as concerned about Mr. Leonard's feelings about such a hypothetical "first time evil" individual as she claimed she was, she certainly would have asked this question of other prospective jurors eventually seated. However, this questioning was reserved for a black male prospective juror, further evidencing that this supposed "race-neutral explanation" was clearly pretextual to facilitate the removal of a member of a targeted cognizable group. (See gen. *Pierre v. Louisiana* (1939) 306 U.S. 354, 361-362; *Ali v. Hickman* (9th Cir 2009) 571 F.3d 902, 916.)

Regarding the other "race-neutral" explanation that Mr. Leonard should be excused because of his opinions as to which penalty was worse, the following must be initially observed. Even discounting any racial motivations, the prosecutor's insistence that there was a correlation between a prospective juror's initial personal opinion of which is the "worse" of the two penalties and that jurors inclination to the follow the law as given by the judge is misplaced and illogical. In itself, the question as to which penalty a prospective juror thought was "worse" is virtually impossible for a juror to intelligently answer as the juror has no previous experience with being incarcerated in the prison system. Any such answer is pure speculation based upon a juror's personal preference based upon incomplete information.

In *Miller-El II, supra,* 545 U.S. at pp. 246-252, the voir dire relating to the panel's attitude as to which was the "worse penalty" virtually mirrored that in the instant case. The prosecution exercised peremptory challenges to several African-American prospective jurors, giving the "race-neutral" explanation that these jurors stated that they were not sure which was the worse penalty or stated that *for them* (emphasis added) life would be worse. In looking at the totality of the circumstances of the entire voir dire, the United States Supreme Court rejected this as a race-neutral reason. The Court pointed out that every one of the African-American

prospective jurors stated that regardless of these opinions, they would have no problems in imposing the death penalty under the law.

Further, the *Miller-El* Court stated that the plausibility of the state's argument was "severely undercut by the protection's failure to object to other panel members" who expressed views much like the challenged African-Americans. (*Miller-El, II, supra,* 545 U.S. at p. 248.)

In the case of Mr. Leonard, the prosecutor claimed that he should be excused because he thought life was worse that death. (16 RT 3383.) This was a mischaracterization of what Mr. Leonard said, the same type of mischarcterization used to excuse prospective jurors for their alleged inability to impose death under the law of *Witt*. (see Argument I.) When asked by the prosecutor why he wrote on his questionnaire that life without parole was the worse penalty, the following telling exchange occurred.

> Prosecutor: And can you tell me why you believe this is worse for a defendant.
> Mr. Leonard: Well, the person would have the rest of their lives to pay for what they did, you know, that it what I mean death, it's death you don't have to think about it any more.
> Prosecutor: So. You are saying that if you had to spend the rest of your life in prison you would think about what you did everyday?
> Mr. Leonard: I think I would.
> Prosecutor: What about someone who believed what they did was okay?
> Mr. Leonard: I think that's where the good versus bad comes into play to determine if that person should be put to death or not. (9 RT 1732.)

It is clear from this exchange that Mr. Leonard's belief that life in prison was the worse penalty was not based upon what was worse for any given defendant but, rather, his personal inherent sense of decency in that he would be haunted by the homicidal act his entire life. However, he recognized that the ultimate decision ultimately relies on the "good" versus "bad" analysis, meaning the law as the court and counsel had already described.

There is absolutely nothing in the balance of Mr. Leonard's written or oral voir dire to even hint that he would not follow the law exactly as the court would give it. He felt that sitting on a jury was a "civic obligation" (VI CT 1450, Q 37) and specifically rejected the notion that blacks were treated unfairly by the system. He also made it clear that he could "set aside religious, social or philosophical convictions" and reach a penalty decision based only upon the evidence heard at trial and the law as given by the judge. (VI CT 1480, Q 200)

Further, a comparative analysis of sitting white jurors, is another revelation of the pretextual nature of this particular "race-neutral" explanation. Seated Juror #4 stated in answer to Q 198 as to which penalty was worse stated that life in prison was worse stating "I can only base this on my personal choice. And I value freedom." (VII CT 1927.) However on

question 227 of the questionnaire, the juror gave a contradictory answer stating that death was worse. (VII CT 1932.) At the very least, these answers indicated that this white juror was at least conflicted about her own opinions. However, the prosecutor never even attempted to clear up this conflict in the voir dire (14 RT 2980 et seq), apparently being satisfied that none of this mattered very much as she had a juror who was not a black male.

The same situation occurred with white seated Juror # 5 who indicated in response to question 198 (VII CT 1927) that based on her perceptions, life was the worse of the penalties but then gave a conflicting answer in question 227. (VII CT 1932.) Once again, the prosecutor did not even bother to clarify these conflicting responses.

White seated Juror #10, in question 198, stated the question as to which penalty was worse was "too tough to answer". She proceeded to vacillate in her questionnaire answers between saying that death may be the worse sentence (VII CT 2230, Q 227) and stating that life appears to be the "more appropriate sentence." (VII CT 2229, Q 224.) She further stated that she would require overwhelming evidence for the death penalty. (12 RT 2604.) Again, none of this seemed to give the prosecutor pause.

White seated Juror #9 in response to question 198 stated that life was the worse penalty (VII CT 2225), then seemed to contradict himself on

question 227. (VII CT 2230.) This time the prosecutor questioned the juror about her feelings. (14 RT 3047-3050.) In doing so, the prosecutor established that this juror clearly believed that life in prison was the worse of the two penalties because, as also opined by Mr. Leonard, she felt that the defendant would have to live with the remorse. (14 RT 3047.) After additional questioning indicating that the juror felt that in spite of her feelings she could follow the law (14 RT 3048-3049), the following exchange occurred.

> Proseuctor: My concern is that you believe that life without the possibility is the worse possible punishment to give a defendant.
> Juror: Yes.
> Prosecutor: So if you believe that, and you believe that this case deserves the worse possible punishment, how could you ever impose the death penalty? Do you see what I am saying?...
> Juror: Well it was my understanding from the explanation from the judge, that there were several factors that have to be weighed here. (14 RT 3049-3050.)

From this exchange, it is clear that this juror believed that life was a worse penalty than death. Further, her answers virtually paralleled those of Mr. Leonard. Both believed that ultimately the decision would not be made on their personal opinion but the factors and the law. Both were willing to do their jobs under the United States Constitution and laws of the State of California. Only one was given their chance to do so. The juror who was

white remained sitting. The juror who was a African-American male was excused.

Alternative Juror #5, another white juror, made it clear that he also felt that life without parole was the worse of the two penalties. (9 CT 2571, Q 198.) However, on oral voir dire, the prosecutor limited her inquiry on this subject as to whether the juror would be able to impose the death penalty. (18 RT 3884.)

Further, white sitting juror #12, while stating that death was the worse penalty, indicated on her questionnaire that in general she would lean toward life without parole. (VII CT 2328, Q 224.) She was not even questioned by the prosecutor about her answer during the oral voir dire. (11 RT 2324 et seq.)

The above comparative analysis clearly demonstrates that the prosecutor's stated concern regarding Mr. Leonard's death penalty attitudes did not extend to a good number of the seated jurors or alternates. The prosecutor's repeated protestations that she was being "race-neutral" and only concerned about attitudes as to the death penalty ring utterly hollow in the face of her treatment of jurors who were not black males, demonstrating her "race-neutral" justification was pretextual.

The prosecutor's claim that Mr. Leonard's belief in "rehabilitation"

serves as a race-neutral reason for his removal from the jury is, again, a pretext to send home this reasonable and thoughtful African-American man. Once again, Mr. Leonard's very careful and precise answers were taken out of context. All that Mr. Leonard said about "rehabilitation" was he would only vote for life if he believed that a defendant could be "rehabilitated" in prison. (9 RT 1730.)

There is absolutely nothing about this statement that indicated that Mr. Leonard could not follow the law. The prosecutor's comment that no prospective juror who believes in rehabilitation would ever sentence a person to death regardless of what that juror may swear to in court is senseless. The whole point of the weighing process is to determine who should live and who should die based on all statutory factors including factor (k) which expressly permits the jury to consider any circumstance of defendant's character which would argue for a sentence of less than death. Therefore, a juror is supposed to consider whether he feels that a defendant is possessed of such a character that his time in prison would be productive or that the defendant may arrive at some state of personal redemption. (See *Skipper v. South Carolina* (1986) 476 U.S. at 1, 3-5; Eddings *v. Oklahoma* (1982) 455 U.S. 104, 110.)

There was nothing in Mr. Leonard's questionnaire or voir dire that he placed an inordinate emphasis on "rehabilitation," or that he could not

follow the law as given by the judge. However, none of this mattered to the prosecutor, who, according to the record, seemed to be far more interested in Mr. Leonard's racial point of origin than any individual thoughts he might have as an independent human being.

Further, once again, a comparative analysis, revealed that several of the sitting white jurors also indicated a personal belief in "rehabilitation" and its function in making a penalty decision. While not using the specific word "rehabilitation," seated juror #4 stated that life in prison would be "appropriate" depending upon "any potential (a defendant) may have left to contribute." (14 RT 2989.) She further explained, "I think a person with life in prison could still offer some positive contribution to society. If you are like writing books, helping other prisoners. It's not likely. You still have some life left, I guess." (*Ibid.*)

In spite of not using the word "rehabilitation" it could not have escaped the prosecutor's notice that Juror # 4 fully ascribed to the concept even to a greater extent than did Mr. Leonard. However, once again, what was bad for the black goose was not bad for the white gander. This juror, who spoke so clearly of rehabilitation, was seated with the prosecutor's blessing.

Similarly, seated Juror #11 twice stated on her questionnaire that the death penalty should be reserved for irredeemable people. (VII CT

2273, Q192; VII CT 2276, Q 209.) She reaffirmed this belief on oral voir dire. (4 RT 720.) There certainly may be some subtle differences between the concepts of "redemption" and "rehabilitation" but certainly not in this context. White seated Juror # 11 essentially stated that her penalty decision would be partially based on whether appellant could do something useful in prison. (VII CT 2273, Q 193.) This comment was a clear endorsement by this white juror of the concept of rehabilitation.

However, this juror also was allowed to sit on this jury, in complete contradiction to the prosecutor's own "race-neutral" explanation that any juror who believed in this concept would vote for life regardless of what he or she swore to at voir dire. (16 RT 3525.)

Alternate juror #6, also fully endorsed by the prosecution, stated specifically in her questionnaire that the penalty of life in prison without possibility of parole should be imposed "for a person who is truly sorry and can be rehabilitated to some usefulness and good." (9 RT 2619, Q 193.) Once again, this did not seem to particularly trouble the prosecutor. (19 RT 4027.) Alternate Juror #6, who was white was allowed to sit on appellant's jury, at the ready to decide Mr. Armstrong's fate. Mr. Leonard, an African-American male, whose views were essentially identical to this juror, was sent home.

Taking into account this comparative analysis, the prosecutor's alleged justification of dismissal because Mr. Leonard would give weight to rehabilitation was plainly pretextual. The prosecutor's claim of racial neutrality does not even bear the most casual consideration.

This pretextual challenge as to "rehabilitation" was very similar to that described in *Miller-El II, supra,* 545 U.S. 242- 245.) In *Miller-El, II,* an African-American prospective juror indicated on voir dire that he believed that the possibility of rehabilitation might affect his penalty verdict. However, this juror also stated that he had no moral, religious or philosophical reservations about the death penalty. (*Ibid.*) He also stated that his belief in rehabilitation would not prevent him from imposing the death penalty. (*Ibid.*)

The High Court noted that upon challenging this juror, the prosecutor "simply mischaracterized" the prospective juror's testimony by telling the trial court that the African-American juror stated that he could not vote for death if rehabilitation was possible, when, in reality the juror stated that he could impose the death penalty regardless of the possibility of rehabilitation. This is exactly what happened in the instant case. (*Miller-El, supra,* 545 U.S. at 242-245.) In addition, the Court noted, "If indeed (the challenged black juror's) thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he

accepted without reservations." (*Id.* at 244.) Such again was the situation in the instant case.

The above-discussed "race-neutral" explanations for the peremptory challenge of Mr. Leonard were nothing but flimsy pretext. They were not even internally consistent. When a comparative analysis was employed, the pretextual and cynical nature of the prosecutor's neutrality is fully laid bare. Several white jurors felt the exact same way as Mr. Leonard, but were allowed to be seated as jurors or alternates. This would be the pattern of all of the prosecutor's peremptory challenges to the four black men.

Regarding the "race-neutral" explanation that Mr. Leonard would make the prosecutor prove all of the special circumstances, Mr. Leonard never said he would do this. This so-called "explanation" arose from an incredibly confusing series of questions that the prosecutor posed to Mr. Leonard in the oral voir dire. (9 RT 1736-1739.) It was clear from this voir dire that Mr. Leonard did not understand the prosecutor's questioning until the end of this exchange. Upon finally ascertaining what the prosecutor was asking, Mr. Leonard clearly stated that he could impose death even if only one special circumstance was found true. (9 RT 1739.)

Not only did the prosecutor again misstate Mr. Leonard's answer, but a comparative analysis reveals the reality that the prosecutor was far

more interested in setting up a trap for this African-American male prospective juror than she was in obtaining an answer to what she considered a critical question. None of the seated jurors or alternates were subjected to this type of questioning. None was asked how many special circumstances it would take to allow them to vote for death. This sort of contrasting voir dire resulting in a "race-neutral" explanation for the excusal of a member of the cognizable group in question is extremely suspect. (*Miller-El II, supra,* 545 U.S. at p. 255.) As stated above, if the prosecutor was so concerned about this particular issue, she certainly would have asked the jurors eventually seated the same questions she asked Mr. Leonard. She did not, because this was not a real issue for the prosecutor. Removing Mr. Leonard, on any pretext possible, was.

It is clear from the above analysis that Mr. Leonard was removed from the jury for having the same thoughts and feelings that were perfectly acceptable in the white jurors who were seated. All of this makes the prosecutor's statement that she was concerned that Mr. Leonard was not "fully participating in a cooperative sense" absolutely unbelievable. It was unclear what the prosecutor even meant at the time she made this statement, or what sort of further "participation" she was expecting from Mr. Leonard. As any good prospective juror, he had no personal interest in the outcome; he didn't care who won or lost, who sat on the jury and who did not. He

simply sat quietly and minded his own business while the other prospective jurors were being questioned. There was no indication in the record that he was not paying attention or was creating a distraction during the questioning of other prospective jurors. The trial court, itself, stated that during the questioning of the other jurors, Mr. Leonard was concentrating on the judge. (15 RT 3225.)

Perhaps the prosecutor harbored some sort of delusion that Mr. Leonard's job when not being questioned was to hang on her every word and "fully participate" as if the jury selection process was a camp sing-along. More likely, this was yet another attempt to rid the jury of a member of a racial group that she didn't feel would vote for conviction and death. In light of the "totality of the circumstance," and the ultimate challenging of all of the four African-American males, her statement to the court was yet another pretext to excuse this juror. As the High Court in *Miller-El II* stated it "reeks of afterthought." (*Miller-El II, supra,* 545 U.S. at 246.)

Even without considering the challenging of the other African-American males, the above makes it clear that the challenge of Mr. Leonard was racially based and constitutionally unacceptable. The final composition of the jury–whether the final composition included one or more minorities or members of as cognizable group– is not dispostive. What is dispostive is whether the prosecutor struck even one prospective

juror based upon unconstitutional bias against a cognitive group. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) It is not necessary to establish a pattern of discriminatory challenges. The establishment of just one is sufficient for *Batson* purposes. (Ibid.) This was clearly established as to Mr. Leonard, alone.

In the instant case, the prosecutor not only misstated the responses of Mr. Leonard, but her explanation of the challenge was clearly pretextual in that other sitting white jurors had the same opinions as Mr. Leonard. As stated by this Court in *Silva*, deference is due to the trial court's findings of race-neutrality only when "the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva, supra,* 25 Cal. 4th at 386; see *People v. Fuentes* (1991) 54 Cal.3d 707, 720; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198.) *Silva* further held that, "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Ibid.*) The judge must be reasonably persuaded by the prosecutor that the challenge was not racially motivated. "If not persuaded otherwise, the judge may conclude that the

challenges rest on the belief that blacks could not fairly try a black defendant. This in effect attributes to the prosecutor that all blacks should be eliminated from the jury venire." (*Batson v. Kentucky* (1986) 476 U.S. 79, 101 (concurr opin of J. White).)

Hence, the trial court is not completed to accept the prosecutor's "race-neutral" reasoning on its face. The court must conduct a vigilant and probing search as to the real reasons why the prospective juror was excused, not blinding itself to the false reasoning of the prosecutor, reasoning that was laid bare within the "four corners" of the record. (*Miller-El v. Dretke, supra,* 545 U.S. at 3239-240.)

The trial court did not fulfill its responsibilities under *Batson*. As in Argument I, the court simply went along with the prosecutor's pretext and allowed the challenge of Mr. Leonard in spite of the many inaccuracies and inconsistencies in the prosecutor's argument.

A discriminatory intent on behalf of the prosecutor has clearly been demonstrated. A peremptory strike shown to have been motivated in substantial part by discriminatory intent can only be sustained if the prosecutor proves that race was not determinative. (*Snyder v. Louisiana* (2005) 552 U.S. 472, 485.) Further, "It does not matter that the prosecutor may have had good reason to strike the prospective jurors. What matters is the real reason they were stricken." (*Paulino v. Castro* (9th Cir 2004) 371

F.3d 1083, 1090.) The unconstitutional dismissal of Mr. Leonard is sufficient to mandate the vacating of the entire judgment in this case. However, on three more occasions, three more perfectly acceptable black men were removed from this jury. This was done until no more remained.

c. Roscoe Cook

Mr. Cook was the second black male juror to be challenged by the prosecutor. His high standing in the community and professional accomplishments and dedication to the law and ability to uphold it in a jury room have been documented. (Argument II, Section B 2 (a).)

In analyzing the legitimacy of the prosecutor's challenge, what must be first addressed is the tone and tenor of the *Hovey* voir dire conducted by the prosecutor. This is essential because the prosecutor's key "race-neutral" challenge to Mr. Cook was that he had a "personality conflict" with her. Mr. Cook was obviously a proud and respected man who responded to his jury summons and possessed a clear view of his role. He knew he was at the courthouse to decide a matter of life and death based upon the evidence and the law and not upon anything he may have endured as an African-American man during the course of his sixty-four years. He certainly was not at the courthouse to be asked trick questions designed to eliminate him from the jury.

The prosecutor's questioning of Mr. Cook concerning his "beliefs"

as to the death penalty was intentionally provocative and intended to confront Mr. Cook in such a way as to deliberately create a personality conflict. This type of confrontational and ultimately insulting questioning was unique to this man. None of the other prospective jurors had to endure anything like it.

As described in Section B 2 (b) of this Argument, Mr. Cook stated on voir dire that he had no "general feelings" about the death penalty and did not lean in either direction as to its imposition. (11 RT 2279-2280.) He stated that each case should be decided on its particular facts. He further stated that he could not possibly judge which penalty was worse but made it clear that he could vote for either penalty depending on the facts. (11 RT 2296.) He further stated that he could vote for the death penalty in a felony-murder situation. (11 RT 2296-2297.)

Any rational interpretation of Mr. Cook's above voir dire answers would result in a finding that he was a fair, honest man, whose neutrality as to the imposition of death would be an asset to any jury. However, the prosecutor became fixated, to the point of utter insensibility, on an ultimately irrelevant question. She began her harassment of Mr. Cook through the following exchange.

> Prosecutor: Okay. Here's my question to you. If you don't have an opinion regarding the death penalty, how will I know you will be able to impose it, should it be appropriate?

> Mr. Cook: You may not know.
> Prosecutor: Because you do not know what your opinion is regarding the death penalty, right?
> Mr. Cook: No, I didn't say that. I said "I don't have a disposition about that." (11 RT 2280-2281.)

Mr. Cook made it clear that what he said about the death penalty was that he didn't personally have any leanings on the superiority of one penalty to the other. However, even if the prosecutor's statement was factually correct and Mr. Cook did not have any "opinion" about the death penalty, logically the prosecutor's attempts to make a direct correlation between someone who has no ingrained opinions as to the death penalty and their inability to impose the death penalty lack any logical connection. The ideal death penalty juror should not have formed definitive opinions on the death penalty, as these opinions would likely be based on bias and prejudice. Further, it is quite possible that an individual could live his life without giving the imposition of the death penalty any thought at all until he was called for jury duty in a capital case. In any event, nowhere in the Mr. Cook's voir dire did he even suggest that he would not impose the death penalty, if appropriate.

Mr. Cook's response to his "opinion" on the death penalty was absolutely clear and very reasonable. However, only seconds later the prosecutor launched herself at Mr. Cook again with the same question, posited in a far more confusing and misleading form.

Prosecutor: Okay. Do you have an opinion on the death penalty.
Mr. Cook: Are we talking about the same thing? I said I didn't have an opinion about the death penalty–
Prosecutor: Okay
Mr. Cook: - - one way or the other
Prosecutor: I said to you, "I wouldn't be able to know whether or not you'd be able to impose the death penalty, because you don't know what your opinion is on the death penalty." Do you recall that..
Mr. Cook: Yes
Prosecutor: And then you said that you wouldn't know. And I'm asking you how can you impose the death penalty, if you didn't know what your opinion is. And you said you had an opinion. And I said , well, what is it?
And you said , well are we talking about the same thing? It's kind of confusing. (11 RT 2281.)

The prosecutor was right about one thing. This whole exchange was confusing, but not in the way she stated. In this single page of transcript, the prosecutor misstated the facts twice. First, Mr. Cook never said that he might not know whether he could impose death. In response to yet another confusing question from the prosecutor he stated that *she* may not know whether in a given situation he would impose the death penalty. Second, Mr. Cook never said he had an opinion as to the death penalty, except that he did not favor or disfavor it in principle. Ultimately, there is absolutely nothing objectively confusing about Mr. Cook's position. As stated in the answers to the questionnaire and in the early part of the oral voir dire, he made perfectly clear that he could impose the death penalty in

the appropriate circumstance and that his personal belief system mandated that he follow the law as given by the court. He simply had no personal opinion as to the theoretical morality of the death penalty. Mr. Cook attempted to explain this to the prosecutor several times. The prosecutor's seeming indifference to the facts and predilection to misstating the obvious intent of the prospective juror's clear response was intended to provoke this educated, rationale, thoughtful, mature man.

As such a man, Mr. Cook simply could not fathom the prosecutor's repeated line of questioning. He already informed her, in writing and orally, that he had no preconceived biases for or against the death penalty and that he could impose it under the law given the proper factual situation. That was his "opinion."

At this point, Mr. Cook began to become concerned at the turn the voir dire had taken. He asked the prosecutor why she kept asking him the same question over and over again and stated that this sort of questioning was not what he expected. However, his answer to her questions remained the same. (11 RT 2282.)

The prosecutor responded to this logical feeling of frustration by taking the voir dire on a course assured to invoke bad feelings on the part of Mr. Cook. She asked him if he "felt threatened" by her questioning. (11 RT 2282.) Once this question was asked, any hope of maintaining a

working relationship between the prosecutor and Mr. Cook forever disappeared. This personal confrontation form of questioning was not seen in her voir dire of the other jurors. The prosecutor's extraordinary conduct caused the "personality" conflict of which she later complained.

For some reason, the prosecutor then questioned Mr. Cook about his earlier career in teaching. The following exchange then occurred.

> Prosecutor: You were a teacher?
> Mr. Cook: Yes
> Prosecutor: Okay. What did you teach?
> Mr. Cook: Everything
> Prosecutor: You taught history?
> Mr. Cook: I taught all subjects.
> Prosecutor: Okay. Well, what are all subjects to you? Because see, I don't know what you taught, because I don't know you, and all subjects to you could just be math and English.. So that's why I am asking, what subjects did you teach? (11 RT 2284.)

Again, the prosecutor's questioning was provocative and insulting. Even if such questioning was at all relevant in a *Hovey* voir dire, it was done in such a manner as to deliberately exasperate Mr. Cook. Twice, Mr. Cook informed the prosecutor that he taught "all subjects." If the prosecutor was truly interested in this line of inquiry, that should have been the end of this line of questioning. Instead, the prosecutor treated Mr. Cook as if he was too stupid to understand a simple question, telling Mr. Cook that "all subjects" may mean to him just English and math, in spite of

the fact that Mr. Cook just stated that he taught history. In light of this questioning, it is not surprising that Mr. Cook would express his exasperation with the prosecutor by calling her "amazing."

After this rather deflating exchange, the prosecutor once again returned to her battering of the Mr. Cook with the same question as to his opinion as to the death penalty. Twice again, she asked how Mr. Cook could possibly impose the death penalty about the death penalty if he had no ethical opinions as to its use. (11 RT 2290-2291.) Again, she asked the unanswerable question as to how she "could be sure" that Mr. Cook could impose the death penalty. (*Ibid.*) Mr. Cook could only tell the prosecutor that he was just a citizen responding to the call of jury duty and reiterate his answers given earlier in the voir dire. (*Ibid*)

Mr. Cook was then given the "bank robbery" and "assault" hypotheticals. He stated that he could impose death on all of the hypothetical defendants in those situations. (11 RT 2294-2300.) Unable to simply accept his answers as she did for the seated jurors, she again asked him that based upon these answers "would you say that you are for or against the death penalty." (11 RT 2295) By this point, all that Mr. Cook could say was, "Lady, I keep telling you the same thing. I don't understand why you keep asking me the same thing." (11 RT 2295.)

However, in light of the fact that all four African-American prospective male jurors were excused from the jury for reasons that applied at least as equally to the white seated jurors, (discussed further below, with respect to Mr. Cook) it is easy to understand why the prosecutor continued along this line of questioning. Having decided that she wanted this educated black man off of the jury, the prosecutor's voir dire was set up in such a way to provoke Mr. Cook into feeling that the prosecutor was harassing him. She then feigned surprise and consternation that Mr. Cook would not answer her questions the way she wanted them answered and used this as a "race-neutral" explanation. (16 RT 3387-3389.)

Ultimately, this preposterous line of questioning yielded a spurious "race-neutral" reason to challenge to Mr. Cook. The prosecutor stated that Mr. Cook could not impose the death penalty because he had no "opinions" about it.

As stated above, Mr. Cook made it unmistakably clear that he could impose the death penalty in any number of circumstances, and would follow the law. He simply did not harbor any preconceived allegiance to it nor any animus against it. As such, Mr. Cook presented a perfect death penalty juror. He would not carry any set of beliefs as to the righteousness of either penalty, therefore, would not be even unconsciously compelled to ratify his preconceived beliefs through his verdict. He was situated

squarely in the middle. However, he was also a black man and this is what made all the difference to the prosecution.

A comparative analysis of the sitting white jurors reveals that two seated white jurors and two white alternate jurors also had no "general feelings" as to the death penalty. Yet, the position that so "troubled" the prosecutor when taken by Mr. Cook, was found perfectly acceptable when taken by these white jurors.

Questionnaire questions 223 and 224 read as follows:

> Q 223: Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a death sentence on a person convicted of a murder with special circumstances?
> Q 224: Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a life without possibility of parole sentence on a person convicted of a murder with special circumstances?

White Juror #5 answered both these questions with the statement "I have no thoughts."(VII CT1980.) In spite of these answers being very similar, if not identical to Mr. Cook's questionnaire response, the prosecutor did not follow up in any way during her oral voir dire. (7 RT 1315 et seq.)

Similarly, Juror # 8, a white male, answered "don't have any" to both of these questions. (VII CT 2130.) When asked on oral voir dire to explain this in terms of whether he "believed in the death penalty" this juror

stated, "I believe in it if it is warranted...if it is not warranted I do not believe in it." (5 RT 867.)

It is impossible to distinguish Juror #8's opinion as to his "belief" in the death penalty from Mr. Cook's. Juror #8's also clearly did not have any preconceived notions or loyalty to the death penalty. To this juror, as with Mr. Cook, it was not a matter of "belief." It was a matter of practical application. Yet, Juror #8 proceeded to sit on the jury with no opposition from the prosecution.

Alternate Juror #1, a white male, answered both questions 223 and 224 by stating "I can't formulated thoughts at this time." (VIII CT 2378.) Alternate Juror #4, also white, simply answered both questions with the word "none." (VIII CT 2525.)

This comparative analysis clearly demonstrates that the so-called "race-neutral" explanation that Mr. Cook could not impose the death penalty because he had no ingrained general feeling about the death penalty was another pretextual and cynical device to cull from this jury all African-American male jurors.

That Mr. Cook was not sure of which would be the worse penalty for any given defendant in no way indicated that he could not impose the death penalty. At no point did he ever even hint that his decision would at

all be effected by his inability to read the minds of prisoners facing the terrible choice of death or life in prison. Furthermore, as the comparative analysis that was done in the discussion of Mr. Leonard indicates, there were several white jurors sitting on the jury that had similar feelings.

The "race-neutral" statement that Mr. Cook could not set aside his personal beliefs was yet another misstatement. While Mr. Cook, in question 200 , wrote that he would not set aside his personal belief system, he made it perfectly clear throughout the voir dire that his belief system demanded adherence to the law and allowed for the imposition of the death penalty.

> Prosecutor: So what is your personal belief system with respect to the law?
> Mr. Cook: I'm going to follow the law.
> Prosecutor: I'm sorry. Could you repeat that.
> Mr.Cook: I'm going to follow the law. (VIII CT 2279.)

Yet once again, the prosecutor confabulated another alleged "race-neutral" explanation by either misquoting a black male juror or taking a comment completely out of context. There was absolutely nothing about Mr. Cook's personal "belief system" that would prevent him from imposing the death penalty. This was unequivocally spelled out to the prosecutor by Mr. Cook, himself, who then supplied her own version of the facts to the court.

Regarding, the prosecutor's claim that Mr. Cook had been "evasive" in regard to his exposure to racial prejudice, there was nothing evasive about his answers. When asked this question on the questionnaire (VI CT 1518, Q129) he stated that he was so exposed and wrote the word "nigger." When asked to explain this at the *Hovey* voir dire, he told the prosecutor that there was a lot of use of the word in society (11 RT 2306) but that,

> I don't waste a lot of time wondering if you're okay or if someone else is okay about race, I don't have enough time left in my life for that, you know. But I do need to know what somebody is not okay about race, because that might help me in a lot of ways. (11 RT 2308.)

While he said that his experiences would cause him to feel "sympathy" for other African-Americans (*Ibid.*), there was no indication that this would affect his role as a juror. In fact, when asked in the questionnaire whether he had any "racist or ethnic attitudes" he answered "little to none". (VI CT 1519, Q135) He further stated that he thought he was a "fair person" and "I will do the best I can no matter what!!!. (punctuation by juror.) (*Ibid.*, Q 137-138.)

The trial court accepted the prosecutor's tendered reasons as race-neutral in that Mr. Cook did not answer the questions posed to him, and,

noted that there was "a lot of friction" between Mr. Cook and the prosecutor. (16 RT 3394.) With this conclusory and perfunctory remark, another violation against the United States Constitution was perpetrated.

The law as described in the above subsection of this Argument regarding the challenge to Mr. Leonard applies equally to Mr. Cook. After a comparative analysis to the seated white jurors, it is plain that the same answers and attitudes that she used to justify the challenge to Mr. Cook were given and held by many of the sitting white jurors. The entire tenor of the voir dire was directed to baiting Mr. Cook into a confrontation. In any situation, this sort of engagement of an unsuspecting potential juror by any attorney is unseemly and unprofessional. In this situation, it was yet another piece of trickery to usher yet another African-American male out the courtroom door. With the court's improper acceptance of this challenge, the prosecutor was halfway toward her goal of eliminating all African-American males from appellant's jury. She would take her next step with Ethan Walters.

d. Ethan Walters

The challenge of Ethan Walters demonstrated beyond any possible doubt that the prosecutor would not suffer a black male to sit on the jury. As stated above in this Argument, Mr. Walters was a well educated, highly

accomplished and very successful member of the community who designed and maintained communication satellites. If anything, his personal views as to the imposition of the death penalty seemed to favor the prosecution, as he felt that the process was too slow and for it to have any deterrent effect, more executions needed to take place. He stated he could faithfully follow the law and even though he personally would prefer life in prison over the death penalty, he understood that not all people felt that way and he would be able to impose the penalty according to the law. He was a man of integrity, accomplishment and reason.

However, the prosecutor exercised her third peremptory challenge against an African-American male juror against him. (16 RT 3372.) The court, now understanding that the prosecutor was challenging every black male on the venire, indicated that it found a prima facie case of discriminatory exclusion and asked for the prosecutor's "race-neutral" explanations.

As with Mr. Leonard and Mr. Cook, the first of the prosecutor's explanations was that Mr. Walters believed that a life sentence was a more severe sentence than death. (16 RT 3375.) This was yet another mischaracterization of what the prospective juror actually stated. Actually what Mr. Walters really indicated on his questionnaire was that *for him*

(emphasis added) death would be preferable "but I can understand someone wants to live or is 'actually' innocent would not (want to die)." He further made it perfectly clear at the *Hovey* voir dire that while he preferred death *for himself*," (emphasis provided), he would have no problem in imposing death under the law given by the judge. (12 RT 2399-2401.)

Mr. Walters' willingness to impose the death penalty in the appropriate situation can be seen in his other answers. He stated that he could impose the death penalty in an aiding and abetting situation (12 RT 2400-2401), would base his verdict on the evidence (12 RT 2411), and could impose the death penalty even if only one person died. (12 RT 2413.) He also stated that he could impose death on all of the perpetrators in the prosecutor's hypotheticals, including the driver of the car in the bank robbery hypothetical.(12 RT 2410-2413; 2417-2421.)

In summary, there was nothing, whatsoever, in the any phase of Mr. Walters' voir dire that indicated he could not follow the law as given by the judge or that he thought that life without parole was the worse of the two penalties in any global sense. In addition, as discussed above, as with Mr. Leonard, a comparative analysis with the sitting jurors clearly shows that the prosecutor endorsed several white jurors whose opinions as to the relative degree of the penalties were comparable or even more favoring a

life sentence than those of Mr. Walters. Therefore, as demonstrated above, the prosecutor's statement to the court that she had perempted all jurors who felt that life was a harsher punishment than death was not true. (16 RT 3478.)

The prosecutor also argued that by stating that he didn't "have any feelings one way or the other" about the death penalty, therefore he could not impose it. (16 RT 3378.) Apparently, the prosecutor based this "race-neutral" reason on the following exchange.

> Prosecutor: So you are going to go in there (the deliberation room) and follow the court's instructions and you are going to deliberate and come out with a verdict you feel is appropriate in this case based on the evidence and nothing else, is that accurate?
> Mr. Walters: Yes
> Prosecutor: Okay. So would it be accurate to say that you are for the death penalty?
> Mr. Walters: I'd say I don't have any feelings one way or the other for it like- -
> Prosecutor: When I say "for it" not that you are protesting for it, something like that, but you are not against it.
> Mr. Walters: Right, I am not against it.
> Prosecutor: You don't believe that California should abolish it?
> Mr. Walters: No (12 RT 2411.)

It is clear from the above that the prosecutor's quotation of Mr. Walters that he "didn't have any feelings about it (the death penalty)" was a complete misstatement of what Mr. Walters actually said. After stating

that he didn't have any personal feelings one way or the other, he stated that he was not against the death penalty and that California should retain it. (12 RT 2411-2412.) Further, Mr. Walters questionnaire answers made it clear that he had thought the death penalty over quite carefully. (VI CT 1577 et seq.) Mr. Walters statement that he didn't have any feelings one way or the other was simply an expression of neutrality. This quote was taken completely out of context and in no way represented what Mr. Walters told the prosecutor and the court. Once again, the prosecutor took a statement of a African-American male and twisted it in such a way to suit the purposes of her argument.

Even if the prosecutor's statement was factually correct and Mr. Walters did not have any "feelings" about the death penalty, as with Mr. Leonard and Mr. Cook, the prosecutor's attempts to make a direct correlation between someone who has no ingrained opinions as to the death penalty and their inability to impose the death penalty lack any logical connection. Nowhere in the Mr. Walters' voir dire did he even suggest that he would not impose the death penalty. He actually was a proponent of rapid trial and execution where appropriate. (VI CT1578, Q178-179, Q 183.)

In addition to the comparative analyses done above, another

comparison is illuminating. Several of the white jurors approved by the prosecutor indicated that they never thought about the death penalty at all before coming to court, a circumstance that could logically be said to show that they had no strong belief s "one way or the other" about its imposition. Question 179 of the questionnaire reads as follows:

> Have you ever thought about whether you were for or against the death penalty before coming to court? _____yes _____no What were your thoughts?

Four seated jurors answered this question in the negative. (Juror # 4, VII CT 1925; Juror #5, VII CT 1974; Juror #7, VII CT 2074; Juror #8 VII CT 2124; Alternate #1, VIII CT 2372; Alternate #4, VIII CT 2519). All of these jurors were white and none of them were challenged.

Yet another alleged "race-neutral" reason offered by the prosecutor was that Mr. Walters was an engineer and because of this the prosecutor could never prove the case to his satisfaction. (16 RT 3376.) To say that the logic of this "reasoning" is tortured would be charitable. As pointed out by appellant's trial counsel, the fact that Mr. Walters was careful at his work and did perform his job in a professional manner hardly disqualified him as a good juror. However, what is far more revealing about the prosecutor's true intent is that there was another engineer seated on the jury, Juror # 11.

As indicated in question #7 (VI CT 2239), he had been working as an engineer for various large oil companies since 1979. At the time of his completion of the questionnaire, the juror was overseeing plant operations at a Conoco/Phillips plant. (*Ibid.*)

None of this drew the slightest bit of attention from the prosecutor, who allowed this white juror to sit in spite of the fact that he had the same "disability" as Mr. Walters. This particular pretextual reason, in and of itself, speaks volumes about the prosecutor's true intentions, and the court's failure to pay sufficient attention to them. The trial court was, or should have been aware that there was a white juror on the panel who was also an engineer. It should have then conducted "a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. " (*People v. Silva, supra,* 25 Cal. 4th at 386.) If it had done so, the blatant pretextual nature of this allegedly "race-neutral" explanation would have jumped off the pages of the transcript. However, as with the *Witt* cause challenges (Argument I, *supra*), the trial court simply allowed the prosecution to complete her purge.

As with the other African-American male jurors, it is obvious that the prosecutor's "race-neutral" reasons are based upon misquotes of their actual positions or contrivances that do not withstand comparative juror

analysis. Time and time again, the four black male jurors are challenged for reasons that were not even considered by the prosecutor when evaluating the white jurors. Time and time again, the statements of these four men were taken out of context and twisted in an attempt to get them excused.

This is seen again when the prosecutor claimed that Mr. Walters should be excused because he believed that the death penalty should be "reformed like affirmative action." (12 RT 2412.) This statement is again taken completely out of context, making it look as if Mr. Walters was creating a racial issue out of the death penalty. What is clear from the entirety of Mr. Walters voir dire is that his concern was that unless the death penalty was not only imposed but used, there will be no deterrent effect. However, he asserted that if effectively used, capital punishment will serve as a deterrent. (VI CT 1578, Q 178 ; VI CT 1579, Q. 186.) Mr. Walters also made it clear that his general views would have no effect on his penalty vote in this particular case. (12 RT 2409-2410.)

The pretextual nature of the prosecutor's alleged justification is demonstrated by the fact that there were seated white jurors who indicated in their respective questionnaires (Q 183) that they were not satisfied with the way the death penalty was being enforced, either stating that it was used "too seldomly"(sic) or "too randomly." Jurors #4 (VII CT 1925), Alternate

1 (VIII CT 2372), Alternate #2 (VIII CT 2421), and Alternate # 3 (VIII CT 2470) checked the questionnaire box that the death penalty was used "too seldomly" (sic). Jurors #7 (VII CT 2074), # 8 (VII CT 2124), #9 (VII CT 2174), # 12 (VII CT 2322.), Alternate # 4 (VIII CT 2519), Alternate # 5 VIII CT 2569) and Alternate # 6 (VIII CT 2618) all checked the questionnaire box that the death penalty was used "too randomly."

The improper challenge of all of the Afircan-American male jurors and the prosecutor's transparently pretextual reasons made the rest of her "reasons" more than just highly suspect; they made them totally lacking in credibility. The prosecutor "reasoned" that Mr. Walters "seemed to have a lot of information about the law," because he was familiar with the terms "intent" and "aider and abettor," and that this would in some unexplained way affect his judgment. The reality is that it does not take special legal knowledge for an intelligent, educated person to know that intent is a critical element in the criminal justice system. Further, the prosecutor left unstated as to how this "knowledge" might work to her detriment.

The prosecutor's explanation that Mr. Walters felt that prosecutor's questions were "overzealous" was yet again taken out of context. In his questionnaire, Mr. Walters did state that his general opinion of prosecutor's "tend to be overzealous to convict." (VI CT 1550, Q42.) However, he also

stated that he thought defense counsel tended to "manipulate the system to win." (*Ibid.,* Q44.) However, Mr. Walters stated that both these opinions were "based on TV shows" and "obviously, I don't give this opinion much weight." (*Ibid.,* Q 43,45.) The trial judge confirmed that little weight should be given to either of these general opinions. (16 RT 3378.)

The prosecutor also cited as a "race-neutral" reason that Mr. Walters stated that he had been pulled over by the police several times for "questionable reasons," and that he felt that the death penalty was based against the economically disadvantaged. (16 RT 3377-3378.) Before discussing the particulars of this "race-neutral" reason, the following must be restated. The rationale behind the whole concept of "cognizable groups" vis a vis the purposes of jury selection has very little to do with the members of this group having some identifiable physical characteristic. The designation of a group of people as "cognizable" has far more to do with their shared life experience and mutual group perspective. As stated by this Court in *People v. Wheeler*, *supra,* 22 Cal.3d at p. 266-267;

> ...(in) our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and

> hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

As similarly stated in *People v. Estrada, supra,* 93 Cal.App.3d at 90, citing to *United States v. Guzman, supra,* 337 F.Supp.at 143-144, affirmed 468 F.2d 1245 (2d Cir.), *certiorari* denied 410 U.S. 937;

> There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. That is, The group must have a community of interest which cannot be protected by the rest of the populace.

African-American males are considered a cognizable group not simply because of their skin color and sex. They are so considered because they may share the some of the same general life experiences which may not be shared by all others, thus have perspectives to offer during the course of deliberation as well as perspectives and perhaps even biases against certain aspects of our society. Suffice it to say that the treatment of such persons since they arrived in shackles at our shores, by society in general and institutions of power in particular, is not a source of pride to any of us. It

cannot be disputed that in the Los Angeles area, African-American males have been inordinately stopped by the police, been incarcerated in disproportionate numbers, and in general been subjected to economic deprivation in far greater numbers than their white counterparts. This is simply part of the history of our nation, a history that all people of good will have struggled to change.

Therefore, the prosecutor's peremptory challenge of Mr. Walters because of his perceptions or interactions with the criminal justice system is simply code for black men need not apply. Certainly, if Mr. Walters indicated some animosity toward the system, a peremptory challenge would have been appropriate. However, as observed above, Mr. Walters was as solid a citizen as could be found. On many occasions he swore that he could follow the law, a law that he still honored in spite of some concerns and negative experiences.

All of the "race-neutral" reasons given for the challenge to Mr. Walters were pretextual. When joined with the pretext in the reasons for the challenges to Mr. Leonard and Mr. Cook, as described above, there is no room for any doubt that the prosecutor's motivation for these challenges was to rid the jury of African-American males. The final challenge to the

last of the African-American prospective jurors was as predictable as it was blatant.

e. Reginald Payne

The prosecutor's peremptory challenge of Roscoe Payne completed her successful campaign to rid the jury of African-American male jurors. The court found that a prima facie case of deliberate exclusion of a cognizable group and asked the prosecutor to provide an explanation. The prosecutor asserted that because of the incidents involving Mr. Payne's sons, he bore animus against the Long Beach Police Department. (16 RT 3457-3458.)[32] She also offered Mr. Payne's statement that he thought that the death penalty was times "overused" in certain jurisdictions, although she admitted that Mr. Payne stated that this would have no effect on his judgment in this case. (16 RT 3458.)

The prosecutor also offered that Mr. Payne stated that he had been called as a juror on two murder cases and that he stated that it wasn't always pleasant to do what had to be done. (16 RT 3459-3460.) She also indicated that she was "disturbed" by Mr. Payne's attitude that because of the horrific conditions in the California prison system, life in prison was the

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32. Mr. Payne indicated that he was upset the way two of his children were treated in chance encounters with the police. However, there was no indication that this Mr. Payne would even consider this in his deliberations in this case.

worse penalty. Because of this, the prosecutor stated that Mr. Payne could not impose the death sentence. (16 RT 3460-3461.) She further stated;

> I don't believe that somebody, one, who believed that life without the possibility of parole is a more severe punishment tan death can actually impose the death penalty, because they believe that spending the rest of *their life* in prison would be the more severe punishment that could be imposed. (16 RT 3472; emphasis supplied.)

The trial court initially rejected these explanations, and properly denied this peremptory challenge. (16 RT 3479-3480.) In response to the court's ruling, the prosecutor embanked upon an argument laced with misstatements, self-pity and hyperbole. She accused the trial court of branding her as a "racist." (16 RT 3480-3481.) [33] She further stated that Mr. Payne "indicated that he is not going to vote for death in this particular case" and, without any factual basis told the court that Mr. Payne was going to "hang this jury." (16 RT 3488.) In support of this baseless prediction, the prosecutor stated

> ...even if we get a conviction, I see this juror as ripe for the defense attempting to get him to change his mind and nullify the verdict that we may get in this particular case. He has basically told the defense 'if I'm on the jury, come see me,

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33. No one even suggested that the prosecutor was a "racist" and such as statement from her evidence the petulance and over-aggressiveness seen throughout the trial. The problem was not that the prosecutor didn't like African-American males. She just didn't like them on this jury.

> because I'm going to be going over it and over it in my mind, and maybe I will find a reason to change my mind.[34] (RT 3523.)

She further stated that Mr. Payne mentioned a certain belief in "rehabilitation" in his voir dire answers. She stated that "California was not a rehabilitation state," and claimed that Mr. Payne will not impose the death penalty because he believes people can be rehabilitated. (16 RT 3525.) After a recess, the court abruptly changed its ruling, stating that Mr. Payne's feelings about prison conditions, the ratio of incarceration of blacks and the overuse of the death penalty created a "race-neutral" reason for the exercise of the prosecutor's challenge. (17 RT RT3537-3538.)

The prosecutor's "race-neutral" explanations are nothing but more misstatements of fact and baseless accusations. Mr. Payne, was an accomplished black man, who currently managed a sanitation plant for the people of Los Angeles County, who served his community by sitting on four juries and organized a Neighborhood Watch to stand up to violent gangs. He made clear his dedication to the law and absolute willingness to set aside any personal feelings he may have to uphold the law to the letter.

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34. It is hyperbolic, almost paranoid statements like this that make it very hard to take any of the prosecutor's "race-neutral" arguments seriously. Not only is there absolutely no basis in fact for such an absurd claim, but the prosecutor is apparently trying to suggest to the court that she has uncovered some sort of unspoken conspiracy between this black prospective juror, the black appellant and his black attorneys to circumvent the integrity of the system.

Yet the prosecutor characterized Mr. Payne as someone who could not be trusted, a person who would act in league with the defense to "nullify" the verdict in this case. She characterized him as being the type of person who would allow his personal feelings to hold sway over his obligation to the law and whose belief that some people could be rehabilitated would translate into him being completely unable to render a death verdict, regardless of the facts in the instant case.

None of this was true. The prosecutor's concern about Mr. Payne's opinions about which was the worse penalty and the concept of rehabilitation were nothing but pretext as said concern did not extend to many of the sitting white jurors. (Argument II, *infra.*) As argued above, many of the seated white jurors felt much as Mr. Payne did regarding which penalty was worse and the concept of rehabilitation.

Further, the concept that the imposition of the death penalty was a very serious matter which deserved careful thought was hardly a radical notion. Mr. Payne simply expressed a concern that in other jurisdictions, the authorities had expressed a concern about the fairness of their systems, and it was necessary to take special care that this situation did not happen in California. (12 RT 2881.) However, he stated that this would not affect his

ability to follow the law in this case and there was nothing in his voir dire that indicated the contrary. (12 RT 2884.)

A comparative review of the voir dire of the sitting white jurors, reveals the same general concerns about the death penalty that Mr. Payne raised. Juror # 2 stated that she would vote for the death penalty only for "heinous crimes" and where the evidence was "overwhelming," where "everything pointed to (his) guilt." (13 RT 2792.) She further stated that the proof would need to be "100%" (13 RT 2796) and "indisputable." (13 RT 2798.) Juror #4 stated that it would be "difficult, but not impossible" to sit on a death penalty case. (VII CT 1928, Q 203.) She also expressed a concern over errors in the use of the death penalty in other jurisdictions. (14 RT 2985-2987.)

Juror #5 stated in the questionnaire that the death penalty was "a needed but a sad way to punish somebody." (VII CT 1974, Q 178.) Juror # 10 stated in the questionniare that the imposition of death was "not (an) appealing decision to make." (VII CT 2223, Q. 178.) On oral voir dire the juror stated she would require "overwhelming evidence" for the death penalty. (12 RT 2604.) Juror # 5 also stated she could not impose death on the driver in the "bank robbery" hypothetical. (12 RT 2614.) Juror # 11 stated that it would be difficult to sit on a death penalty jury as it was a

"hugely serious decision." (VII CT 2275.) Alternate # 6 similarly stated that it would be difficult to sit on a death penalty as it was an "awesome responsibility." (VIII CT2621, Q 203.) She was also concerned about the conviction of innocent people. (19 CT 4029.)

Alternate # 5 indicated on her questionnaire that, "I am a bit apprehensive about someone's life being put in my hands," (VIII CT 2540, Q 30) and said it was something she would be thinking about everyday. (18 RT 3881.)

In short, many of the seated white jurors were at least as concerned by the death penalty as Mr. Payne. However, their reservations meant little to the prosecutor, who, for the most part, did not even bother to probe into them.

Regarding Mr. Payne's comments about blacks being incarcerated and on death row in a greater proportion that other racial groups, Mr. Payne's statement was in response to a question from the prosecutor. (17 RT 3593-3596.) However, as Mr. Payne ultimately responded to the prosecutor's continuing probing, "Why are we, at this point in our history. Why are we denying a fact?" The following exchange then occurred,

> Prosecutor: Okay. I understand exactly what you are saying. That makes sense. Now with that in mind , are you going to take that into consideration in this particular case?

Mr. Payne: No, that's not my job. (14 RT 2896.)

In essence, at the *Hovey* voir dire, the prosecutor accepted Mr. Payne's observation as being one of fact and not a demonstration on animus against the state. More importantly, when asked if this fact would effect his judgment, Mr. Payne, fully understanding the role of a juror through his past experience, stated that he would not. This observation had great significance coming from a man who sat on four juries, including two murder cases. He knew what a juror's job was and knew that it was not up to him to change the law or make a social statement.

The same basic facts of life and law applied to Mr. Payne as applied to Mr. Walters. The reason why African-American males are considered a cognizable group is because their perspective and etperience may differ from those of other classifications. As stated above, The United States Supreme Court, as well as this Court made it clear that this perspective and experience must be given voice in the petit jury. (*People v. Fields*, *supra,* 35 Cal.3d at 342.) The fact that Mr. Payne may have shared this perspective and experience is not a race-neutral explanation. If it was, this voice could be silenced by any prosecutor who wishes to do so.

The fact that Mr. Payne rendered decisions on two separate murder cases, makes it clear that he can subrogate any personal discomfort

he may have in judging and impose a very serious judgment on his fellow man when the law requires him to do so. Apparently, what the prosecutor wanted was a jury that discounted all sympathy and human feeling, ready to condemn without a single hesitation or question to the prosecutor, the state's agent. Because of the history of the black male community in the United States, and their possible sympathy with appellant, the prosecutor could suffer no members of this cognizable group to be allowed to remain on the jury.

Mr. Payne was the last African-American male prospective juror left in the venire panel. It is for this reason alone he was the last to be excused. Like the other three African-American prospective jurors, he was challenged and ultimate excused not because he was unable to fairly decide the matter or because of his views. He was challenged because he was a member of group which had a constitutional right to bring their backgrounds and experiences to the jury box..

The improper challenge to and excusal of even a single prospective juror for racially motivated reasons is cause for reversal of the judgment. The prosecutor improperly challenged all four African-American males on the panel and the court accommodated her.

f. Summary

This Court has made very clear its position on the type of insidious racial discrimination that permeated the jury selection process in this case. Citing to *Miller-El II*, this Court warned about the "troubling" and "blatant" ways "in which racism can infect the justice system." (*People v. Lenix, supra,* 44 Cal.4th at p. 615.) This Court also recognized the long-standing commitment of the High Court "to eradicate this pernicious influence." (*Ibid.*)

This Court has always shared such a noble and absolutely essential goal. While hopefully we have elevated our courts above the more obvious racism of past generations, the more subtle, manipulative exclusion of an entire racial group from the jury still exists, and existed in the instant case. The petit jury is the people's most hallowed protection against government excess. It remains one of the few duties of citizenship in which a person may directly play a role in American democracy. Shawn Leonard, Roscoe Cook, Ethan Walters and Reginald Payne, were, by any measure, good citizens of the United States and the State of California. They sought only to serve their community. They were denied their right to do so by a prosecutor who was able to manipulate the system to prevent them from doing so because they didn't pass her standards as to which racial groups

did or did not serve her purpose; the conviction and execution of Mr. Armstrong. The above argument makes clear that any contrived prosecutorial remonstration to the contrary are engulfed by the totality of the record of this case.

> When the government's choice of jurors is tainted with racial bias, that 'overt wrong'...casts doubt over the obligation of the parties, the judge and indeed that court to adhere to the law throughout the trial.[citation omitted] That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality. (*Powers v. Ohio* (1991) 499 U.S. 400, 412; *Georgia v. McCollum* (1992) 505 U.S. 42, 49.)

The best evidence of discriminatory intent will most often be the conduct and actions of the prosecutor. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477.) The conduct of the prosecutor in this case was singularly hostile to the impanelment of a constitutionally sanctioned jury. The instant case gives offense to all people who respect the law and our system of justice. However, it most offends the condemned. Jamelle Armstrong was entitled to a jury free from this sort of racial manipulation. In addition to being protected by the Equal Protection Clause, appellant was entitled to a jury comprised of a cross-section of the community; meaning the entire community of Los Angeles, not just the part of the community that the prosecutor felt would be prone to conviction and death.

Mr. Armstrong was deprived of such a jury, and was deprived of his rights under the Equal Protection Clause of the United States Constitution and Sixth Amendment right to a jury representing a fair cross-section of the community. Under the Constitution of the United States and the unequivocal mandates of both this Court and the Supreme Court of the United States, the manner in which Mr. Armstrong's jury was selected renders its verdicts null and void.

Mr. Armstrong's conviction and death sentence must be reversed by this Court.

INTRODUCTION TO ARGUMENTS III-VI

On four separate occasions, the trial court, without legal cause, prevented appellant's counsel from presenting evidence that would have supported the heart of the defense; that appellant lacked the specific intent to commit the crimes in question and that he did not, in fact, commit any sexual offenses against the victim, nor murder her. The cumulative effect of the court's error was to deprive appellant of evidence that would have supported his own testimony, irrevocably damaging the defense and destroying appellant's credibility. The court's errors deprived appellant of his right to Due Process of Law, a fair trial and effective assistance of

counsel and a reliable determination of guilt and death eligibility under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as state law as set forth by this Court.

Further, this excluded evidence was, by its very nature, would have served as mitigating evidence in the penalty phase of this case. This excluded evidence would have served to inform the jury that appellant was not the monster portrayed by the prosecution, but rather a young man who got caught in the wrong place, at the wrong time, with the wrong companions. As such, the exclusion of the evidence also deprived appellant of his right to a fair determination of penalty under the Eighth and Fourteenth Amendments to the United States Constitution.

III. BY DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE OF THE VICTIM'S STATE OF INTOXICATION AT THE TIME OF THE CRIME, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW, EFFECTIVE REPRESENTATION OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, SPECIAL CIRCUMSTANCES AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the

corollary provisions of the California Constitution, including his rights to due process of law, to present a defense, a fair trial, effective assistance of counsel, and reliable determination of guilt, special circumstances, and penalty, because the trial court erroneously precluded evidence of the victim's intoxication.

B. Procedural and Factual Summary

On January 27, 1994, at a pre-trial hearing, the prosecutor orally requested that evidence that the victim was intoxicated not be allowed before the jury. (3 RT 250.) While the prosecutor never stated the grounds for this request, the court characterized it as a Motion to Exclude under Evidence Code section 352, and questioned appellant's counsel as to this evidence's relevance. (*Ibid.*)

Counsel originally informed the trial court that the relevancy would be shown "when we get to the defense phase of the case." (3 RT 250.) However, the court insisted that there was a Motion to Exclude before it, and an offer of proof was required. (*Ibid.*) The trial court further asked, "Well, I will ask you how is it relevant? How is the toxicology of the victim in a murder case relevant? If she was drunk, should she be murdered?" (3 RT 251.)

Counsel stated that he could not make such an offer without compromising the defense. (3 RT 251.) The court then ruled that until counsel made an offer of proof, there would be no mention of the toxicology issue. (*Ibid.*) While counsel found this acceptable, the prosecutor objected, stating that in order to properly voir dire the prospective jurors she needed to know presently whether this type of evidence would eventually be admitted. (3 RT 251-252.)

The trial court reversed itself, telling counsel to make an offer of proof, immediately. (3 RT 252.) The prosecutor then revealed that there was a toxicology report received from the medical examiner, she specifically wanted excluded. (3 RT 255.) The trial court once again inquired about the relevancy of this report. Counsel stated that it would become clear when the defense presented its case. (3 RT 255.) However, after being informed by the trial court that he must articulate some relevance, counsel stated that it would be relevant to both the credibility of appellant, and what the victim's actions were prior to her death. (3 RT 256.)

Counsel further stated:

> (The victim's) sobriety would tend to support the believability of (appellant's) statement to the police officers as transcribed in the audio tape and transcribed from the audiotape in question. (3 RT 257.)

In response to the trial court's further inquiry about relevance, counsel argued;

> There is a statement not only that she, by him, that she is inebriated, but that she says the words "Fuck you niggers, all niggers should be dead" and it goes to what the state of mind of the party was at the time of the attack. Was it to rob? Was it to rape? Was or what was it? In other words there needs to be specific intent on his part to rob, to rape...The People's theory is that the attack was for the purpose of robbery and rape, because the attack is, because the person who was inebriated, in other words she uttered those words in the presence of three black individuals that, "fuck you niggers, all niggers should be dead." Whether or not the attack was for the purpose of robbery, rape or some other purpose. And the key issue is this, what a sober person, we have a lone white female in the hours around 12:00 midnight out in the streets, confront a person or three young black individuals and utter those words. I think the trier of facts should know this so they can make a determination that (appellant) is being truthful when he says she uttered these words. (3 RT 257-259.)

Counsel further argued that the importance of this evidence was its bearing upon whether appellant acted with the required intent to prove some of the crimes or special circumstances charged, or whether he acted out of revenge. (3 RT 262-263.)

The court excluded this evidence on the ground that it was irrelevant. In addition, the court indicated any relevance that the evidence could possibly have was substantially outweighed by

> the probability that its admission will create a mini-trial whether or not the person is in fact drunk or under the

> influence and will create substantial confusion as to the real issue in this case and will mislead the jury as to whether or not the seminal issue in this case is the specific intent of the defendant. (3 RT 263-264.)

B. Legal Argument

From its opening statement, the theory of the prosecution in this case was that appellant, Pearson and Hardy approached the victim for the purpose of robbing and raping her. (19 RT 4152.) When she was uncooperative they beat her, assaulted, raped her and eventually murdered her. (19 RT 4153.) During the guilt phase of the trial, the prosecutor continued to advance this theory, and in her summation she told the jury that the three men crossed the street to the victim with the express intent of robbing her and raping her. (24 RT 5305.) She further argued that the victim's death was a result of the crimes committed against the victim by appellant and his companions, who put into action their already formed intent. (24 RT 5305-5307.)

In view of the prosecutor's theory of the case, the evidence of the victim's intoxication was most relevant and the court erred in excluding it from the jury's consideration. Appellant's statement to the police and testimony to the jury was that the victim's use of racial epithets started the entire exchange. As further stated, such evidence clearly went to the critical issue of appellant's intent. Without evidence corroborating appellant's

account, appellant's statement and testimony would be easily disregarded, especially in the light of the prosecutor's vehement argument that the crimes were premeditated. Reasonable jurors would expect to hear evidence of intoxication if it existed. Excluding such evidence, allowed them to infer- falsely- that appellant's account of the encounter was fabricated. The excluded evidence provided corroboration and an explanation for a lone, smallish white woman confronting three young black men with the word "nigger" on an otherwise empty street after midnight.

Therefore, the evidence of Ms. Keptra's intoxication would have been powerful circumstantial evidence that appellant was telling the truth when he testified that on the night of Ms. Keptra's death he was not prowling the streets looking for someone to rape and rob. The exclusion of this evidence prejudiced appellant by denying him a viable defense to murder under the felony-murder theory. The jury was instructed on the felony-murder doctrine. (3 CT 819.) A conviction of murder under this doctrine requires proof beyond a reasonable doubt that the defendant acted with the specific intent to commit the predicate felony. This is true even though the predicate felony may be a general intent crime. (*People v. Hart* (1999) 20 Cal.4th 546, 608; *People v. Hernandez* (1988) 47 Cal.3d 315,346.) "Under the felony murder doctrine, the intent required for the

conviction of murder is imported from the specific intent to commit the concomitant felony." (*People v. Sears* (1965) 62 Cal.2d 737, 745.)

In *People v. Hood* (1969) 1 Cal.3d 444, 456-457, this Court expressed the distinction between specific and general intent crimes thusly:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

Therefore, appellant's lack of such specific intent to commit the predicate felonies charged in this case has a direct bearing on his conviction for murder. In addition, for the special circumstances charged in this case to be found true, the prosecution must prove appellant's specific intent to commit the underlying felony. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1299.)

In the instant case, the evidence excluded bore directly on the felony-murder theory as well as on the special circumstances alleged, and it was a circumstance of the crime which the jury was required to consider and weigh, should the case have proceeded to the penalty phase. By statutory definition, it was relevant. According to Evidence Code Section 210,

relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declaring, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts. (*People v. Fields* (2009) 175 Cal.App.4th 1001.) Further, it was not the court's function to exclude this evidence based upon its opinion that it may not be dispostive. (*In re Romeo* (1995) 33 Cal. App.4th 1838.) Appellant was deprived of his constitutional right to a full and fair trial by jury, and due due process of law, by the trial court's exclusion of evidence highly relevant to his defense. *(United States v. Cronic* (1984) 466 U.S. 648, 656.)

In the instant case, the intent of appellant was not obvious from the evidence. The prosecutor asked the jury to assume that the attack on Ms. Keptra was unprovoked and premeditated, carried out with a "wolfpack" mentality by appellant and his two companions, with intent to find a victim for the purpose of rape and robbery. Appellant took the stand to state that this was not true; that the victim initiated the initial contact by shouting out racial epithets. However, in light of the highly emotionally charged racial aspects of the crime, without evidence to corroborate appellant's testimony,

he stood little chance of swaying the jury without evidence indicating a reason why the victim would have uttered such provocative words while in such a vulnerable situation. Once the jury found that this aspect of appellant's testimony was a lie, it was far more likely to discount the balance of his testimony. In fact, appellant's jury was instructed as to this common sense principle. (3 CT 792.)

The prosecutor's evidence consisted almost entirely of appellant's statement to the police and his in court testimony. The forensic evidence could just as easily be interpreted as appellant being a passive observer as opposed to an active participant. The case largely was determined on appellant's credibility. Without evidence to corroborate his version of the events, appellant was made to look like not only a murderer, but someone who would defame the character of the woman he allegedly killed. The court's refusal to admit this evidence was a violation of the United States Constitution. As stated by the United States Supreme Court in *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691;

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation omitted] Chambers or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citations omitted], the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." [citations omitted.] That opportunity would be an empty one if the State were permitted to exclude

> competent, reliable evidence... when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." (See also *United States v. Cronic, supra,* 466 U.S. at 656; *Washington v. Texas* (1967) 388 U.S. 14, 22-23.)

The excluded evidence was critical both to appellant's claim that he lacked the specific intent to commit the predicate felonies; its exclusion prevented the jury from fairly assessing his guilt or innocence of murder, the special circumstances, and general credibility. There was no "valid state justification" for the exclusion of this evidence. The court's reference to Evidence Code section 352 is wholly unavailing. Its concern that the admission of the toxicology report would create a "mini trial" as to the issue of the victim's state of intoxication was entirely misplaced. What appellant sought was the admission of a single, unambiguous report. There was no indication the admission of this evidence would have unduly consumed time or confused or distracted the jury. Compared to the prosecutor's protracted, repetitive and highly descriptive direct examination of the medical examiner, this very simple piece of evidence was uncomplicated, concise and non-inflammatory. There was absolutely no reason under state law to have excluded it. Instead, its admission was critical to appellant's

right to defend, rights to jury trial, due process, fair trial, and reliable determinations of guilt, special circumstances and penalty.

When the prosecutor seeks a conviction under alterative theories, such as felony murder and premeditated murder, if the conviction cannot be sustained under one of the theories, the conviction can only be sustained if it can be shown beyond a reasonable doubt that the jury relied on one of the other theories to convict. (*People v. Howard* (2005) 34 Cal.4th 1129, *People v. Calderon at* 1307, 1309, 1310.) There were three theories of liability for murder in this case: felony murder, murder by torture, and premeditated murder. There was little evidence to suggest that appellant had any actual intent to kill Ms. Keptra. Further, there was no evidence that appellant acted with the specific intent to inflict pain required for a conviction of murder under the torture murder theory. (*People v. Steger* (1976) 16 Cal.3d 539, 546.) Therefore, any legal deficiency as to the felony-murder theory necessitates a reversal of the murder conviction.

The error in excluding this evidence - which corroborated appellant's testimony, bore directly upon the circumstances of the offense and contradicted the prosecutor's arguments- did not only skew the adversarial process and effect the guilt phase trial. The circumstances of the crime are also a sentencing factor at the penalty phase. The Eighth Amendment

requires heightened reliability in capital cases (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638), as well as an individualized determination of the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) While the jury was required to weigh and consider this evidence it was never allowed to hear it. There is a reasonable probability that the outcome would have been different, had the jury been fully appraised of the victim's state of intoxication.

The exclusion of this critical evidence substantially prejudiced appellant and violated his rights to due process of law, jury trial, a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, and reliable determinations of guilt, capital eligibility and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden.

Even using the state standard, it is clear that appellant was substantially injured by the errors of which he complained and it can not be said that "it appears that a different verdict would not otherwise have been probable" if not for the error. (*People v. Watson* (1958) 42 Cal.2d 818,

836.) This error was too great and manifest to be called harmless, particularly in conjunction with the trial court's redaction of appellant's statement to the police, as argued in Argument IV, as incorporated herein.

This entire judgement must be reversed.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE OF THE VICTIM'S PROVOCATORY RACIAL SLURS IMMEDIATELY PRIOR TO THE COMMISSION OF THE CRIME, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, THE RIGHT TO DEFEND, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corollary provisions of the California Constitution, including his rights to due process of law, to present a defense, a fair trial, effective assistance of counsel, and reliable determination of guilt, special circumstances, and penalty, because the trial court erroneously precluded evidence of the victim's intoxication.

B. Procedural and Factual Summary

On January 28, 2004, the prosecutor filed her "Motion to Exclude Self-Serving Hearsay." (3 CT 675 et seq.) In said Motion, the prosecutor requested that the court redact from appellant's January 7, 1999, statement to the police that portion of said statement that referred to the racial slurs that Ms. Keptra uttered to appellant and his companions prior to the commission of any crime. (*Ibid.*) In said statement, appellant told the police what drew his attention to Ms. Keptra was someone yelling out something to the effect that "I hope–like I hope you all die niggers," "Niggers I hope you die" and "Fuck you, niggers," or "The niggers are going to die." (3 CT 676-677.)

The prosecutor claimed that these particular statements were "self-serving statements, to which there is no exception." (3 CT 677.) She further stated that these statement were irrelevant and did not relate to appellant's conduct. Further, the prosecutor claimed that appellant could not prove that Ms. Keptra made these statements. (3 CT 677-678.)

The trial court accepted the prosecutor's argument and redacted these statements from the tape of appellant's statement to the police that was subsequently played to the jury. (21 RT 4503-4509.) This error-particularly in conjunction with the error in excluding evidence of the victim's

intoxication, set forth in Argument III, incorporated herein by reference-deprived appellant of multiple constitutional rights and rendered the trial so unfair that the verdict cannot stand.

C. Legal Discussion

The trial court erred in ordering the redaction of these so called "self serving" statements because it applied the wrong section of the Evidence Code to the analysis. The applicable code section has nothing to do with declarations against interests or statements as to state of mind. What the court had before it was an admission as defined by Evidence Code section 1220.

> An "admission" is something less than a confession. Instead, is an acknowledgment of some fact or circumstance which in itself is insufficient to authorize conviction but which tends toward the proof of the ultimate fact of guilt. In contrast, a 'confession' leaves nothing to be determined in that it declares defendant's intentional participation in a criminal act, and it must be a statement of such nature that no other inference than that of guilt may be drawn therefrom. (*People v. Chan Chaun* (1940) 41 Cal.App.2d 586, 594.)

There is no principle of law that permits a prosecutorial proponent of a defendant's admission to edit that admission so as to remove those parts of it that might not be advantageous to the prosecution's case. If such were the case then any prosecutor would be allowed to manipulate the words of

a defendant to make them appear to be far more incriminating than they actually were. Therefore, with some skillful editing, all admissions would effectively become confessions.

This Court has made it clear that "if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission ... in evidence.'" (*People v. Arias* (l996) 13 Cal.4th 92, 156 ; *People v. Breaux* (1991) 1 Cal.4th 281, 302: *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.) This Court has recognized that to hold otherwise would allow the prosecutor to create a false impression as to the full import of a defendant's admission, by culling out those parts of the admission that could have added a context to the admission favorable to defendant. (*People v. Pride* (1992) 3 Cal.4th 195, 235.)

The court's ruling was more than an error in applying the evidence code. As argued in Argument III, *supra,* incorporated herein, the exclusion of this evidence deprived appellant of evidence crucial to his defense-and critical to demonstrating his reliability- and, as such, was a violation of due process of law and effective assistance of counsel. (*Crane v. Kentucky*, *supra,* 476 U.S. 683, 690-691.) Moreover, should the case have proceeded

to the penalty phase, the entire admission would have gone to factor (a), the circumstances of the offense, which the jury was constitutionally bound to consider and weigh.

The error in excluding this evidence - which corroborated appellant's testimony, bore directly upon the circumstances of the offense and contradicted the prosecutor's arguments- did not only skew the adversarial process and effect the guilt phase trial. The circumstances of the crime are also a sentencing factor at the penalty phase. The Eighth Amendment requires heightened reliability in capital cases (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638), as well as an individualized determination of the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) While the jury was required to weigh and consider this evidence it was never allowed to hear it. There is a reasonable probability that the outcome would have been different, had the jury heard the full extent of appellant's statement to the police.

The exclusion of this critical evidence substantially prejudiced appellant and violated his right to due process of law, effective assistance of counsel, a fair trial, and a reliable determination of guilt, capital eligibility and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. A trial court error of federal constitutional

law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden.

Even using the state standard, it is clear that appellant was substantially injured by the errors of which he complained and it can not be said that "it appears that a different verdict would not otherwise have been probable" if not for the error. (*People v. Watson* (1958) 42 Cal.2d 818, 836.) This error-particularly in conjuction with the error addressed in Argument III- was too great and manifest to be called harmless.

This entire judgement must be reversed.

V. THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE AS TO AN ALTERNATE THEORY OF HOW APPELLANT'S SEMEN WAS DEPOSITED ON HIS SHIRT, DEPRIVING APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, THE RIGHT TO DEFEND, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corollary provisions of the California Constitution, including his rights to

due process of law, to present a defense, a fair trial, effective assistance of counsel, and reliable determination of guilt, special circumstances, and penalty, because the trial court erroneously precluded evidence of an alternative theory as to how appellant's semen came to be on his shirt.

B. Factual and Procedural History

The prosecution presented evidence that a black checkered cream-colored shirt was recovered at appellant's mother's house during the January 7, 1999 execution of a search warrant. (20 RT 4322-4324; 22 RT 4758.) Subsequent DNA testing revealed that appellant deposited a semen stain on that shirt[35]. (*Ibid.*) In spite of the fact that Monty Gmur testified that appellant was not wearing such a shirt the night of the crime (20 RT 4376), the prosecution argued that this semen stain proved that appellant took his "turn" in raping the victim. (24 RT 5308.)

During the examination of appellant's girlfriend, Jeanette Carter, counsel attempted to elicit the fact that when she and appellant had intercourse, he would sometimes put his shirt back on after. This answer was offered to explain to the jury a reason for the semen stain on the creme colored shirt. (21 RT 4536; 4539-4351.) The prosecutor objected to the admission of this evidence on relevance grounds, stating that appellant's

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35. Mr. Gmur testified that appellant was *not* wearing this shirt the night of the crime.

sexual habits have nothing to do with this case so the proffer was not relevant. The prosecutor further argued that as Ms. Carter had already testified she never saw that article of clothing before, the inquiry was not relevant. The trial court agreed and excluded the proffered evidence. (21 RT 4541.)

C. Legal Argument

As in Arguments III and IV, *supra,* incorporated herein by reference, appellant once again was denied his right to present relevant evidence that directly supported his defense that he was but a minor participant in the crimes. As previously stated, the entire thrust of the prosecutor's theory of the case was that appellant shared the intent of his two companions and participated in the sexual assaults. The semen stain was used as "proof" that appellant engaged in a sexual act with Ms. Keptra, despite the prosecution's own witness Gmur, denying that appellant wore such a shirt on the night of the offense.

The evidence that the court excluded would have shown that there was an alternative and plausible theory as to how the semen stain came to be deposited on the creme colored shirt. The court was mistaken when it held that appellant's consensual sexual practices were irrelevant to the case.

The evidence was proffered not to explain appellant's sexual practices but, rather, suggest a physical mechanism that would account for the stain that did not involve appellant ejaculating at the scene of the crime. Yet, for a third time, appellant was denied his right to present a critical element of his defense by the court. Again, this was a violation of his right to due process of law and right to effective assistance of counsel and his constitutional right to reliable determinations of guilt, capital eligibility and punishment.(*Crane v. Kentucky, supra,* 476 U.S. 683, 690-691.)

The error in excluding this evidence bore directly upon the circumstances of the offense and contradicted the prosecutor's arguments- did not only skew the adversarial process and effect the guilt phase trial. The circumstances of the crime are also a sentencing factor at the penalty phase. The Eighth Amendment requires heightened reliability in capital cases (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638), as well as an individualized determination of the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) While the jury was required to weigh and consider this evidence it was never allowed to hear it. There is a reasonable probability that the outcome would have been different, had the jury heard the full extent of this evidence.

The exclusion of this critical evidence substantially prejudiced appellant and violated his right to due process of law, effective assistance of

counsel, a fair trial, and reliable determinations of guilt, special circumstances and punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden.

Even using the state standard, it is clear that appellant was substantially injured by the errors of which he complained and it can not be said that "it appears that a different verdict would not otherwise have been probable" if not for the error. (*People v. Watson* (1958) 42 Cal.2d 818, 836.) This error-particularly in conjuction with the error addressed in Argument III- was too great and manifest to be called harmless.

This entire judgement must be reversed.

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE AS TO APPELLANT'S FEAR OF PEARSON, DEPRIVING APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, THE RIGHT TO DEFEND, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant was deprived of this rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and corollary rights under the California Constitution including his rights to present a defense, to due process of law, equal protection of law, a fair trial, to counsel in aid of his defense, and to reliable determination of guilt, death eligibility, and sentence, because the trial court erroneously excluded evidence that appellant was fearful of his co-defendant, and the reasons for that fear.

B. Procedural and Factual History

During the part of appellant's direct examination that related to the three men's conduct in allegedly helping to remove various items from the crime scene, counsel attempted to expand upon appellant's relationship with Kevin Pearson by asking him why he was afraid of Pearson. (23 RT 4974.) The prosecutor objected to this question, but the objection was overruled.

(*Ibid.*) Appellant began to respond "Because of his reputation..." but was interrupted by the court who commanded him to "stop, stop." (*Ibid.*)

At side bar, the court indicated that testimony about Person's reputation would be hearsay and rhetorically asked "We're not going to have a trial on Kevin Pearson's reputation, are we?" (23 RT 4975.) The prosecutor then asked for a jury admonition that the answer be stricken, and the court complied. (*Ibid.*)

C. Legal Argument

Once again, the court denied appellant an opportunity to present relevant evidence that would have served to create a reasonable doubt as to his guilt. As mentioned above, the verdicts in this case hinged largely on appellant's intent and actual conduct. It was the prosecutor's argument that appellant was an eager and equal participant in the crimes committed against Ms. Keptra. Much of that argument was based upon prosecutorial speculation as to what really happened the night of Ms. Keptra's death.

In this instance, appellant attempted to show that he did not share the intent of either Hardy or Pearson by indicating that he was afraid of Pearson and acted in accordance to that fear and not with specific intent to commit the murder or any of the predicate felonies. The court seemed to recognize this and initially overruled the prosecutor's relevance objection. However, when appellant attempted to answer that question, the court, on

its own initiative, forbade him from answering and rhetorically asked "We're not going to have a trial on Kevin Pearson's reputation, are we?" (23 RT 4975.)

It is hard to fathom why the court would first allow appellant to explain his fear of Pearson and then suddenly change course and stop appellant from answering. The initial overruling of the prosecutor's relevance objection clearly indicated that it believed that appellant's fear of Pearson was indeed relevant. There was no reason in the law for the court's change in ruling.

Evidence of appellant's fear of a co-defendant was clearly relevant to his intent, a set of issues critical to guilt and the truth of the special circumstances. Should this case have reached the penalty phase, that evidence would have gone to the circumstances of the offense, a statutory factor which the jury was required to consider and weigh.

While the court never gave any specific reason for its own objection to the testimony, apparently it had something to do with application of Evidence Code section 352. The court's rhetorical question suggested the that the court believed that the danger of undue consumption of time would substantially outweigh the probative value of the evidence proffered. (Evidence Code section 352.)

This Court has held that presentation of evidence by the defendant that "goes to the heart" of the defense is never an "undue consumption of time." (*People v. Minifie* (1995) 13 Cal.4th 1055, 1070-1071.) In *Minifie,* this Court reversed defendant's conviction for assaultive crimes on the grounds that the trial court erred in not allowing him the opportunity to present evidence of threats against him, which in turn would have supported his self-defense argument.

In *Minifie* this Court held that the prejudice referred to in Evidence Code section 352 "applies to evidence which uniquely tends to evoke an emotional bias against ... [one party] ... and which has very little effect on the issues." (*Ibid.*; *People v. Wright* (1985) 39 Cal.3d 576, 585.) This Court further stated that

> evidence bearing on [defendant's] state of mind was highly probative, and had no "unique tendency" to evoke any emotional bias against the prosecution. Evidence that [defendant] might have had reason to fear for his life would not have "confused the issue." It would have further illuminated the situation the jury was required to evaluate. (*Ibid* at p. 1071.)

As in *Minifie,* appellant's fear of Pearson was directly relevant to his specific intent to commit the crimes in question. Evidence of Pearson's reputation was both "highly probative" and had no "unique tendency" to evoke emotional bias against the prosecution. Further, the court's fears that

an entire "trial" would have to be dedicated to Pearson's reputation was more of a sarcastical utterance than a reflection of truths of the paradigm of a criminal trial. Apparently, appellant would have testified that he was afraid of Pearson because of Pearson's reputation for violence.

This Court made it clear in *People v. Davis* (1965) 63 Cal.2d 648, 656 that an individual's reputation for violence may be admissible in a self-defense case in order to show the legitimacy of a defendant's fear of imminent bodily harm. (See also *People v. Minifie, supra,* 13 Cal.4th at 1068.) *Minifie* followed the reasoning of *Davis*, stating that any prohibition of the law forbidding evidence of reputation to prove the character of an individual or individuals did not apply to situations where it was the *defendant's* state of mind that was at issue. (*Minifie, supra,* at 1068-1069.)

Once again, the trial court never specifically explained what it found objectionable about appellant's testimony. However, whether it was a mistaken belief that evidence of reputation was inadmissible or that such evidence would cause an undue consumption of time, the trial court erred. The evidence of Pearson's reputation bore directly on appellant's state of mind and intent, and therefore on his true actions on the night of Ms. Keptra's death. It was at the heart of the defense and should not have been excluded under any circumstances.

For yet a fourth time, the court deprived appellant of an opportunity to present evidence that went to the heart of his defense. Again, this was a violation of his right to due process of law and right to effective assistance of counsel. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation], or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment [citations], the Constitution guarantees criminal defendants a meaningful opportunity to present and complete a defense. (*California v. Trombetta* (1984) 467 U.S. 479, 485;*Crane v. Kentucky* (1985) 476 U.S. 683, 690-691.) The rights of a defendant to present witnesses and challenge those of the prosecution has "long been recognized as essential to due process." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294; see also *Washington v. Texas* (1967) 388 U.S. 14, 19.)

Both the circumstances of the offense and duress are statutory sentencing factors. (Penal Code section 190.3) In a capital case, the Constitution demands a higher degree of accuracy; a heightened need for reliability that applies to both phases of the trial. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Beck v. Alabama* (1980) 447 U.S. 635, 637-638.) Moreover, the sentencing process requires an individualized determination of the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 605), which requires "precision." (*Stringer v. Black* (1992) 503 U.S. 222, 231.)

The exclusion of this critical evidence substantially prejudiced appellant and violated his right to defend, due process of law, effective assistance of counsel, a fair trial and reliable determination of guilt, capital eligibility and punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden.

Even using the state standard, it is clear that appellant was substantially injured by the errors of which he complained and it can not be said that "it appears that a different verdict would not otherwise have been probable" if not for the error. (*People v. Watson* (1958) 42 Cal.2d 818, 836.) This error was too great and manifest to be called harmless.

This entire judgement must be reversed.

VII. APPELLANT WAS DENIED BY THE TRIAL COURT HIS RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND WAS THEREFORE DENIED HIS RIGHT TO DUE PROCESS OF LAW

A. Introduction

Appellant was denied his rights under the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution, including his rights to confrontation and cross-examination, due process of law, a fair trial, and reliable determination of guilt, capital eligibility eligibility, and penalty, because the trial court erroneously admitted the extra-judicial inculpatory statements of non-testifying co-defendant.

B. Procedural and Factual History

Out of the presence of the jury, counsel objected on hearsay ground to the admission of a statement from co-defendant Pearson which directly implicated appellant in the killing of Ms. Keptra.(20 RT 4397-4398.) The court inquired of the prosecutor as to the nature of this statement and was informed that the statement was an adoptive admission, hence was admissible as a hearsay exception. (20 RT 4398.)

The prosecutor stated that the statement would be introduced through Keith Kendirck, who was present at Monte Gmur's house with Pearson and

appellant a few days after the crime. They were watching the news on television when a story was aired that a body had been found. (20 RT 4398.) Kendrick allegedly made a remark in the presence of appellant "Oh, I know who did that, killer Kev."(*Ibid.*) Immediately thereafter, appellant allegedly said to Pearson "How does he know that?" (*Ibid.*) Pearson proceeded to give more details about the crime. Appellant made no further comments in response to Kendrick's alleged statement.

Counsel stated that the admission of such a statement would violate appellant's right to confront witnesses, citing Crawford v. Washington (2004) 541 U.S. 36 to support his position that admission of Pearson's statement through Kendrick would violate appellant's right to confrontation of witnesses under the Sixth and Fourteenth Amendments to the United States Constitution. (20 RT 3399-4400.) The prosecutor distinguished the instant case from *Crawford*, arguing that appellant had every opportunity to call Pearson to testify. (*Ibid.*) The trial court agreed with the prosecution, stating that Pearson waived his Fifth Amendment rights at trial and could be compelled to testify.(20 RT 4401-4402.) The trial court then ruled that Kendrick's testimony as to Pearson's statement was admissible as an adoptive admission. (20 RT 44409-4410.)

C. Legal Argument

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." This axiomatic procedural guarantee applies to both federal and state prosecutions. (*Pointer v. Texas* (1965) 380 U.S. 400, 406.)

The seminal case of *Bruton v. United States* (1968) 391 U.S. 123 held that admission of a co defendant's confession that implicated defendant at a joint trial constituted prejudicial error even though the trial court gave a clear , concise and understandable instruction that said confession could only be used against co-defendant and must be disregarded with respect to the defendant. The rationale behind this holding was that the Confrontation Clause of the Sixth Amendment requires that a defendant must have the right to cross-examine witnesses against him. (*Id.* at 126) Therefore, when a co-defendant's admission that implicated a defendant at joint trial and co-defendant did not take the stand, defendant is denied his constitutional right of confrontation.(*Id* at pp. 127-128.)

Twelve years after the decision in *Bruton*, the High Court in *Ohio v. Roberts* (1980) 448 U.S. 56 was confronted with the question under what circumstances hearsay statements , not subject to cross-examination, can be admitted against a defendant without violating the Confrontation Clause.

The Court held that the Confrontation Clause does not bar admission of a hearsay statement against a defendant as long as it bears "adequate indicia of reliability'" or a "particularized guarantee of trustworthiness." (*Id.* at 66.) The factual scenario in *Roberts* was a challenge of the introduction at trial of a transcript containing testimony from a probable cause hearing from a witness subjected to cross-examination from the defendant's counsel, but not produced at trial. The Court rejected a Confrontation Clause challenge in that case holding that the cross-examination of the witness provided the degree of trustworthiness necessary to satisfy the Confrontation Clause.

A dozen years after the holding in *Roberts*, the Court in *White v. Illinois* (1992) 502 U.S. 346 re-visited *Roberts* in deciding the application of the Confrontation Clause in a factual scenario that involved a well-established exceptions to the hearsay rule. It held that the prosecution was not required to produce the four year old victim of a sexual assault at trial or to have the trial court find that she was not available for testimony before the out of court statements of said child could be admitted under the spontaneous declaration and medical examination exceptions to the hearsay rule. (*White, supra* at 354.)

More recently, in *Crawford v. Washington* (2004) 541 U.S. 36, the trial court permitted the prosecutor to introduce defendant's wife's

statement to the police, implicating defendant in a first degree assault with a deadly weapon. The wife was not available to testify due to privilege reasons. The trial court admitted Sylvia Robert's statement because it bore a "particularized guarantee of trustworthiness" according to the standard set forth in *Roberts*.

The Court in *Crawford* reversed defendant's conviction, reiterating that the Confrontation Clause, providing that the accused has the right to confront and cross examine witnesses against him, applies not only to in-court statements but also to out-of-court statements introduced at trial, regardless of admissibility of statements under the law of evidence. (*Crawford, supra,* at 51.)

In the instant case, the trial court essentially held that, as Pearson was available to testify for the defense, the fundamental protections of the Confrontation Clause did not apply in this instance. The Court was wrong. An individual is free to invoke his right against self-incrimination even though it was waived it at a prior occasion. The United States Supreme Court has stated that the Fifth Amendment protects an individual from being compelled to answer any question put to him that might incriminate him in future proceedings. (*Lefkowitz v. Turley* (1973) 414 U.S. 70, 77.) The High Court also indicated that the Fifth Amendment provision against

self-incrimination must be "accorded liberal construction in favor of the right that it was intended to secure.)

There is nothing in the law that even suggests that once waived, the right against self-incrimination can never be invoked again. If such was the case, then a prosecutor call a defendant to the stand in a re-trial of a case in which the defendant originally testified. As such, the fact that Pearson testified at his own trial does not mean that he was waived his right against self-incrimination in this matter as it pertained to appellant's trial. His case was on appeal. If the appeal is successful, Pearson would face trial once again and certainly has the right to invoke his right against self-incrimination in anticipation of a second trial.

Further, this is not the type of case as described in *Roberts* where defendant's right to confront a witness is satisfied by the admission of hearsay state that bears a "adequate indicia of reliability'" or a "particularized guarantee of trustworthiness." No United States Supreme Court case has held that an adoptive admission of the type seen in this cases has an "adequate indicia of reliability" to satisfy the Confrontation Clause. To do so would allow a defendant be convicted by his own silence through the testimony of a wholly unreliable witness. Kendrick initially related Pearson's statement to the police while he was in police custody and facing criminal charges. His testimony at trial was self-contradictory, at best. Only

after the prosecutor, during a break, helped Kendrick remember what "really" happened, was Kendrick able to recall that appellant was even present when Pearson allegedly made this statements.

While *People v. Jennings* (2010) 50 Cal.4th 616,655, indicated in situations where there is a joint interview between the police and two suspects, the statements of one of the suspects can be adopted by the defendant by silence, the fact situation in the instant case is completely dissimilar. In *Jennings,* the presence of the police officers in a formal interrogation setting provided the indicia of reliability required by both the United States Supreme Court and this Court. The statement of Pearson was related by an individual of extremely questionable character, who changed his story several times while he was testifying. It was not until the prosecutor confronted him during a break did he say that appellant was even present during Pearson's statements.

The protections of the Confrontation Clause were denied appellant in this case. Contrary to the trial court's holding, Pearson was not available to testify. Further, the degree of reliability of the hearsay statement was simply insufficient to satisfy appellant's constitutional right to confront his accuser. The error furthermore violated the Eighth Amendment's requirements of heightened reliability. (*Beck v. Alabama, supra,* 447 U.S. at 637-638) and an individualized determination of sentence. (*Lockett v. Ohio, supra,* 438

U.S. at 605.) A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden. Kendrick's unreliable testimony was a large element in establishing appellant's guilt. The judgment must be reversed.

VIII. THERE WAS INSUFFICIENT EVIDENCE FOR A TRUE FINDING ON THE TORTURE MURDER CIRCUMSTANCE HENCE, APPELLANT'S CONVICTION ON THIS SPECIAL CIRCUMSTANCE VIOLATED HIS RIGHT TO DUE PROCESS OF THE LAW, TO A FAIR TRIAL AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant was charged with a circumstance of torture murder. That allegation was found true, despite the lack of evidence to support the allegation. This Court must reverse for this reason.

B. Legal Argument

A defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a *rational* fact finder beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis added.)

The Eighth and Fourteenth Amendments to the federal constitution

require heightened standards of reliability in capital cases. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.) As stated by Justice Mosk in his concurring opinion in *People* v. *Jones* (1998) 17 Cal.4th 279:

> . . . [B]ecause the death penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and penalty is paramount as a matter of policy. It is also constitutionally compelled: "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases . . .
> (*Id.* at p. 321, quoting *People* v. *Cudjo* (1993) 6 Cal. 4th 585, 623, conc. opn. of Mosk, J.) *See also Beck* v. *Alabama* (1980) 447 U.S. 625, 638 [the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

A criminal defendant's state and federal rights to due process of law, a fair trial, and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 636, 100 S.Ct. 2382; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) This rule follows from the requirement that the prosecution must prove beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068.) Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, 443 U.S. at p. 319.) Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Id.* at p. 320.)

Under California law, when the sufficiency of evidence of a given count is challenged on appeal, the reviewing court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence, that is evidence that is reasonable, credible and of solid value, from which a reasonable trier of fact could find that the defendant is guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701,758.) In the support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence, including reasonable inferences based upon the evidence but excluding inferences based upon speculation and conjecture, is presumed. (*People v. Tran* (1996) 47 Cal.App. 4th 759,771-772.)

The reviewing court similarly inquires whether a " reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Memro* (1985) 38

Cal.3d 658, 694-695 [quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576].) The evidence supporting the conviction must be substantial in that it "reasonably inspires confidence" (*People v Basset* (1968) 69 Cal.2d 122, 139; *People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of solid value. (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Bolden* (2002) 29 Cal.4th 515, 533.) Mere speculation cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500.)

Although the evidence is viewed in the light most favorable to the judgment, the reviewing court "does not ... limit its review to the evidence favorable to the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577 [internal quotations omitted].) Instead, it "must resolve the issue in light of the whole record - i.e., the entire picture of the defendant put before the jury - and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (Ibid. [italics in original]; see *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 ["all of the evidence is to be considered in the light most favorable to the prosecution"] [italics in original].) Finally, the rules governing the review of the sufficiency of evidence apply to challenges against a special circumstance finding. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496-497; *People v. Green* (l980) 27 Cal.3d 1, 55.)

When the reviewing court determines that no reasonable trier of fact could have found the defendant guilty, it must afford the appellant relief. (*People v. Guiton* (1993) 4 Cal.4th 1116,1126-1127.)

The Eighth and Fourteenth Amendments to the federal constitution require heightened standards of reliability in capital cases. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.) As stated by Justice Mosk in his concurring opinion in *People* v. *Jones* (1998) 17 Cal.4th 279:

> . . . [B]ecause the death penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and penalty is paramount as a matter of policy. It is also constitutionally compelled: "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases . . . .(*Id.* at p. 321, quoting *People* v. *Cudjo* (1993) 6 Cal. 4th 585, 623, conc. opn. of Mosk, J.) *See also Beck* v. *Alabama* (1980) 447 U.S. 625, 638 [the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

California's torture special circumstance requires a finding of personal intent to torture, together with the other statutory elements. (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312; *Morales v. Woodford* (9th Cir. 2003) 336 F.3d 1136.)

There was no evidence that appellant had any intent to torture Ms. Keptra. The evidence against him consisted almost entirely of appellant's own statements, in and out of court. There was nothing in those statements

that indicated any intent to torture the victim. In fact, appellant testified that he was shocked and sickened by the vicious attack by Hardy and Pearson. (23 RT 4945-4955.) The prosecutor's argument that appellant had the intent to torture Ms. Keptra was not based on the evidence. It was based up speculation. As such, there is insufficient evidence upon which to base a true finding of this special circumstance and the special circumstance of murder involving the infliction of torture.

For the reasons set forth above, reversal of the true finding on the torture special circumstance and the penalty phase verdict are required.

PENALTY PHASE

IX. THE TRIAL COURT'S EVIDENTIARY RULINGS IN THE PENALTY PHASE VIOLATED APPELLANT'S RIGHT TO PRESENT TO THE JURY EVIDENCE THAT TENDED TO MITIGATE THE PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

The Sixth, Eighth and Fourteenth Amendments to the United States Constitution guarantee a capital defendant the right to introduce a wide range of evidence that has a tendency to mitigate a sentence of death. The jury must be allowed to consider all relevant evidence proffered by a defendant that he is deserving of a sentence less than death.

A California jury has great discretion in determining a capital defendant's fate. The individual juror is instructed to place any moral weight they choose on any aspect of the circumstances of the crime or the character of the defendant. As long as the evidence is relevant to the circumstances of the offense or character of defendant, the court may not limit the defendant's presentation of relevant evidence.

The penalty phase that resulted in appellant's death judgment violated the above referenced provisions of the United States Constitution. The trial court denied appellant the opportunity to present his case by unconstitutionally excluding evidence regarding appellant being a follower when his brother (a co-defendant) initiated things; observations of the intoxication of appellant's mother; the poor outcomes of other children in the family; and the conditions and circumstances surrounding the housing projects in which appellant lived as a child. Further, as set forth in the succeeding argument, the trial court improperly permitted the prosecutor to present evidence that was irrelevant to the California capital sentencing scheme pursuant to Penal Code section 190.3 and the United States Constitution.

B. Legal Argument

As this Court well knows,

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment that a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability that death is the appropriate punishment in an appropriate case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The Eighth and Fourteenth Amendments to the Constitution require that the sentencing jury in a capital case be allowed to consider any relevant mitigating evidence, that is, evidence regarding "any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence of less than death." (*People v. Frye* (1998) 18 Cal.4th 894, 1015 citing to *Lockett v. Ohio* (1978) 438 U.S. 586, 604 fn omitted; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104.) This constitutional mandate contemplates the introduction of a "broad range of evidence mitigating imposition of the death penalty." (*People v. Frye, supra*, 18 Cal.4th at 1015-16.)

The purpose of this constitutional mandate is to guarantee the reliability of the sentencing decision by assuring that a wide range of factors and evidence be taken into account by the sentencer. (*Lockett v. Ohio, supra,* 438 U.S. at 602-604.) As stated by the High Court, "(T)he jury must be allowed to consider on the basis of all relevant evidence not

only why a sentence of death should be imposed but also why it should not be imposed." (*Jurek v. Texas* (1976) 428 US 262, 271.)

Relevant mitigating evidence is evidence "which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 440.) The case law makes it clear that admissibility should not be conditioned upon the evidence having some objectively measured great weight in mitigation; it is sufficient that the evidence has a tendency in reason to show that the defendant is not as morally culpable for the offense as the other evidence may suggest. (*People v. Frye*, *supra*, 18 Cal.4th at pp. 1016-1017; *People v. Easley* (l983) 34 Cal.3d 858, 876, fn 10.)

This broad scope of relevancy is seen in the pivotal United States Supreme Court case of *Skipper v. South Carolina*, *supra,* 476 U.S. at pp. 3-5. In *Skipper,* the trial court prevented the jury from hearing evidence from two of defendant's jailers that defendant had made a good adjustment to jail in the months prior to sentence. The United States Supreme Court reversed the judgment of death. The Court held that this evidence was indeed mitigating in that inferences could be drawn from it that might serve "as a basis for a sentence less than death." (*Id.* at pp. 5-6.) The reversal came in

spite of the fact that there was other mitigating evidence presented to the jury, including evidence of defendant's adjustment in prison.

The *Skipper* Court specifically rejected any attempt to base the admissibility of mitigating evidence on its relative importance in the scheme of the sentencing determination. Instead, it cited to its decision in *Eddings v. Oklahoma*: the sentencer must not be precluded "from considering as a mitigating factor *any* (emphasis added) aspect of defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death." (*Skipper v. South Carolina, supra,* 476 U.S. at p. 4 citing to Eddings *v. Oklahoma* (1982) 455 U.S. 104, 110.) This mitigation need not have any direct connection to the crime, itself, but only need to demonstrate that a defendant may deserve a sentence of less that death. (*Id.* at p. 4.)

Once this low threshold for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. (*Tennard v. Dretke* (2004) 124 S.Ct. 2562, 2570.) Preventing the jury from fully hearing and considering the mitigating evidence deprived appellant of the individual sentencingto which he was entitled. (*Woodson v. North Carolina, supra,* 428 U.S. at 305.)

In addition to the above case law, California statutory law makes clear that a defendant must be allowed to offer into evidence " any other

circumstance which extenuates the gravity of the crime ... and any sympathetic or other aspect of defendant's character or record that the defendant offers as the basis for a sentence less than death." (Penal Code section 190.3(k).)

C. Specific Instances of Evidence Excluded

1. Testimony of Larry Clark

Reverend Larry Clark, who attended to the Armstrong family when appellant for about four to five years beginning when appellant was ten years old, was called as a penalty phase witness for appellant. In an attempt to demonstrate how dysfunctional appellant's family was, counsel asked Reverend Clark why he was ministering to Pamela Armstrong, appellant's mother. The prosecutor objected to this questioning on the ground of relevance. (27 RT 5823.) The court sustained the objection, gratuitously adding that the evidence was also barred under "penitent-clergy privilege." (*Ibid.*) It should be noted the purpose of this privilege is not to prevent the presentation of relevant mitigating evidence. The court has no standing to assert a privilege, as it did here. Further, the observations that the witness was asked to relate were not privileged.

Reverend Clark was also questioned as to the relationship between appellant and his brother Warren. He testified that Warren would "initiate whatever was going on, and Jamelle kind of tagged along and was there

with him." (27 RT 5824.) When counsel attempted to follow up by asking "what would he initiate," the prosecutor objected, without any specific ground, and the court sustained said objection. (*Ibid.*)

On re-direct examination, counsel asked Reverend Clark whether or not he ever smelled alcohol on Pamela Armstrong's breath. Once again, without any specific ground, the prosecutor objected to this question and the objection was sustained. (27 RT 5874.)

The evidence excluded went to the dysfunction in appellant's family life, appellant's tendancy to follow his brother, and the mother's substance problems– all highly relevant to the jury's assessment of the appropriate sentence.

2. Testimony of James Armstrong

James Armstrong, appellant's father, was also called as a penalty phase witness for appellant. In response to counsel's questioning, he stated that he was a "poor excuse for a father." (27 RT 5899.) He was asked, "Of the six children you have, how many are in jail?" The witness answered "four," upon which the prosecutor objected, without stating a reason, and asked for the answer to be stricken. The court complied, and at the request of the prosecutor admonished the jury that this inquiry was irrelevant and instructed them to "ignore the response." (27 RT 5899-5900.)

Counsel also attempted to adduce from the witness what was the nature of the housing development that appellant lived in when he was in his pre-teen year. (29 RT 5928.) The prosecutor objected on the ground of relevancy and, once again, the court sustained the objection stating "We're a little far afield." (*Ibid*)

D. Application of the Law to the Above Specific Instances

All of the above suppressed evidence was relevant to the central issue of whether life without the possibility of parole or death was the appropriate sentence. What counsel was trying to adduce from both of these witnesses was that appellant was raised in a disadvantaged and dysfunctional environment. The above questions propounded to these witnesses pertained directly to this background and circumstances under which appellant was raised.

The relevance of this information was based upon the holding of the United States Supreme Court that there is a "belief, long held by this society, that defendant's who commit criminal acts that are attributable to a criminal background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (*Boyde v. California* (1990) 494 U.S. 370, 382.)

The above evidence is directly relevant to this issue of mitigating factor's in appellant's background. The reasons why Mrs. Armstrong

sought counseling for the problems she had with herself and her family and the fact that she was out in public with alcohol on her breath were not only relevant to appellant's background and upbringing, but would have given further credence to the other evidence that appellant grew up in a very disadvantageous environment. Evidence that Warren Hardy would "initiate things" that appellant would follow was relevant not only to appellant's background, but to the circumstances of the instant crime, as it was appellant's contention that it was Hardy and Pearson who were responsible for the most violent conduct against Ms. Keptra.

The proffered testimony of James Armstrong was similarly relevant in the penalty phase. The fact that four of six of appellant's father's children were presently in jail at the time of his testimony would have spoken volumes about the completely dysfunctional environment in which appellant was raised, and the utterly incompetent parenting he endured. It would have also demonstrated that appellant was not simply the black sheep of the family but, rather, it was his family that produced dysfunctional individuals.

Further, the proffered testimony as to the type of socio-economic environment in which appellant was raised during his pre-teen years would have also supported appellant's contention that his entire childhood was one of disadvantage and turmoil.

What is particularly disturbing about the prosecutor's objections and the court's responses to them was that on most occasions, the prosecutor did not even bother to state a ground for her objection, nor did the court require one. In fact, on one occasion, the court provided a ground for the prosecutor. Further, the entire thrust of the prosecutor's cross-examination and argument in the penalty phase (29 RT 6381 et seq.) was that appellant had led a relatively normal life. By sustaining her improper objections, the court lent the prosecutor a helping hand in her attempt to again skew the truth.

The trial court's error in not allowing admission of the above evidence before the jury violated appellant's right to a fair determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. As indicated above, this error is one of constitutional dimensions and as such the prosecution must prove that it was harmless beyond a reasonable doubt. The state cannot meet this burden and the death judgment must be reversed.

X. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND REASONABLE DETERMINATION OF PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATION IN THE PENALTY PHASE

A. Introduction

Appellant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and corollary rights under the California Constitution, including his rights to an opportunity to be heard, due process of law, equal protection of law, and a reliable determination of appropriate penalty, because the trial court erroneously permitted the prosecution to introduce constitutionally irrelevant non-statutory aggravating evidence indicating appellant's gang involvement under the guise of factor (b) evidence.

B. Factual and Procedural History

Immediately prior to the penalty phase, appellant's counsel objected to the proffered testimony of Monte Gmur. The prosecutor indicated that this testimony consisted of Mr. Gmur's observations of the conduct of Pearson, Hardy and appellant while they were at Mr. Gmur's house the night of the attack on Ms. Keptra. The prosecutor stated that Mr. Gmur would testify that Pearson, Hardy, appellant and a man described only as

"Chris" were at his house that night. Pearson approached Mr. Gmur and asked whether he could use one of his rooms to "put (Chris) on the block."(26 RT 5570-5571.) Mr. Gmur understood this request "meant having (Chris) join their gang." (26 RT 5571.)

Mr. Gmur refused this request. Subsequently, the four men left Mr. Gmur's residence for fifteen to twenty minutes. (*Ibid.*) When they came back, Hardy made a phone call to someone named "Capone" and told this person that "Chris is cool. We're going to call him Playboy." The prosecutor argued that this inferred that the three men had "jumped" Chris into the gang,[36] "all of which took place in front of Mr. Armstrong." (*Ibid.*) Appellant's counsel objected to the admission of the evidence both on the ground that there was no foundation that Mr. Gmur had any personal knowledge of anything that occurred, and that whatever may have occurred did not qualify as a Penal Code 190.3 (b) criminal offense that could be admitted before the jury. (26 RT 5560.)

The court overruled appellant's objection, in effect holding that the proffered testimony in question qualified as a Penal Code section 190.3 (b) aggravating factor. (26 RT 5575-5577.)

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36. Another rebuttal witness would testify that this phrase signified a gang initiation ritual. (See AOB at 39, supra)

Mr. Gmur subsequently testified before the jury, in accordance to the above proffer.

C. Discussion of Law of Statutory Factors in Aggravation

Penal Code section 190.3 sets forth the procedure that a jury must use in reaching the penalty determination in a capital trial. Derived from the 1978 initiative, this statute made certain fundamental changes from the 1977 death penalty law, which it superceded. The most critical change was described by this Court in *People v. Boyd* (1985) 38 Cal.3d 762, 773.

> The 1978 initiative...provided specifically that the jury "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances. If [it] determines that the mitigating circumstances outweigh the aggravating circumstances [it] shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (section 190.3, see discussion in *People v. Easley, supra,* 34 Cal.3d 858, 881-882.) By thus requiring the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute, the initiative necessarily implied that matters not within the statutory list are not entitled to any weight in the penalty determination.

This Court proceeded to state,

> The change from a statute in which the listed aggravating and mitigating factors merely guide the jury's discretion to one in which they limit its discretion requires us to reconsider the question of what evidence is "relevant to aggravation, mitigation, and sentencing." (Section 190.3.) Relevant evidence "means evidence ... having any tendency in reason to prove or disprove any disputed fact *that is of consequence*

> *to the determination of the action.*" [Citation omitted.] Since the jury must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those factors. Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation. (*Boyd, supra*, at 773.)

Therefore, evidence that does not apply to one of the listed aggravating factors is inadmissible before the penalty jury. (*People v. Boyd, supra,* 38 Cal.3d at p.775, citing to *People v. Easley* (1983) 34 Cal.3d 858, 878.) The Boyd Court stated that while a defendant is permitted under 190.3 (k) to introduce any evidence as to defendant's character or record or the circumstances of the crime as a basis for a sentence less than death, the prosecutor does not have a concomitant right to present evidence that defendant was of bad character unless it is specifically within the statutory scheme of 190.3. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.)

For a particular incident to be held admissible under section 190.3 (b) there must be "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Cal. Penal Code section 190.3 (b)). For an incident to so qualify, there must be proof of

actual, attempted, or threatened force or violence against a person. (*See People v. Wallace* (2008) 44 Cal.4th 1032, 1081-1082; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1152.) The prosecutor is constiutionally required to prove a criminal act beyond a reasonable doubt before the jury may consider the proffered evidence in aggravation.

There was no such proof that appellant used or attempted to use any force against another person. While the prosecutor contends that Hardy, Pearson and appellant went outside with "Chris," reportedly to "jump" him into the gang, there was no evidence that any violence was done to him, whatsoever. Mr. Gmur did not observe any indication that Chris had been assaulted, nor did it appear that appellant was out of breath when he returned to the Gmur residence. (26 RT 5631, 5637.)

Further, there was no proof that appellant was involved in any aspect of the planning of this alleged violent act or even knew what was allegedly going to happen to "Chris." Mr. Gmur stated that he believed that appellant was out of earshot when Pearson asked Gmur to use one of his rooms to put "Chris" "on the rack." (26 RT 5622-23, 5633.)

The evidence the prosecutor presented through Mr. Gmur did not serve the proper purpose of proving that a "(b)" factor act of violence was committed. What it did was serve the improper purpose of admitting before

the jury non-statutory, hence, barred character evidence that speculated upon appellant's involvement in gangs. As recently stated in *People v. Albarran* (2007) 149 Cal. App.4th 214, 223:

> California courts have long recognized the potentially prejudicial effect of gang membership. As one California Court of Appeal observed: "[I]t is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from 'Our Little Gang' series. The word 'gang' ... connotes opprobrious implications.... [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (People v. Perez (1981) 114 Cal.App.3d 470, 479, 170 Cal.Rptr. 619.) Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only tangentially relevant to the charged offenses. (People v. Cox (1991) 53 Cal.3d 618, 660, 280 Cal.Rptr. 692, 809 P.2d 351.) In fact, in cases not involving gang enhancements, the Supreme Court has held evidence of gang membership should not be admitted if its probative value is minimal. (People v. Hernandez (2004) 33 Cal.4th 1040, 1047, 16 Cal.Rptr.3d 880, 94 P.3d 1080.) "Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (People v. Sanchez (1997) 58 Cal.App.4th 1435, 1449.)

In spite of the above warnings from this and lower courts, the prosecutor was allowed to carelessly and prejudicially use evidence of possible gang affiliation at will. (See Argument XI, *infra*), incorpoated herein by reference. This crime had nothing to do with gangs. Appellant's alleged involvement in a gang-type culture was irrelevant in both phases

and served only to further prejudice him before the jury. Moreover, appellant has rights under California law and the federal constitution to notice introduced in aggravation. (Cal. Penal Code section 190.3; *Keenan v. Superior Court* (1981) 106 Cal.App.3d 576, 587; *In re Oliver* (1948) 333 U.S. 257, 273.) In the context of a capital sentencing proceeding, the need for heightened reliability requires fair warning of the sentencing procedure that will be used against defendant. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

XI. IN ALLOWING IMPROPER PROSECUTORIAL REBUTTAL EVIDENCE BEFORE THE JURY, THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND REASONABLE DETERMINATION OF PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATION IN REBUTTAL IN THE PENALTY PHASE

A. Introduction

Appellant was deprived of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and parallel provisions of the California Constitution, including his right to notice and opportunity to be heard, to due process of law, equal protection of law, and a reliable determination of penalty, because the trial court erroneously

permitted the prosecutor to introduce non-statutory aggravating evidence of "gang contacts," supposedly as rebuttal to appellant's case in mitigation.

B. Factual and Procedural History

During the prosecutor's rebuttal case, out of the presence of the jury the prosecutor informed the court that she intended to call police witnesses to testify as to the "gang contacts" they had with appellant. (29 RT 6107.) Appellant's counsel objected to the admission of this evidence in that it was not proper rebuttal and that it was irrelevant. (*Ibid.*) In response to an inquiry from the trial court, counsel also objected on the ground that it "exceeds the scope of our presentation." (29 RT 6108.)

Without argument by the prosecutor, the trial court overruled the objection, stating "it goes to background evidence which is evidence we've been talking about. In other words, exceptional latitude is to be provided for background evidence to be presented in this trial. And this is background evidence."

The prosecutor was then allowed to present the police witnesses, including a "gang expert'" as more fully described in the Statement of the Case.Detective Victor Thrash has been a gang enforcement officer for the Long Beach Police Department for the past ten years. (29 RT 6221.) The witness stated that there are three major black gangs in Long Beach; the

Insane Crips, the Rolling 20's and the Mack Mafia. The Insane Crips and Rolling 20's gangs would sometimes band together against the Bloods but generally kept apart from one another. Lately, there had been friction between the gangs. (29 RT 6221-6223.)

The witness also described the gang related term of "jumping in." He stated this is when an established member of a gang would instruct two or three other members of the gang to initiated a new member by fighting him. (29 RT 6224.) The witness also testified that these gangs are involved in violent crime and committing such crimes increases one's status in the gang and the more violent the crime the better stating that doing a murder "puts them pretty high up there." He further stated that gangs have organizational structures and to move up in the structure one must either commit violent crimes or show loyalty. (29 RT 6225-6226.)

Detective Thrash also testified that he reviewed the Long Beach Police Department data based which revealed that appellant was a member of the Rolling 20's gang. (29 RT 6226-6228.)

Tom Keleler, was a Long Beach Police Officer working South Division Patrol. He made contact with Jamelle Armstrong who stated that he was a member of the "terrorist street gang the Insane Crips." (29 RT 6231.)

This error compounded the error described in Argument X, incorporated herein by reference.

C. Legal Argument

While the prosecution may not introduce evidence of a defendant's bad character in their penalty case-in-chief, once defense places his character at issue during the penalty phase, the prosecution is entitled to respond, in rebuttal, with evidence of their own. (*People v. Loker* (2008) 44 Cal.4th 691, 709.) "The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines defendant's claim that his good character weighs in the favor of mercy." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791.) As stated by this Court in *In re Ross* (1995) 10 Cal.4th 184, 208 "[T]he purpose of rebuttal in this context is to present a more balanced picture of the defendant's personality."

However, this Court has limited the use of this theory and precludes the use of general evidence of bad character in all situations. As stated in *Loker*,

> The scope of proper rebuttal is determined by the breadth and generality of the direct evidence. If the testimony is 'not limited to any singular incident, personality trait, or aspect of [the defendant's] background' but 'paints an overall picture of an honest intelligent, well-behaved and socialble person

> incompatible with a violent or anti-social character' rebuttal evidence of a similarly broad scope is warranted." (*People v. Loker, supra,* 44 Cal.4th at p. 709.)

Further, in *Loker* this Court stated that "we have firmly rejected the notion that 'any evidence introduced by defendant of his 'good character' will open the door to any and all 'bad character' evidence the prosecution can dredge up. As in other cases, the scope of rebuttal must be specific, and the evidence presented or argued as rebuttal must be related directly toward a particular incident or character trait defendant offers in his own behalf." (*People v. Loker, supra,* 44 Cal.4th at p. 709 citing to *People v. Rodrigue, supra,* 42 Cal.3d at 792.) Loker further stated;

> When a witness does not testify generally to defendant's good character or to his general reputation for lawful behavior, but instead testifies only to a number of adverse circumstances that defendant experienced in his early childhood it is error to permit the prosecution to go beyond theses aspects of defendant's background to introduce a course of misconduct that defendant had engaged in throughout his teenage years that did not relate to the mitigating evidence presented on direct examination. (*Loker* at p. 709-710 (internal citations omitted; see also *In re Jackson* (1992) 3 Cal.4th 578, 613-614.)

The prosecutor's claim that rebuttal evidence of appellant's gang membership was warranted due to the testimony of Larry Clark does not stand the scrutiny of the above law. Reverend Clark never testified as to appellant's generally good character. He was called by counsel to testify as

to the adverse circumstances that appellant suffered during his childhood. and his relationship with his brother, Warren Hardy. (See Argument IX, incorporated herein by reference.) He never stated that appellant was a "good" person or conducted himself in a fashion that would indicate that appellant's general character was incompatible with violence.

The fact is that Reverend Clark admitted that he knew very little about appellant's character and he certainly did not testify that appellant possessed a serviceable moral compass. He testified that appellant was "taught right from wrong" but this "didn't necessarily make him do the right thing." (27 RT 5826.) He also opined that appellant didn't commit crime because he didn't know right from wrong. (27 RT 5830.) The Reverend also testified that even though appellant was taught the Ten Commandments, this did not mean that he necessarily abided by them. (27 RT 5879.) Reverend Clark also stated that appellant could have been a completely different type of person outside of the church than what he observed of him while in a church. (27 RT 5853.)

None of the above can rationally be construed as demonstrating that appellant was a "well-behaved, sociable person" whose character was at odds with violent behavior. However, according to the prosecutor and court, the highly prejudicial evidence offered in rebuttal was justified by the fact

that Reverend Clark testified that appellant had some limited participation in church activities. Taken in context, the testimony that appellant's activities such as clean-up and handing out gifts to needy children has little to do with appellant's "good character."Rather, it was a description of what appellant would do while under the watchful eye of adults at the church. Reverend Clark did not testify that appellant stood out from the other children in doing these tasks.

The trial court's attempt to justify the admission of this evidence by stating that "exceptional latitude" was needed to allow for "background evidence" demonstrated a profound and troubling lack of understanding of the California statutory death penalty scheme and of the constitutional underpinnings of mitigating evidence. As stated above, the law does not allow "extraordinary latitude" as it relates to the prosecutor's presentation of aggravating evidence. It specifically constrains the prosecutor to those specific factors allowed by the statute. While the defense can present any evidence that would support an argument for a sentence of less than death, the prosecutor cannot do the same to argue for a sentence of more than life. Factor (k) evidence is specifically limited to mitigating evidence. (*People v. Boyd, supra,* 38 Cal.3d at 773-775.) Appellant's "background," unless it

can properly be introduced under another factor, may not be introduced by the prosecution in aggravation of evidence.

What is even more troubling is the fact that the trial court specifically denied appellant the sort of "latitude" to which he was constitutionally entitled when it denied appellant the right to present relevant evidence through Reverend Clark and James Armstrong. (Argument VII , *supra.*) The trial court placed thumbs on the scale of justice, not only impermissibly allowing the prosecutor to introduce constitutionally improper aggravation, but also preventing appellant from introducing the mitigating evidence that the jury was required to consider and weigh at sentencing.

The trial court went far beyond the boundary of what the prosecutor was constitutionally permitted to introduce in the penalty phase. In doing so, it allowed irrelevant and prejudicial evidence of gangs and gang culture, including an expert to testify as to the generally violent nature of street gangs. As stated above, evidence of immersion in a gang culture is viewed as highly prejudicial by the courts of this state. Its admission, in this instance, deprived appellant of his rights to a fair trial, effective assistance of counsel, Due Process of Law, and a reliable determination of guilt, death

eligibility and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, requiring reversal of the death judgment.

XII. THE PROSECUTOR'S PERVASIVE MISCONDUCT IN THIS CASE DEPRIVED VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, INCLUDING HIS RIGHTS TO DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY AND IMPROPERLY WEIGHED THE SCALES IN FAVOR OF A DEATH JUDGMENT IN THIS CASE.

INTRODUCTION

The penalty and guilt phase errors complained of above were not only the result of improper application of statutory and Constitutional law. They were the result of misconduct by the prosecutor that permeated every aspect of this trial, from the selection of the jury to the final penalty arguments. As stated by this Court, "A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.

The prosecutor's intemperate actions in the unconstitutional selection of appellant's jury, preventing exculpatory evidence from being heard by

the jury, interfering in the attorney client relationship, disparaging treatment of witnesses and counsel and her further improper conduct at trial violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, including his rights to due process of law, a fair trial, effective assistance of counsel and a reliable determination of guilt, death eligibility and penalty and improperly weighed the scales in favor of a death judgment in this case.

In addition, to the prosecutor's blatant misconduct in preventing the impanelment of a constitutionally constituted jury, she also committed intentional misconduct in other aspects of the trial that had the independent and cumulative effect of depriving appellant's of his rights to a fair trial, effective assistance of counsel, Due Process of Law, and a reliable determination of guilt, death eligibility and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, requiring reversal of the death judgment. This misconduct included suppression of evidence, interference in the attorney-client relationship between appellant ane his lead counsel, and disparaging questioning and treatments of witnesses.

A. DUE TO THE PROSECUTOR'S MISCONDUCT IN THE SELECTION OF THE JURY, APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The conduct of the prosecutor in the selection of appellant's jury has been fully documented in Arguments I and II, *supra,* incorporated here by reference. This improper conduct dominated every aspect of the jury selection. The prosecutor did virtually everything she could to intentionally deprive appellant of a constitutionally impaneled jury. Her conduct was inexcusable. She continually misrepresented the facts, misstated the law and tried to keep the true state of the law from the prospective jurors. Her examination of the prospective jurors she sought to excuse was little more than bullying or confusing the prospective jurors she did not like into making statements that a trial court sympathetic to the prosecution would use to improperly excuse those jurors.

During the *Hovey* voir dire, the prosecution was allowed by the trial court to set up a gauntlet of confusing, irrelevant and legally defective hypotheticals that she employed on selected prospective jurors who wished to excuse. (Argument I, *supra.*) She consistently attempted to confuse the prospective jurors that she did not like, and when that tactic failed she

simply misrepresented their clearly stated views to the court. She further used a tactic of half truths, misstatements and outright lies to exclude all black males from the jury in violation of appellant's right to a fairly constituted jury. (Argument II, *supra.*)

The prosecutor's baseless and completely unprofessional *ad hominem* attack on Mr. Cook, the second black male prospective juror to be improperly excused was but one example of the lengths to which this prosecutor would go to "win" this case. (Argument II, section B. 2.b at p 156 et seq.) However, it was one of the most blatant. This sort of personal verbal assault on a prospective juror in order to create a conflict which would allow the prosecutor to excuse an otherwise qualified juror because he was a black male was an exercise in pure cynicism that has no place in an American courtroom.

As stated in Argument II, *supra.,* the prosecutor claimed that she removed all of the black males for the jury for "race-neutral' reasons. The prosecutor had to have known that this argument was false as she permitted any number of white jurors to sit on the jury who had responded to her questions exactly as did the four black male jurors.

The removal of all of the black male potential jurors in this racially charged case by a combination of argumentative questioning, misstatement

of facts, hypocritical "reasoning" and sophistic argument reduced the jury selection procedure into an exercise in racial politics. The voice of an large segment of Los Angeles County was deliberately silenced by the prosecutor's intemperate behavior.

A prosecutor has a special duty commensurate with his unique power to assure that defendants receive fair trials. (*United States v. LePage* (9th Cir. 2000) 231 F3d 488, 492.) It has been long held by the United States Supreme Court that, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." (*Berger v. United States* (1935) 295 U.S. 78, 88.) The prosecutor

> is the representative not of any party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*People v. Fierro* (1991) 1 Cal.4th 173, 207-208.)

This prosecutor did not conduct herself as required above. Her role in the selection of appellant's jury was one of a win-at-all-costs partisan, who used every trick at her disposal to impanel a jury stacked toward conviction and a death verdict. Her continued misconduct through the trial

as set forth in the remaining sub-arguments to this Argument, incorporated here, reduced appellant's trial to a mockery. Reversal is required.

B. DUE TO THE PROSECUTOR'S MISCONDUCT IN THE SUPPRESSION OF RELEVANT AND LEGALLY ADMISSIBLE EXCULPATORY EVIDENCE, APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Like the trial court, the prosecutor was similarly responsible for the denial of appellant's right to present a defense, by improperly pressing to exclude relevant and admissible evidence critical to the defense. (See Argument III-VI, *supra,* incorporated herein by reference.) It is the function of the prosecutor to seek justice and not convictions. It is the prosecutor's job to see that the innocent not be made to suffer as well as that the guilty not escape punishment. (*Berger v. United States* 295 U.S. at 88.)

The prosecutor's theory of the case was that from the outset on the night of the crime, appellant had the intent to rape and rob. It was only the identity of the victim that was unknown to him. The prosecutor made this

theory clear to the jury in her opening statement, examination of the witnesses and summation. (19 RT 4151 et seq.)

In order to advance her theory, the prosecutor did everything she could to suppress competent evidence that would counter it. She successfully resisted the admission of the victim's intoxication and racial slurs, so that she might falsely argue appellant's pre-existing intent to rape and rob, and so that the credibility of appellant's testimony would be undermined. (See Arguments III and IV, *supra*), incorporated herein. She further successfully opposed any evidence as to why appellant was afraid of Pearson for the same reasons. (See Argument VI, *supra.*) She also prevented the admission of critical evidence that would have explained to the jury how appellant's semen may have been deposited on his cream-colored shirt. (See Argument V, *supra.*)

The prosecutor knew that all of this evidence was competent, relevant and otherwise admissible. However, she also knew that its admission would damage her case, and render her arguments far less effective. She took an intentional role in deliberately suppressing the truth in order to argue a false theory. By doing so, she abandoned her role as an impartial advocate of justice and, along with the court, deprived appellant of his right to a fair trial. The Constitution requires that a defendant be able to present a defense,

meet the state's evidence, and be convicted only on proof beyond a reasonable doubt. However, those rights and others-including his right to reliable determinations of guilt, capital eligibility and penalty- were grossly undercut by the prosecutor's conduct.

The prosecutor capitalized upon the exclusion of this evidence by making false statements in her summation. She indicated that prior to the attack, Ms. Keptra said "Happy New Year" to appellant and his companions. (24 RT 5306; 5386.) There was no evidence that this occurred. She further stated that there was evidence that appellant was wearing the cream colored shirt that night. (24 RT 5308.) There was no evidence of this, either. Argument of facts not in evidence violates the constitutional rights of confrontation and counsel. (*Turner v. Louisiana* (1965) 379 U.S. 466, 470-473.) A defendant may not be convicted if the evidence is insufficient to persuade a rational fact finder of guilt, beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319) ; that principle demands that prosecutors not rely upon theories with no basis in evidence.

Perhaps, the most cynical argument made by the prosecutor was when she rhetorically asked the jury why would a lone woman yelled out racial slurs to three men. (24 RT 5385-5386.) This was precisely the same argument that appellant's counsel used to urge the court to admit the

evidence of Ms. Keptra's intoxication so as to give a rationale explanation for her racial slurs.(Argument III, *supra.*) The prosecutor successfully argued to the court that this evidence was irrelevant, but, in summation, she used the absence of such evidence as relevant proof that the racial slurs were not uttered, therefore appellant was a liar who intended to rape and rob someone from the moment he left the Gmur house.

The trial court, as set forth in Arguments III and IV, improperly permitted this egregious misconduct. The prosecutor's consistent course of misconduct throughout this trial requires reversal.

C. BY INSISTING UPON EXTENDED HEARINGS DURING THE PENALTY PHASE INTO TRIAL COUNSEL'S ALLEGED DISCOVERY VIOLATION, THE PROSECUTOR DEPRIVED APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural History

Appellant's counsel called James Armstrong as a penalty phase witness. Mr. Armstrong testified that he had made money by selling drugs and illegally exploiting women as a pimp. He also stated that he used this money to support appellant and take him on a trip to Chicago. (28 RT 5904-5905.) At this point, the prosecutor asked for a side bar conference and informed the court that this information was not contained in the discovery

received from counsel in reports dated April 10, 1999 and April 11, 2003. (28 RT 5905-5909.) Therefore, she stated she would call defense investigators Joe Brown and Malcolm Richards in rebuttal to testify as to the nature of said reports. (28 RT 5910.) The court subsequently placed calls to these two individuals to secure their attendance. (28 RT 5910-5913.)

In the penalty phase Pamela Armstrong testified as a prosecution witness. Prior to her cross-examination, the defense handed the prosecution a 1999 letter from Mrs. Armstrong to Mr. Patton. (28 RT 6061.) The prosecutor claimed that Mrs. Armstrong was originally listed as a witness for appellant and that this report should have been turned over to the prosecution at the time Mrs. Armstrong was listed as a defense witness. (*Ibid.*) The prosecutor indicated that she was being "sandbagged" by Mr. Patton, in that he did not tender this letter in discovery. (28 RT 6076.) She further stated that there was a pattern of discovery violations by Mr. Patton. (28 RT 6080-6083.)

After Mrs. Armstrong's testimony, but before any other witnesses were called, the court held what it called an Evidence Code section 402 hearing regarding the proffered testimony of Investigator Joe Brown. (28 RT 6115 et seq.) Mr. Brown indicated that James Armstrong told him that

he took appellant to Chicago on a trip. During that trip, James indicated he used drugs in the presence of his son. Mr. Brown further stated that he never put this information in any report. (28 RT 6121-6122.)

The balance of this hearing was an attempt by the prosecutor to show that Mr. Patton was in possession of other information about the Chicago trip that was never included in any report tendered to the prosecution. (28 RT 6122-6154.)

After the testimony, the trial court informed Mr. Patton that it believed that he did not act in good faith, and that the court was "tremendously troubled" by Mr. Patton's conduct. (28 RT 6161-6164.) Mr. Patton indicated that he was very troubled by the court's characterization of his actions. (28 RT 6163.)

This hearing was continued to the next day. (29 RT 6169-6217.) As a result of this third hearing Mr. Brown was allowed to briefly testify in rebuttal as to the testimony of Mr. James Armstrong. (29 RT 6217.) Mr. Brown did briefly testify. (29 RT 6233-6238.)

However, this was not to be the end of the matter. After the close of all testimony, the prosecutor called Investigator Richards to the stand, apparently to demonstrate how Mr. Patton committed an discovery

violation, which, she argued was a breach of legal ethics. (29 RT 6245-6279.)

After Mr. Richards completed his testimony, the court confronted Mr. Patton, placing him on the defensive as to his perceived lack of ethics in the discovery matter. (29 RT 6279-6281.) The jury was not present for these extended hearings, but must have perceived that the interruption to the trial, following the prosecutor's objection, involved a serious matter.

B. Discussion of the Law

The defendant in any criminal action has a constitutional right to assistance of counsel for his defense. (US Const 6th Amend, Cal Const., art I, section 15.) The right to assistance of counsel is "indispensable to the fair administration of our adversarial system of justice" and "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." (*Maine v. Moulton* (1985) 474 U.S. 159, 168-169.)

> It is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel and his Fifth Amendment right to due process of law. (*U.S. v. Irvin* (9th Cir. 1980) 612 F.2d 1182, 1185 citing to *Weatherford v. Bursey* (1977) 429 U.S. 545.)

Therefore, the prosecution is "obliged to refrain from unreasonable interference with that individual's desire to defend himself in whatever

manner he sees best, using every legitimate resource at his command." (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 431 citing to *People v. Crovedi* (1966) 65 Cal.2d 199, 206.) The proceedings against the accused are rendered improper when conduct on the part of authorities is so outrageous as to interfere with the rights of the accused to counsel and to due process of law. (*People v. Tribble* (1987) 191 Cal.App.3d 1108, 1116 citing to *Rochlin v. California* (1952) 342 U.S. 165, 172) ; *People v. McIntire* (1979) 23 Cal.3d 742, 748, fn.1.)

In effect, the trial court conducted a series of discovery sanction hearings (although sanctions did not follow) at one of the most crucial junctures on a capital trial. It was completely unnecessary to force Mr. Patton to defend himself while he should have been thinking of defending appellant. If there was a discovery violation, it was minor and of no prejudice to the prosecutor whatsoever. The final hearing after the witnesses had completed their testimony was simply gratuitous.

The final hearing held after all testimony had been completed was a gratuitous effort by the prosecutor and court to make trial counsel look and feel "guilty," embarrassing and distracting him immediately before he was to give his final plea for appellant's life. If there was a real discovery issue which truly offended the court, any sanction hearing could have been held

after the trial. However, there is nothing in the record to suggest that the trial court pursued this alleged ethical issue after the final hearing in which Mr. Richard's testified. (29 RT 6245-6279.)

Once again, the prosecutor clearly demonstrated her absolute indifference to the fairness of the process, employing any and all means necessary to secure a conviction. In doing so she breached the trust that the criminal system has placed in her office and denied appellant a fair trial.

The right of a criminal defendant to assistance of counsel for his defense is guaranteed by the California Constitution, Article I, section 15, and by the Sixth Amendment of the United States Constitution. The right of the effective assistance of counsel is "indispensable to the fair administration of our adversarial system of criminal justice," and "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." (*Maine v. Moulton* (1985) 474 U.S. 159, 168-169.)

Appellant was denied the effective assistance of counsel, not withstanding counsel's presence in court, because of these ill-timed attacks on defense counsel's integrity, honesty and professionalism. The prosecutor's conduct was aimed at disabling counsel from performing his role as an advocate. This constitutional error mandates reversal of the penalty verdict in this case.

D. THE PROSECUTOR'S CONDUCT IN HER STATEMENTS TO THE JURY, EXAMINING WITNESSES, AND DISPARAGING APPELLANT'S COUNSEL CONSTITUTED PROSECUTORIAL MISCONDUCT

In addition to the above cited prosecutorial misconduct, the prosecutor often engaged in disruptive and petty conduct during the trial. From the outset of the pre-trial hearings, the prosecutor conducted herself in an aggressive and hostile manner toward appellant's counsel. She gratuitously suggested to the trial court sanction trial counsel for a discovery "violation"in such a way that counsel would be forced to report himself to the state bar, although the matter was not even ripe for discovery sanction. (2 RT 97.)

During another pre-trial discovery proceeding, the prosecutor continued this hostile tactic, informing the court that the issue had arisen because trial counsel was getting a flat fee for his services and simply did not want to work all that hard. (2 RT 197-206.)

As set forth more fully herein, the prosecutor's opening statement was part of her concerted attempt to mislead the jury as to how the confrontation between Ms. Keptra and the three men was initiated. Having succeeded in suppressing evidence of Ms. Keptra's toxicology report and

use of racial slurs, the prosecutor was free to cynically, and without factual basis, tell the jurors that the victim was peaceably walking to a store when appellant and his companions came up to her and demanded money. (RT 20 RT 4152-4153.) She further told the jury that when the three men did not find any money they stated "why don't you give us these food stamps to begin with?" (*Ibid.*) There was no evidence that this exchange ever occurred.

The prosecutor's argument of facts not in evidence deprived appellant of his rights to confrontation and counsel (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473) and improperly promoted the inference that she had access to information not presented to the jury. (See *People v. Bain* (1971) 5 Cal.3d 839, 848; *People v. Bell* (1989) 49 Cal.3d 502, 539.)

Improper comments were directed toward counsel (19 RT 4402), including twice accusing him of lying to the court regarding a discovery issue. (22 RT 4731; 26 RT 5565.) She punctuated appellant's direct examination with hypertechinical and unnecessary objections intended to disrupt the concentration of appellant and destroy the flow of the testimony. (23 RT 4921; 4923; 4925; 4935; 4941; 4946-4950; 4953; 4959; 4963)

Further, the prosecutor conducted her cross-examination of appellant in such a way as to confuse and intimidate appellant. Her

questioning was repetitive and argumentative, confusing and hostile. She would repeatedly accuse appellant of lying and would essentially testify as she asked the same argumentative questions multiple times. (See e.g., 23 RT 4979; 4982; 4985; 4988; 4999; 5000; 5001; 5002; 5004; 5006; 5017; 5024; 5026; 5030; 5036; 5038-5039; 5042; 5047; 5049; 5055; 5058-5060.)

The prosecutor's examination of many of the witnesses was almost entirely leading. The prosecutor essentially testified for these witnesses. There was hardly a non-leading question asked to Joseph O'Brien, the victim's boyfriend. (21 RT 4350.) Large portions of the critical testimony of Keith Kenrick (21 RT 4447 et seq) was leading , as was the testimony of Detective Birdsall (21 RT4468 et seq), Jeanette Carter (21 RT 4509 et seq), Tyaire Felix (21 RT 4575) and Pamela Armstrong. (21 RT 4473.) Thus, in effect, the prosecutor herself testified with the benefit of the oath.

This questioning was not the result of misinterpretation of the rules of evidence. Instead it was yet another example of a prosecutor who made her own rules.

CONCLUSION

The Supreme Court has found that prosecutorial misconduct may occur in a variety of unique factual settings. (See *United States v. Williams* (1990) 504 U.S. 36, 60, (Stevens, J., concurring) ("[l]ike the Hydra slain by Hercules, prosecutorial misconduct has many heads".) "Each of these settings may have its own peculiar standards for finding prosecutorial misconduct and for determining whether a constitutional violation occurred as a result of such misconduct." (*Woods v. Adams* (C.D. Cal. 2009) 631 F.Supp 1261, 1278.)

Where prosecutorial misconduct has occurred, the relevant question then is whether the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Earp v. Ornoski* (2005) 431 F.3d 1158, 1171.) If the prosecutor committed "misconduct," the reviewing court must determine if such misconduct resulted in actual prejudice to the defendant, such that his trial was rendered "fundamentally unfair." (See, e.g., *Donnelly v. DeChristoforo* (1974) 416 U.S.637, 642.)

Because this was a capital case, the Constitution demands a heightened degree of reliability at both the guilt and penalty phases. (*Beck v. Alabama, supra,* 447 U.S. at 637-638; *Gilmore v. Taylor, supra,* 508 U.S.

at 345.) The prosecutor's misconduct, individually and systematically, rendered appellant's trial both unreliable and unfair.

As stated in Arguments I and II, the prosecutor's misconduct in the jury selection process created a "structural error" in which the error cannot be "harmless." The misconduct in preventing appellant from presenting evidence that went to the heart of his defense deprived appellant of the fundamental right to defend himself. Further, the prosecutor's argumentative, hostile, petty and disparaging attitude throughout the trial contributed to the fundamental unfairness of the trial.

A prosecutor represents the interests of all the entire citizenry and their interest ism, above all things, fairness. The prosecutor possesses a power unique to our system of justice and as such he also is charged with a unique obligation to assure that a defendant receives a fair trial. (*United States v. LePage* (9th Cir 2000) 231 F.3d 448, 642.) This did not happen in this case. Instead, the prosecutor used her unique power to place appellant on death row, in complete disregard of any notions of fairness.

Appellant incorporates all Arguments argued up to this point as if more fully stated herein. The instances of misconduct in this case were numerous, and the improprieties occurred throughout the trial rather than in a brief or isolated context. (See *People v. Kirkes* (1952) 39 Cal.2d 726.) The

nature of the prosecutor's misconduct implicated appellant's federal constitutional rights because "it [was] so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process." (*People v. Harris* (l989) 47 Cal.3d 1047, 1083-1084.) The prosecutor's above stated misconduct in this case rendered the entire proceeding "fundamentally unfair," depriving appellant of due process of law, the right to a fair trial, the right to effective assistance of counsel, and the right to a fair and reliable determination of guilty, capital eligibility and penalty in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The entire judgment must be reversed.

TRIAL COURT BIAS

XIII. BY CONDUCT DEMONSTRATING BIAS FAVORING THE PROSECUTOR'S CAUSE, THE TRIAL JUDGE DENIED APPELLANT DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction and Factual Summary

Appellant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, including his rights to due process of law, a fair trial, an unbiased jury comprised of a fair cross-section of the community, the right to defend, and reliable determinations of guilt, capital eligibility and penalty, due to the pervasive bias of the trial court.

Throughout the jury selection and guilt phase of appellant's trial, the court ruled in a manner that indicated its prejudice against appellant. It excluded critical evidence that established a reasonable doubt as to appellant's guilt. These rulings also prevented him from presenting evidence in support of his defense, in violation of his rights to due process of law, a fair trial, effective assistance of counsel, trial by jury, reliable determinations of guilt, death eligibility and penalty, and fundamental fairness under the Fifth, Sixth,

Eighth and Fourteenth Amendments of the United States Constitution and their state analogues.

As indicated in Arguments I and II, *supra*, the court also ruled in such a way as to allow the prosecutor to fashion a jury that not only was stacked toward the death penalty but deliberately and systematically excluded all black males. Appellant refers to and incorporates Arguments I-XIII regarding the prosecutor's pervasive misconduct.

Taken as a whole, the court's actions and rulings manifested a pattern of judicial bias against appellant that infected the entire proceeding and was so pervasive as to deny appellant a fair trial and due process of law.

B. It is a Fundamental Violation of Due Process of Law for a Trial Court to Conduct Itself in Such a Manner so as to Favor the Prosecution Over the Defense

It is a fundamental right of due process of law under the United States Constitution that a defendant's right to a fair trial depends on being tried in a court before an impartial judge. (See *Tunney v. Ohio* (1927) 273 U.S 510, 523.) Impartiality requires that in conducting the trial, the judge should not become an advocate for either party, nor should he or she cast aspersions on defense witnesses, the defendant or on the theory of the defense itself. (*People v. Rigney* (1961) 55 Cal.2d 236, 241.) The failure of

the trial judge to conduct himself in an impartial manner can so seriously prejudice the presentation of a defendant, as in this case, that it denies appellant the right to a fair and impartial trial under both the federal and state constitutions. (*Powell v. Alabama* (1932) 287 U.S. 45.)

Seventy-five years ago, the Supreme Court of California set forth the standard for judicial behavior. The Court warned that the trial court must act in an impartial manner, and not become an advocate and "so intemperately espouse the cause of the prosecution in criminal cases [otherwise] no man charged with a penal cause of action is safe, whether he be guilty or innocent. Every defendant under such a charge is entitled to a fair trial on the facts and not a trial on the temper or whimsies of the judge who sits on his case." (*People v. Mahoney* (1927) 201 Cal. 618, 626.)

This Court recognized that any attitude of the trial judge that manifests partiality for the prosecution's cause or theory is unacceptable.

> Such an attitude on the part of a trial court as that here disclosed cannot be passed over so lightly. Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and not too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant...When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent

> comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so beyond the pale of judicial fairness as to render a new trial necessary. (*People v. Mahoney*, *supra,* 201 Cal.at 626.)

It is the duty of the trial court to rise above the fray, to overlook and forgive any excessively zealous or persistent conduct of counsel that does not disrupt the proceeding. The court is admonished to avoid "hypersensitivity " [to the] rigors of advocacy," and should respond to the heat of the trial with "patience and understanding." (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 557-558.) The trial court should not engage in a pattern of bickering with counsel, or impute to counsel any sort of unethical conduct unless it is justified. (*People v. Zammora* (1944) 66 Cal.App. 2d 166, 205.) It is critical that the tenor and tone of the trial court's rulings do not give the impression to the jury who is in "trouble with the judge." (*People v. Carpenter* (1997)15 Cal.4th 312, 353.)

In *People v. Mahoney, supra*, 201 Cal. at p.623, the judge derided defense counsel's objections as "idiotic," "silly," and "trivial." This was determined to be reversible error. "There is never an instance" that justifies a trial judge in being discourteous to defendant or counsel. (*People v. Williams* (1942) 55 Cal.App.2d 696, 703.) Further, the court is forbidden

from doing anything that serves to disparage defendant in any way. (*People v. McNeer* (1935) 8 Cal.App.2d 676.)

A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit or create the impression it is allying itself with the prosecution. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1107; *People v. Clark* (1992) 3 Cal.4th 41, 143.) The alleged conduct of the court must be viewed within the context of the entire trial. (*People v. Carpenter, supra,* 15 Cal.4th at p. 353.) Certainly, a pattern of prejudice toward defendant's counsel by the court in front of the jury is reversible error. (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1172-1175; *People v. Alfaro* (1976) 61 Cal.App.3d 414, 426-427.)

Even a single remark which has the effect of disparaging the defendant in the eyes of the jury can constitute misconduct. In *People v. Byrd* (1948) 88 Cal.App.2d 188, 191, defendant was testifying that he was innocent of a prior burglary for which he had been convicted. The trial judge, unable to restrain himself from indulging in improper comment, made a sarcastic jibe in which he asked defendant whether his protestation of innocence in the instant crime was just as true or false as that of the prior. The court of appeal found the error prejudicial and reversed the conviction, reasoning that this was a close case with a prosecution witness of doubtful credibility.

C. Specific Instances of Judicial Bias

1. Jury Selection

a. Improper Exclusion of Prospective Jurors for Beliefs as to the Use of the Death Penalty

In Argument I, *supra,* incorporated herein, appellant set forth the court's ninefold error in excluding nine separate qualified prospective jurors from the jury panel because they did not meet the prosecutor's need to assure herself of a death-stacked jury. While appellant will not repeat his arguments here, the following must be recognized. For most, if not all of these excluded prospective jurors, the court's rulings were not only wrong, but were so far removed from both the facts and the law that they must have been the result of judicial bias against appellant.

The court allowed the prosecutor to continually badger jurors with incomplete and legally inaccurate hypothetical questions, thereby supporting the prosecutor in her attempt to both confuse and intimidate certain prospective jurors into saying something that could be used to eliminate them. As fully discussed in Argument I, *supra*, these hypotheticals largely had nothing at all to do with the general facts of this case. The court blindly followed the prosecutor's lead no matter how sophistic her challenge.

In sustaining the prosecutor's challenge for cause of Prospective Juror Pfeffer, the court completely misstated Mr. Pfeffer's responses to the oral voir dire. (AOB Argument I, B, 1 c *supra*.) It stated that Mr. Pfeffer said he could not impose the death penalty when he clearly and unequivocally said that he could. The court then went so far as to accuse this perfectly rational and neutral citizen of using the trial as a "laboratory" because the juror was an "intellectual" who practiced some sort of "intellectual sophistry." (*Ibid.*, at 59-60.)

This sort of rant can only be attributed to the court's prejudice against anyone who might give appellant a favorable ear. What is especially disturbing is that there was absolutely nothing in Mr. Pfeffer's voir dire that would even conceivably prompt the court's bizarre description of this prospective juror.

Further, the trial court's reasoning for the dismissal of Prospective Juror Salazar was based upon its complete misrepresentation of what Mr. Salazar said. In order to comply with the prosecutor's wishes to remove this qualified prospective juror, the trial court stated that Mr. Salazar "emphatically, with his right fist waiving (saying) "I'm not for death, death, death." (6 RT 1233.) This was a gross misinterpretation of what Mr. Salazar actually said. (*Ibid.*) The complete twisting of what the juror said can only

be viewed as further evidence of the trial court's desire to provide the prosecutor a jury of her choosing.

The court's reasons for the dismissal of many of the other prospective jurors indicated that the court was not even focusing on what the prospective jurors were saying about their ability to put aside any personal beliefs. Few, if any, of these nine excluded prospective jurors even *had* any personal beliefs against the death penalty. The court excused these prospective jurors simply because they might have some trouble in imposing the death penalty under some incomplete, confusing and irrelevant hypothetical factual scenario that involved confusing, incomplete and irrelevant hypothetical fact situations. (Prospective Juror Bijelic AOB Argument I, B, 2, c and Prospective Juror Rutigliano AOB Argument I, B, 3, c)

On one occasion, the court went so far as inviting the prosecutor to challenge a prospective juror on *Witt* grounds. (AOB Argument I at 87.) As stated in Argument I, *supra,* this suggestion from the court as to how to prosecute appellant was not only completely improper but was also an indication of the court's eagerness to present the prosecutor with the type of jury she wanted.

Further, the court refused to clear up the confusion created by the prosecutor's clearly deficient hypotheticals by instructing the prospective jurors on the proper law to counteract the prosecutor's specious hypotheticals. (AOB Argument I at 87-89.) The prosecutor's convoluted hypotheticals and misstatements of the law created an absurd paradigm that created an "alternative" law that substituted for the law so carefully promulgated by this and the appellate courts.

The court continually misstated or misinterpreted the clearly stated voir dire answers of the prospective jurors. The views of virtually every dismissed prospective juror were distorted by the prosecutor in a successful attempt to convince a sympathetic court that they could not legally sit. (Argument I, *supra.*) These misstatements were never challenged by the court, which adopted them as part of its rulings. The court essentially stripped appellant's jury of all prospective jurors who would not enthusiastically impose the death penalty simply because they expressed some hesitancy to impose it in morally ambiguous situations. These prospective jurors were forced to undergo some sort of tortured loyalty test to the *prosecutor's* vision of the death penalty, the court depriving them of the real law of the case. The court knew the law and exactly what the

prosecutor was trying to accomplish. However this did not prevent the impanelment of this constitutionally improperly selected jury.

b. *Wheeler/Batson* Challenges

As stated in Argument II, *supra,* incorporated herein, the entire process by which the prosecutor removed all of the black male prospective jurors from the jury panel was a farce. The prosecutor misstated the views of these four black men, intentionally distorted their clearly stated views, and gave "race neutral" reasons for their exclusion that applied to any number of white jurors, as much or more so, than the excused black prospective jurors. Once again, the prosecutor's tactics were obvious. However, the court did nothing to prevent the prosecutor from achieving her purpose, to eliminate all black males from the jury. In fact, regarding Prospective Juror Payne, after a completely unprofessional and unseemly soliloquy by the prosecutor as to how badly she was being treated, the court reversed itself, and granted a peremptory challenge on the last black male prospective juror, a challenge the court originally denied on *Wheeler/Batson* grounds. (17 RT 3537-3538.)

Regarding Prospective Juror Cook, the court passively sat while the prosecutor baited Mr. Cook into a fight which gave her cause to challenge

him, in part, because there was "a lot of friction" between Mr. Cook and the prosecutor. (16 RT 3394.)

The entire jury selection process was tainted by the prosecutor's disregard of the law, twisting of the facts and her lack of basic fairness and respect for the process. It is was impossible for a judge qualified to preside over a capital case not to recognize what was transpiring. However, this judge accommodated the prosecutor's desires, strongly suggesting bias against appellant.

In summary, there was a small, yet very telling exchange that occurred between the judge and the prosecutor that helps to illustrate appellant's argument. Out of the presence of the jury, the trial court informed counsel that seated Juror #7 had broken her ankle and suggested she be replaced. (22 RT 4803.) After, the trial court suggested that appellant's counsel would not find a substitution objectionable, the prosecutor stated that she liked Juror #7. The trial court then responded, "You like everyone of the 18." The prosecutor responded, "You're right, I do." (*Ibid.*)

While under most circumstances this exchange might appear to be a harmless interjection of levity, in view of the facts of this record this exchange is something more. There was no reason why the prosecutor

should not like this jury and the trial court knew it. Under the watch of the trial court, the prosecutor was allowed to create the jury of her dreams; devoid of all African-American males and chosen in such a way to create a tribunal not only prone to conviction, but one stacked toward the death penalty.

2. Refusal to Allow Appellant to Present a Defense

As fully argued in Arguments III-VI, incorporated herein, the court consistently refused to allow appellant to present evidence that would have concretely and substantially aided in his defense. This evidence would have created reasonable doubt as to appellant's intent and actual participation in the rape of Ms. Keptra, and would have also supported appellant's credibiliy. There was no legal reason to exclude this evidence. The court's reliance on Evidence Code section 352 for some of its reasoning, indicated a complete lack of belief in appellant's defense, manifesting that lack of belief by holding that it simply wasn't worth the jury's time to hear the evidence. Appellant was entitled to have his jury decide the facts of the case, with full access to that evidence supporting his defenses.

Further, as indicated directly below, the exclusion of this proffered evidence was part of a pattern of judicial impatience and dismissiveness toward the entire defense.

3. The Court's Disparaging Comments Toward Counsel

From the outset of this proceeding, the trial court made clear its negative attitude toward defense counsel. (2 RT 146; 169; 176; 184; 197-206; 3 T 250; 3 RT 258; 271.) These comments were made during pre-trial hearings and ranged from impatience to personal insult. While these early interruptions of counsel, disparaging remarks and generally negative attitude toward the defense occurred before a jury was impaneled, they did presage what was to come.

On several occasions during the trial, the court directed remarks to counsel that could only have diminished the cause of the defense in the jury's eyes. In the presence of the jury, the court, in a disparaging manner, told counsel that he was asking an "unintelligent question." (20 RT 4463.) On another occasion, in the presence of the jury, the court accused counsel of asking an "unintelligible question" when there was nothing at all unintelligible about it. (23 RT 4958.) On yet another occasion, without any objection from the prosecutor, the court interrupted counsel's questioning by stating "That is such an incomplete question." (21 RT 4535.)

In addition, to the above, outside of the presence of the jury, the court went so far as to accuse counsel of attempting throughout the trial to create error and set up an appeal. (23 RT 4861.) This comment had no basis

at all in fact. It was made in the context of a discussion of a note sent to the court from a juror about the conduct of another juror. Counsel was simply attempting to clear up the meaning of the note. There was no attempt by counsel to confuse the issue or create an unclear record. The court's comment was gratuitous and provocative. It further suggests a profound misunderstanding of counsel's role in a capital trial, which includes making a record of errors in the event of an appeal.

4. Other Acts of in Trial Bias

On several occasions, the court would either object to a line of questioning on behalf of the prosecution or supply the prosecution with a grounds for objection. This behavior clearly indicated partisanship. The court did this during the testimony of Jeanette Carter, where the court, in its own motion, struck an answer by appellant's girlfriend in which she was attempting, under aggressive questioning by the prosecutor, to explain her prior statements to the police by stating that she was "nervous" at the time. (21 RT 4553-4554.) On its own, the court decided that the jury should not hear the reason why the witness gave inconsistent statements. When the prosecutor objected to a question without stating a cause, the trial court provided one for her and sustained the objection. (21 RT 4534.)

On another occasion, counsel was asking a question to Ms. Carter that related to appellant's use of condoms during sex. (See Argument V, *supra*, incorporated herein.) As stated in Argument V, appellant's non-use of condoms was relevant to an alternate way that his semen could have gotten on his shirt. Counsel posed a question as to whether the witness and appellant ever used condoms. (21 RT 4534.) The prosecutor objected to the question but tendered no ground for the objection. The court quickly provided a ground, that the question called for speculation, and sustained the objection. (*Ibid.*)

On other occasions, the trial court causelessly interruptted a witness examination by defense counsel to ask its own questions. (See e.g. 21 RT 4500, 4537.) In addition, the responded to certain objections in an inconsistent manner which favored the prosecution. During the direct examination of appellant, counsel asked what appellant did to help the victim at a certain point of time during the assault. The prosecutor objected to the question on the basis that it misstated the evidence. The court overruled the objection. (23 RT 4946.) Counsel then asked fundamentally the same question and the prosecutor made the same objection. For some unstated and inscrutable reason, this time the court *sustained* the objection. (*Ibid.*)

This abrupt inexplicable reversal by the court occurred again during the cross-examination of appellant. In discussing what the prosecutor touted as critical trace evidence, she asked, "Would you agree with me that it would be highly unlikely that your DNA and the DNA in those spots would be in the same place-on that place?" The court sustained an objection on the grounds of speculation. (24 RT 4980.) The prosecutor then asked the same question in a slightly different way. "Would you agree that it would be very difficult for your DNA and the victim's DNA to be in the same as it on that jacket." This time the same objection was overruled. (*Ibid.*)

In another revealing exchange, during appellant's direct testimony, appellant stated that he was going to deny to the police any involvement in the crimes, but "it was on my heart heavy, so I just told them." (24 RT 4963.)[37] The prosecutor objected and asked for this testimony to be stricken. At side bar, the court did so on the basis that it was relevant only to sympathy and compassion which was not a material issue in the guilt phase. (*Ibid.*) However, the court also informed counsel that while counsel did not try to elicit this information, appellant "knows better" than to make such a comment. (24 RT 4964.)

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37. As set forth in Argument IV, the trial court refused to permit the jury to hear exculpatory information in that same statement, regarding the victim's conduct.

While made outside of the presence of the jury, this comment is representative of the court's attitude throughout the entire case. The court's prejudice toward appellant is such that it ascribes legal knowledge to him that very few defendants, let alone a young, uneducated male such as appellant, would have. There is no reason why appellant should "know better." He was simply explaining why he decided to give the statement to the police.

Further, as discussed in Argument XII, C, *supra,* the trial court allowed the prosecutor to pursue a discovery violation hearing during the penalty phase.

Taken as a whole, the court's trial conduct manifested a negative attitude toward the defense which deprived appellant of a fair trial, due process of law and effective assistance of counsel. As such, the entire judgment should be reversed.

INSTRUCTIONAL ISSUES

XIV. CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINE THE CONSTITUTIONAL REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

In accordance with CALJIC No. 2.90, the trial court instructed the jury at appellant's trial that appellant was presumed to be innocent until the contrary was proved and that this presumption placed upon the state the

burden of proving him guilty beyond a reasonable doubt. (3 CT 803.) In addition, the jury was also instructed on the meaning of reasonable doubt in interrelated instructions which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence and which addressed proof of specific intent and/or mental state. Except for the fact that they were directed at different evidentiary points, each of these three instructions informed the jury, in essentially identical terms, that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." [38]

These directives as to what the jury "must" do appeared in the sufficiency of circumstantial evidence instruction, CALJIC 2.01 (3 CT 775, 1015), the sufficiency of circumstantial evidence to prove specific intent or mental state instruction, CALJIC 2.02 (3 CT 812), the sufficiency of circumstantial evidence to prove special circumstances instruction, CALJIC 8.83 (3 CT 832) and the sufficiency of circumstantial evidence to prove

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38. The issue of the erroneous circumstantial evidence instructions has not been waived. Penal Code section 1259 provides that "The appellate court may also review any instruction given, refused, or modified even though no objection was made in the lower court, if the substantial rights of the defendant were effected, thereby." (See *People v. Hannon* (1977) 19 Cal.3d 588,600.)

required mental state in the special circumstances, CALJIC 8.83. (3 CT 833.)

These directives were contrary to the requirement that appellant may be convicted only if guilt is proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781.) As a result, appellant's federal and state rights to due process of law, to a jury trial, and to a reliable determination of guilt and penalty were violated. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The problem lies in the fact that the instructions required the jury to accept an interpretation of the evidence that was incriminatory, but only "appear[ed]" to be reasonable. These instructions are constitutionally defective in that telling jurors that they "must" accept a guilty interpretation of the evidence as long as it "appears to be reasonable" is blatantly inconsistent with proof beyond a reasonable doubt and allows for a finding of guilt based on a degree of proof less than that required by the Due Process Clause. (See, *Cage v. Louisiana* (1990) 498 U.S. 39 (per curiam) .)

These instructions given in appellant's case were also unconstitutional because they required the jury to draw an incriminatory inference when such an inference merely appeared to be reasonable. The

jurors were told that they "must" accept such an interpretation. Thus, the instructions operated as an impermissible mandatory, conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable." (*Carella v. California* (1989) 491 U.S. 263.)

The erroneous reasonable doubt/circumstantial evidence instructions require reversal of appellant's conviction. The error is reversible without any inquiry into trial evidence, both because it involved the basic standard to be applied at trial, and ths undermined the verdicts in this case, and because the error operated as an improper mandatory, conclusive presumption. (See *Carella v. California, supra,* 491 U.S. at pp. 267-273 (conc. opn of Scalia, J).) Even if this Court does not find that this error is reversible per se, it is of constitutional magnitude, hence, the state must prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) It can not do so

XV. THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY MUST AGREE UNANIMOUSLY WHETHER APPELLANT HAD COMMITTED MALICE MURDER OR FELONY-MURDER

Appellant was charged in Count 1 of the information with premeditated and deliberate murder in violation of section 187, subdivision (a), with special circumstances. (2 CT 306.) To determine whether these charges had been proved, the jury received instructions on three theories of first degree murder: a theory of deliberate and premeditated murder (3 CT 817), a theory of felony murder (3 CT 819), and a theory of torture murder. (3 CT 821.) The jury was not instructed that they were required to reach a unanimous verdict, beyond a reasonable doubt, as to which of these theories it accepted.

Appellant was thus found guilty of first-degree murder by a jury that failed to unanimously find each and every element of the charges against him to be true beyond a reasonable doubt. The instructions erroneously denied appellant his rights to have the state establish proof of the crime beyond a reasonable doubt, to due process and to a reliable determination on allegations that he committed a capital offense under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the correlate provisions of the state constitution.

A. This Court Should Reconsider Its Case Law Regarding the Relationship Between Premeditated Malice Murder and Felony-Murder

Appellant recognizes that this Court has rejected several arguments pertaining to the relationship between malice murder and felony-murder. (see e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. McPeters* (1992) 2 Cal.4th 1148, 1185.) In light of *People v. Schmeck, supra,* 37 Cal.4th at pp. 303-304 appellant presents an abbreviated argument in order to preserve this issue for further review.

Murder is explicitly defined only in section 187, which states that "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Malice aforethought is defined in section 188, and, contrary to the common law, does not include within its definition the commission of

a felony. [39] Section 189 lists various factors which will elevate a murder to murder of the first degree.[40]

The plain language of these statutes leads to the conclusion, as this Court has stated that, "To prove first degree murder *of any kind*, the prosecution must first establish a murder within section 187– that is, an unlawful killing with malice aforethought. [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 794, emphasis added.) Section 189 then provides guidance for fixing the degree of murder once murder with malice has been proven.

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[39] Provides in pertinent part that:

> Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

[40]Section 189 provided, in pertinent part at the relevant time, that:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle with the intent to inflict death, is murder of the first degree; and all other kinds of murders are of the second degree.

In accordance with this understanding, this Court has held that all types of murder, including felony-murder, were defined by section 187 and therefore included the element of malice aforethought (*People v. Milton* (1904) 145 Cal. 169, 170-172), though in the case of first-degree felony-murder the necessary malice was presumed from commission of a felony listed in section 189 (*People v. Ketchel* (1969) 71 Cal.2d 635, 641-642; *People v. Milton, supra,* at p. 172).

However, in *People v. Dillon* (1983) 34 Cal.3d 441, the Court re-examined its earlier cases and concluded that first-degree felony-murder was not merely an aggravated form of the malice murder defined by section 187, but was instead a separate and distinct crime, with different actus reus and mens rea elements, and defined exclusively by section 189. (Id. at p.465, 471-472.) Under this construction, malice aforethought is *not* an element of first-degree felony-murder. (Id. at p. 465, 475, 477, fn. 24.)

Notwithstanding *Dillon*, however, this Court has continued to occasionally assert that, "There is still only a 'single, statutory offense of first degree murder.'" (*People v. Carpenter, supra*, 3 Cal.4th at p. 249) In light of these seeming contradictions, and the continuing uncertainty regarding the elements of certain kinds of first degree murder, counsel respectfully requests that this Court reconsider whether the jury may

convict a defendant of first degree murder without being unanimous as to whether the killing was a felony-murder or premeditated and deliberate murder.

B. The Trial Court Should have Instructed the Jurors That to Convict Appellant of First Degree Murder, They Had to Be Unanimous as to Whether the Murder Was Premeditated and Deliberate Murder or Felony-Murder.

Due process requires that the state prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*In re Winship, supra,* 397 U.S. at p. 364.) Although states have great latitude in defining what constitutes a crime, once the elements of a crime have been established, the state may not relieve the prosecution's burden of proving every element of that offense. (See *Sandstorm v. Montana* (1979) 442 U.S. 510; *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

Appellant submits that in California, under *People v Dillon, supra,* 34 Cal.3d 441, malice murder and felony-murder have different elements which need to be proved beyond a reasonable doubt in order to convict. (See *id.* at p. 465, 471-472, 477 fn. 24)

The United States Supreme Court addressed the due process implications of convicting a defendant of both premeditated murder and felony-murder in *Schad v. Arizona* (1991) 501 U.S. 624. The defendant in

Schad challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony-murder or premeditated and deliberate murder. The Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (Id. at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit a state's capacity to define different courses of conducts or states of mind as merely alternative means of committing a single offense. In finding that *Schad* was not deprived of due process the court gave deference to Arizona's determination that, under its statutory scheme, "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (Id. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime,* we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (Id. at p. 636, emphasis added.) Thus, while Arizona determined not to treat premeditation and the commission of a felony as independent element of the crime, *Shad's* language implies that when a state ***has*** determined that the statutory alternatives are independent elements of the crime, it is a due

process violation if jury unanimity does not apply to all the elements.

California has followed a different course than Arizona. Under *Dillon,* premeditated malice murder and felony-murder have different elements. Even if it is assumed there is one crime of murder (*People v. Davis, supra,* 10 Cal.4th at p. 515, *cf Dillon, supra,* 34 Cal.3d p. 476, fn. 23), and malice murder and felony-murder may be described as two theories of that one crime (*People v. Pride, supra,* 3 Cal.4th at p. 249), they are crimes and/or theories with different elements and one of those elements cannot be removed by the state without violating due process under *Winship.*

In *Dillon*, the Court, *inter alia,* addressed the contention that the first-degree felony-murder rule operated as an unconstitutional presumption of malice because malice is an element of murder as defined by section 187. (*Id.* at p. 472.) The resolution of that issue depended on the Court's conclusion that there are two distinct crimes of "murder," each with different elements:

> We do not question defendant's major premise, i.e., that due process requires proof beyond a reasonable doubt of each element of the crime charged. [Citations.] Defendant's minor premise, however, is flawed by an incorrect view of the law of felony-murder in California. To be sure, numerous opinions of this Court recite that malice is 'presumed' (or a cognate phrase) by operation of the felony-murder rule. But none of those opinions speaks to the constitutional issues now raised, and their language is therefore not controlling . [Citation.](*People v. Dillon, supra,* 34 Cal.3d at p. 473-474,

fn. omitted.)

The Court conceded that, if the felony-murder rule did operate as a presumption of malice, the presumption was a conclusive one. (*People v. Dillon, supra,* at p. 474.) The Court also conceded that malice is an essential element of the crime of murder defined in section 187. "In every case of murder other than felony-murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.] (*Id.* at p. 475.) However, the Court concluded that what appeared to be a conclusive presumption of malice in the felony-murder rule was not a true presumption but rather a rule of substantive law, and thus: "[A]s a matter of law malice is not an element of felony-murder." (*Ibid.*)

If there were any doubt that the Court was distinguishing between two crimes with distinctly different statutory elements, it was laid to rest by the Court's response to the equal protection claim raised in *Dillon*:

> There is likewise no merit in a narrow equal protection argument made by defendant. He reasons that the "presumption" of malice discriminates against him because persons charged with 'the same crime,' i.e., murder other than felony-murder, are allowed to reduce their degree of guilt by evidence negating the element of malice. *As shown above, in this state the two kinds of murder are not the "same" crimes* and malice is not an element of felony-murder.(*People v. Dillon, supra,* at p. 476, fn. 23, emphasis added; see also p. 476-477, fn. 24.)

After *Dillon*, this Court appears to have retreated somewhat from the description of felony-murder and malice murder as "separate crimes." (See e.g., *People v. Pride, supra,* 3 Cal.4th at p. 249.) Nonetheless, the Court has continued to reaffirm that "the *elements* of the two types of murder are not the same." (*People v. Carpenter, supra,* 15 Cal.4th at p. 394, emphasis in original.) The Court's continuing treatment of felony murder as a separate crime with separate elements brings the *Schad* analysis into play. In that case, appellant's right to due process was violated when the court failed to require jury unanimity on each element of the crimes charged.

The same result applies if the elements of malice murder and felony-murder are the same. Malice would then be an element of felony-murder, and the California felony-murder rule violates *Sandstrom* and *Mullaney* in that the required element of malice is unconstitutionally presumed. Also, if that is the case, the trial court failed to instruct that the jurors must find malice in order to convict of felony-murder. This instructional failure amounts to an unconstitutional conclusive presumption. (*Carella v. California* (1989) 491 U.S. 263; *People v. Figueroa* (1986) 41 Cal.3d 714, 723-741.)

In the face of this conundrum, the instructions given violated the bedrock principle that all elements of an offense must be found beyond a

reasonable doubt by the trier of fact, (*Sandstrom v. Montana, (supra),* 442 U.S. 510), by a unanimous jury. (See e.g., *Burch v. Louisiana* (1979) 441 U.S. 13, 139.) Moreover, in California, a criminal defendant has a constitutional right to trial by a unanimous twelve person jury that has found every element of the crime alleged to be true beyond a reasonable doubt. (See Cal. Const, art. 1 § 16; see also *People v. Wheeler, supra,* 22 Cal.3d at p. 265; *People v. Collins* 91976) 17 Cal.3d 687, 693.) This state created right is protected under the due process and equal protection clauses of the Fourteenth Amendment. (See generally *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Bush v. Gore* (2000) 531U.S.98; *Fetterly v. Peskett* (9th Cir. 1993) 997F.2d 1295.)

Thus, by failing to properly instruct the jury on the elements of murder, the trial court denied appellant his rights to due process and to have a properly instructed jury find that the elements of all the charged crimes had been proven beyond a reasonable doubt. (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., art. I, § § 7, 16.) Also, by reducing the reliability of the jury's determinations and creating the risk that the jury would make erroneous factual determinations, the trial court violated appellant's right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art I, § 17.)

A unanimity instruction is required where, "'The jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.'" (*People v. Gonzales* (1983) 141 Cal.App.3d 786, 791; see *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300-302.) Nonetheless, this Court has held that a unanimity instruction is not required where a single charged offense is submitted to the jury on alternative "legal theories" of culpability, i.e. first degree murder based on alternate theories of felony murder.(*People v. Milan* (1973) 9 Cal.3d 185, 195.) However, if two theories have different elements, they are, by definition, different crimes. As the United States Supreme Court has observed, "[c]alling a particular kind of fact and 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.)

As shown above, this Court has determined that malice murder and felony-murder are different crimes and have different elements. Having instructed on both malice murder and on felony-murder, the State may not remove the burden of proving one of those elements from the prosecution without violating appellant's constitutional rights. Nonetheless, each juror in the instant case was allowed to find different factual elements to be true under the different theories presented by the State, yet vote guilty for the first degree murder charge. Because the jury was not instructed to set forth

the theory under which they convicted,[41] the jury was never required to unanimously find beyond a reasonable doubt each element of the crime for which it found appellant guilty. The Constitution requires more. (*In re Winship, supra,* 397 U.S. at p. 364.)

Because this is a capital case, there are additional foundations for a requirement of a unanimous verdict on the murder count. The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict. (*Brown v. Louisiana* (1980) 447 U.S. 277 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352.) There is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama, supra,* 447 U.S. at p. 638.) As the U.S. Supreme Court has explained: "The Framers would not have thought it too much to demand that, before depriving a man of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors.'" (*Blakely v. Washington* (2004) 542 U.S. 296 307, quoting 4

41.This Court has noted that, "in an appropriate case," the trial court may protect the record by requiring the jury to explain, in special findings, which of several alternate theories was accepted in support of a general verdict, but only where the defense requests such special findings. (*People v. Carter* (2003) 30 Cal.4th 1166, 1200-1201.) The federal Supreme Court's holding in the *Apprendi* and *Blakely* opinions dictate that where alternate theories of an offense are based on different elements, the trial court must sua sponte instruct the jury to return special verdicts indicating it has found all elements of one theory to be true beyond a reasonable doubt.

Blackstone, Commentaries, at 343; see also *United States v. Booker* (2005) 543 U.S. 220, 230.) Mr. Armstrong did not receive the required "unanimous suffrage" before he ws deprived of his liberty.

The trial court, by failing to instruct the jury that it had to agree unanimously whether appellant committed malice murder or felony-murder, incurred constitutional error. Because the jurors were not required to reach unanimous agreement on each and every element of first degree murder, there is no valid jury verdict on which harmless error analysis can operate.

XVI. THE PROSECUTION'S UNCHARGED CONSPIRACY THEORY DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS, FAIR TRIAL, JURY TRIAL THE RIGHTTO DEFEND AND RELIABLE DETERMINATIONS OF GUILT AND PENALTY, AS IT PERMITTED JURORS TO INFER BUILT OF CHARGED OFFENSES ON A QUANTUM OF EVIDENCE LESS THAN THE STANDARD OF PROOF.

At the request of the prosecutor, the court gave the guilt phase jury a full set of conspiracy jury instructions. (CALJIC 6.10-5, 6.11 and 6.12; 3RD 809-812.) These instructions defined conspiracy and informed the jury that it was not charged in this case. (3 CT 809.)

The instructions also informed the jury that,

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration in furtherance of the object of that conspiracy the act of one conspirator pursuant to or in furtherance of a common deign of the conspiracy is the act of all conspirators. A member of a conspiracy is not

> only guilty of the particular crime that to his knowledge his confederate agreed to and did commit, but is also liable for the natural and probable consequences of any crime of a co-conspirators to further the object of the conspiracy, even though the crime was not intended as part the agreed upon objective and even though he was not present at the time of the commission of that crime. (*Ibid.*)

While these Instructions address the uncharged conspiracy theory, they do not the quantum of proof necessary to find the existence of a conspiracy. These instructions, moreover, do not address the scope of the conspiracy. The jury was not required to return written findings on the uncharged conspiracy, so it is impossible to know whether or not a conspiracy was found unanimously, the scope of any conspiracy found, or the quantum of proof applied by individual jurors or the jurors as a whole.

Jurors were further instructed that, "The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent . . .." (3 CT 811.) Because the conspiracy was uncharged, jurors were not required to regard it as a crime, and they may reasonably have understood the conspiracy instructions to be outside the constitutional requirements of a presumption of innocence and that the burden is on the state to prove the allegations beyond a reasonable doubt.

All of these instructions were given to the jury in spite of the fact that there was no evidence that such a conspiracy ever existed in this case.

These instructions freed the prosecutor to argue to the jury that yet another ground for finding first-degree murder existed. The prosecutor took full advantage of this opportunity. She argued that the evidence showed that the evidence showed a conspiracy to commit a robbery, that there was an agreement on appellant's part to hold the victim down as she was being robbed. (24 RT 5365.)

A. Legal Overview

The necessary elements of a criminal conspiracy are: (1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that particular offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy. (*People v. Backus* (1979) 23 Cal.3d 360, 390; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.) Since conspiracy to commit murder is an "inchoate crime," a defendant can be found guilt of conspiracy to commit murder absent any evidence that a human being was killed or injured in any manner. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1229.)

Because a conviction for conspiracy to commit first degree murder, "by definition does not include the death of or even the serious injury to

another person" it follows that such a conviction cannot support a death sentence. (*Coker v. Georgia* (1977) 433 U.S. at 598 .) This Court so held in *People v. Hernandez* (2003) 30 Cal.4th 835.

In *Enmund v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 33681, the Supreme Court held that the Eighth Amendment does not permit imposition of the death penalty on one who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (Id., 458 U. S. at 797.) Flying in the face of *Enmund*, the uncharged conspiracy theory transformed an ill-advised relationship into a capital offense, with the result that appellant – a very young man with no criminal record, who neither intended to kill nor killed – is on death row. The Eighth Amendment guarantee of particular reliability in capital cases was eviscerated in this case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Due process of law requires that a person be given, "Reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . to examine the witnesses against him, to offer testimony, and to be represented by counsel." (*In re Oliver* (1948) 333 U.S. 257, 273, quoted in *Lankford v. Idaho* (1991) 500 U.S. 110, 126.) Presenting extensive

evidence of an amorphous and uncharged offense strips a criminal defendant of these basic guarantees.

Notice is as important at the sentencing phase of a capital trial as it is at the guilt phase. As the High Court explained in *Gardner v. Florida* (1977) 430 U.S. 349, 360, n. 23:

> Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

In this case, the alleged uncharged conspiracy invited the jury to impose a death sentence on the basis of extensive evidence about the death-worthiness of the co-defendants, Pearson and Hardy, and to disregard appellant's youth, lack of a prior criminal record, military service, and positive efforts to overcome obstacles that he faced in life.

Furthermore, due process of law requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (*In Re Winship* (1970) 397 U.S. 358, 361-364; *Jackson v. Virginia*, supra, 443 U.S. 307, 318 318-319.) The uncharged conspiracy theory, argued as the functional equivalent of proof of the actual charges, undermined this fundamental precept of criminal law.

The High Court has rightly condemned unconstitutional efforts by prosecutors to gain tactical advantage.

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States* (1935) 295 U.S. 78,88.)

It is the duty of the trial court, however, to keep in check the excesses of the prosecution. (*See People v. Sixto* (1993) 17 Cal.App. 4th 374, 398-399.) The trial court in appellant's case refused to do so. It permitted the jury to hear extensive evidence of the uncharged conspiracy theory, without deciding whether a conspiracy existed, or its scope. The evidence was largely admitted against both defendants, and without limitation as to purpose.

B. Because the Alleged Conspiracy Was Uncharged, Appellant Was Deprived of Notice and the Opportunity to Defend.

As noted, notice and an opportunity to be heard are essential to due

process of law. (*In re Oliver* (1948) 333 U.S. 257, 273; *Lankford v. Idaho* (1991) 500 U.S. 110, 126.) The failure to charge the alleged conspiracy deprived appellant of the opportunity to fairly defend, and permitted the jury to use evidence of an alleged conspiracy without the bothersome detail of needing to find a conspiracy was proven beyond a reasonable doubt.

The damage did not end with the guilt verdict. The uncharged and unproven conspiracy theory was then used to tar appellant with the bad acts of his co-defendant at the penalty phase. State law requires that notice be given of the factors in aggravation sought to be introduced by the state at penalty phase. (Penal Code § 190.3.) The nature and evidence of the alleged conspiracy were not so noticed.

An exception to the notice requirement is made for proof of offenses or special circumstances (Penal Code § 190.3), which typically are proven at the guilt phase of trial. In this case, however, the uncharged conspiracy was explicitly not proven at the guilt phase of trial. That exception has no application to this unusual circumstance. Appellant was deprived of adequate notice of the factors in aggravation, violating state law, his due process rights, and his Eight Amendment right to a reliable determination of sentence. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

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

XVII. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE 190.2 IS IMPERMISSIBLY BROAD

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> 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." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)(*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:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage

of legislative definition: they circumscribe the class of persons eligible for the death penalty.(*Zant v. Stephens* (1983) 462 U.S. 862

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.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.(See *People v. Hillhouse* (2002) 27 Cal. 4th 469, 500-501, 512-515; *People v. Morales*

(1989) 48 Cal.3d 527, 557-58, 575.) These broad categories are joined by so many other categories of special circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

Regarding the specific special circumstance of felony murder present in the instant case, the California Penal Code (section 189) defines first degree murder quite broadly, as all murder perpetrated by certain means (e.g., poison, explosives); "any other kind of willful, deliberate, and premeditated killing "; and felony murder-that is, any killing, whether intentional or not, committed in the course of any of the statutorily specified felonies.

As construed by this Court in *People v. Anderson* (1987) 43 Cal.3d 1104, the felony-murder special circumstance, like the felony murder rule itself, does not contain an intent element for the actual killer. Thus, this special circumstance permits an accidental or unintentional killing to form the basis for a death sentence, despite the United States Supreme Court's repeated emphasis that an evaluation of the accused's mental state is "critical" to a determination of his suitability for the death penalty. (See e.g. *Enmund v. Florida* (1982) 458 U.S. 782, 800.) It should follow from

the High Court's concern that special care would be taken in administering the California death penalty scheme to ensure that genuine narrowing criteria apply to felony-murder offenses, and that death eligibility would be limited to the most reprehensible murders and the most blameworthy felony murders.

But in fact, the death penalty scheme as applied to felony murder sweeps in a broad and arbitrary fashion. While all willful, deliberate and premeditated killings are first degree murder under the California statute, not all such killings are subject to the death penalty. On the other hand, any perpetrator of a felony murder, by virtue of even an unintended killing, may be sentenced to die. Such a sorting cannot be other than arbitrary and capricious, in violation of the Eighth Amendment.

XVIII. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE § 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 § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion," or because three weeks after the crime defendant sought to conceal evidence,[42] or threatened witnesses

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42. *People v.* Nicolaus (1991) 54 Cal.3d 558, 581-582 (hatred of religion); People *v. Walker* (1988) 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

after his arrest,[43] or disposed of the victim's body in a manner that precluded its recovery.[44]

The purpose of § 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, 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, 987-988), 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

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

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43. *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S.Ct. 498.

44. *People v. Bittaker* 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35(1989), *cert. den.*, 496 U.S. 931 (1990).

a. Because the defendant struck many blows and inflicted multiple wounds,[45] or because the defendant killed with a single execution-style wound.[46]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[47] or because the defendant killed the victim without any motive at all.[48]

c. Because the defendant killed the victim in cold blood[49] or

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45.See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, 28. (cont.)No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

46. See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

47 . See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge)

48. See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

49.See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

because the defendant killed the victim during a savage frenzy.[50]

d. Because the defendant engaged in a cover-up to conceal his crime,[51] or because the defendant did not engage in a cover-up and so must have been proud of it.[52]

e. Because the defendant made the victim endure the terror of anticipating a violent death[53] or because the defendant killed instantly without any warning.[54]

f. Because the victim had children,[55] or because the victim

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50. See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

51. See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

52. See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

53. See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

54. See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

55.See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

had not yet had a chance to have children.[56]

g. Because the victim struggled prior to death,[57] or because the victim did not struggle.[58]

h. Because the defendant had a prior relationship with the victim,[59] or because the victim was a complete stranger to the defendant.[60]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is

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56. See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

57.See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

58.See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

59.See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d at 717, 802 P.2d at 316 (same).

60. e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[61]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[62]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual

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61. e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life");

62. e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax);

gratification, to avoid arrest, for revenge, or for no motive at all.[63]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[64]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[65]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every

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63. e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification).

64. e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

65. e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park).

prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, § 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420.])

XIX. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING, AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME; IT THEREFORE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). A defendant, like appellant, convicted of felony-murder is automatically eligible for death, and freighted with a potential aggravating circumstance to be weighed on death's side of the scale. Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they

outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral," and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

A. Beyond a Reasonable Doubt Is the Appropriate Burden of Proof for Factors Relied on to Impose a Death Sentence, for Finding that Aggravating Factors Outweigh Mitigating Factors, and for Finding that Death Is the Appropriate Sentence.

Twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[66] Only

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66. Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30 (c)(Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State*

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[67] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.) California 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

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v. Stewart (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A),9 (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071 (c)(West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.(c) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(I) (1992).)
Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a (c) (West 1985)

67. Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

even in that context, the required finding need not be unanimous.

This Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) The moral basis of a decision to impose death, however, does not mean that a decision of such magnitude should be made without rationality or conviction. Nor is it true that the penalty phase determinations mandated by section 190.3 do not involve fact finding.

Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences *which is above and beyond the elements of the crime itself."* (CALJIC 8.88; emphasis added.) Thus, before the process of weighing aggravating factors against mitigating factors can begin, a fact other than those that underlie the guilty verdicts must be found by the jury. And

before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors. These determinations are essential elements of the decision that a crime is death-worthy.

The fact, that under the Eighth Amendment, "death is different" cannot be used as a justification for permitting states to relax procedural protections provided by the Sixth and Fourteenth Amendments when proving an aggravating factor necessary to a capital sentence. (*Ring v. Arizona* (2002) 536 U.S. 584, 609.) No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly found the *Santosky* statement of the rationale for the burden of proof beyond a reasonable doubt requirement[68] applicable to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant are of such magnitude that . . . they have been protected by standards of

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68. "When the state brings a criminal action to deny a defendant liberty or life, . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [internal citations omitted].)

proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." (*Bullington v. Missouri* (1981) 451 U.S 435, 441 [quoting *Addington v. Texas* (1979) 441 U.S. 418, 423-424; *Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the U.S. Supreme Court 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 478.) This decision seemed to confirm that as a matter of due process under the Fourteenth Amendment the proof beyond a reasonable doubt standard must apply to all of the findings the sentencing jury must make as a prerequisite to its consideration of whether death is the appropriate punishment.

Under California's capital sentencing scheme, the "trier of fact" may not impose a death sentence unless it finds (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) In *Ring v. Arizona, supra*, 536 U.S. 584, the high court held that the Sixth and Fourteenth Amendment's guarantees of a jury trial means that such determinations must be made by a

jury, and must be made beyond a reasonable doubt.

Before *Ring* was decided, this Court rejected the application of *Apprendi* to the penalty phase of a capital trial. In so doing, the Court relied in large part on *Walton v. Arizona* (1990) 497 U.S. 639, and its conclusion that there is no constitutional right to a jury determination of facts that would subject defendants to a penalty of death. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453 [*Walton* compels rejection of defendant's instant claim that he was entitled to a finding beyond a reasonable doubt of the applicability of a particular section 190.3 sentencing factor.]

In *Ochoa*, this Court stated that a finding of first degree murder in Arizona was the "functional equivalent" of a finding of first degree murder with a section 190.2 special circumstance in California: "both events narrowed the possible range of sentences to death or life imprisonment . . . a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence." (*People v. Ochoa, supra*, at 454;

see also, *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14.)

This contention was specifically rejected by the high court in *Ring*, hich (1) overruled *Walton* to the extent *Walton* allowed a sentencing judge, sitting without a jury, to make factual findings necessary for imposition of a death sentence, and (2) held *Apprendi* fully applicable to all such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial. "Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense'. . . .". (*Ring, supra,* 536 U.S. at p. 609, quoting *Apprendi*, 530 U.S. at 494, n. 19 (2000).)

In light of *Ring*, this Court's holdings, made in reliance on *Walton*, that there is no need for any jury determination of the presence of an aggravating factor, or that such factors outweigh mitigating factors, because the jury's role as factfinder is complete upon the finding of a special circumstance, are no longer tenable. California's statute requires that the jury find one or more aggravating factors, and that these factors outweigh mitigating factors, before it can decide whether or not to impose death. These findings exposed appellant to a greater punishment than that authorized by the special circumstances finding alone. Capital defendants,

no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. (See *Ring v. Arizona, supra,* 536 U.S. at p. 609.)

In *People v. Snow* (2003) 30 Cal.4th 43,126, fn 32, this Court stated that *Aprendi v. New Jersey* (2000) 530 U.S. 466, which held that a jury must find beyond unanimously and beyond a reasonable doubt any fact that increases the maximum sentence possible for a defendant, does not affect California's death penalty process, because once a special circumstance has been found beyond a reasonable doubt the defendant is death eligible and jury findings as to aggravating circumstances do not expose a defendant to a higher maximum penalty.

However, a careful look at California's death penalty procedures shows that essential steps in the death-eligibility process take place during the penalty phase of a capital trial and these steps are subject to the mandates of *Ring.*

California utilizes a bifurcated process in which the jury first determines guilt or innocence of first-degree murder and whether or not alleged "special circumstances are true. If a defendant is found guilty and at least one special circumstance is found to be true, a penalty phase proceeding is held, wherein new witnesses may be called and new evidence presented by the prosecution and defense to establish the presence or absence of specified aggravating circumstances, as well as any mitigating circumstances. The jurors are instructed that they are to weigh aggravating versus mitigating circumstances and that they may impose death only if they find that the former substantially outweigh the latter. If aggravating circumstances do not outweigh mitigating circumstances, the jury must impose life without possibility of parole, or LWOP. Even if aggravating circumstances do outweigh mitigating circumstances, the jury has the discretion to exercise mercy and impose LWOP instead of death. (See sections 190-190.9; CALJIC Nos. 8.84-8.88; *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I),* (1985) 40 Cal.3d 512, 541.)

In California, the penalty for first-degree murder is 25 years to life unless at least one of a statutorily enumerated list of special circumstances

is found. This special finding is made during the guilt phase by the jury, unanimously and beyond reasonable doubt. Prior to *Ring*, this Court held that "there is no right under the Sixth or Eighth Amendments to the United States Constitution to have a jury determine the existence of all of the elements of a special circumstance. (*People v. Odle* (1988) 45 Cal.3d 286, 311.) However, in *People v. Prieto,* the Court acknowledged the error of that holding. (*People v. Prieto* (2003) 30 Cal.4th 226, 256.)

Only if a special circumstance is found does the trial proceed to the penalty phase where the jury hears additional evidence and argument from the prosecution and defense and determines whether the penalty will be LWOP or death.

California's scheme in the eligibility phase is directly parallel to Arizona as recognized by *Ring.* (Compare Ariz. Rev. Stat. Ann

13-7-3 (E) & (F) to Cal. Pen. Code 190.2 & 190.3.) The Arizona statute, like section 190.3, lists the specific circumstances which can be considered as aggravating or mitigating the offense. (Ariz. Rev. Stat. Ann. 13-703(F).) Some of these are similar to some of the special circumstances found in California's section 190.2 (compare 190.2(3) with Ariz. Rev. Stat. Ann. 13-703(F)(8); and 190.2(2) with Ariz. Rev. Stat. Ann. 13-703(F)(1);

and 190.2(7) with Ariz. Rev. Stat. Ann. 13-703(F)(10); others, however, are equivalent to section 190.3's aggravating circumstances. (Compare 190.3, subds.(c)), (a), (I), (h), (g), & (k), with Ariz. Rev. Stat. Ann.13-703(F)(2), (F)(6),(9)&(3), (F)(5)&(9), (G)(1), (2), and 13-703(G), respectively.)

Like a first-degree murder conviction under the Arizona statutory scheme invalidated by this Court in *Ring*, a jury verdict of guilt with a finding of one or more special circumstances in California, authorizes a maximum penalty of death only in a formal sense. (*Ring, supra*, 536 U.S. at pp. 602-605.) In California, death is the maximum penalty for *all* murder convictions. (See 190.1, subds. (a), (b) & (c.) Section 190(a) provides that the punishment for first-degree murder is 25 years to life, life without the possibility of parole, or death. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190. (*Ibid.*)

Section 190.3 requires the jury to impose LWOP unless the jury finds the existence of at least one additional aggravating factor above and beyond what was found during the guilt phase, and then finds that the

factors in aggravation outweigh any factors in mitigation. According to California's principal sentencing instruction. (*People v. Farnam* (2002) 28 Cal.4th 107, 177), an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. (CALJIC No. 8.88.) In the context of a California capital murder conviction, elements of the crime can only be interpreted to mean the elements necessary to prove both the first degree murder and whatever special circumstance or circumstances were found during the guilt phase.

Only then is the defendant truly eligible for death. The jury then engages in the final, purely normative stage of determining whether a particular defendant should be sentenced to death. Even if the jury concludes that aggravation outweighs mitigation, as noted, it may still impose LWOP.

To summarize, then, there are four steps to determining whether the sentence in a California capital case will be death or LWOP: (1) the defendant must be found guilty of first-degree murder and at least one of the of the "special circumstances enumerated in section 190.2 must be

found; (2) at least one of a *different* list of aggravating factors from section 190.3 must be found; (3) aggravating factors must be found to outweigh any mitigating factors present; and (4) if and only if aggravating factors are found to outweigh mitigating factors present, the jury must choose between death and LWOP.

Of these four steps only the first occurs during the guilt phase of the trial, attended by the Sixth Amendment's protections of unanimity and proof beyond reasonable doubt. In contrast, Steps 2, 3, and 4 occur during the penalty phase. Although occurring in the penalty phase, in actuality steps 2 and 3 are part of the *eligibility* determination as described by this Court in *People v. Tuilaepa* (1992) 4 Cal.4th 569, rather than the *selection* determination. Like the Arizona defendant in *Ring* convicted of first-degree murder, a person convicted of first-degree murder with a special circumstance finding in California is eligible for the death penalty in a formal sense only (*Ring, supra,* 536 U.S. at pp. 602-605); death cannot be imposed until Steps 2 and 3 have occurred.

It is here that California's scheme runs afoul of *Ring* because Steps 2 and 3 do not require juror unanimity or findings beyond reasonable doubt. Yet they do involve factual determinations above and beyond those

made in the guilt phase of the trial necessary for the imposition of death. Therefore, under *Ring*, these factual determinations must be made unanimously and beyond a reasonable doubt. A special circumstance findings pursuant to section 190.2 is not the same as an aggravating factor; it can even serve as a mitigating factor. (See e.g., *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance of section 190.2, subd. (a)(1) can be argued as mitigation if murder was committed by an addict to feed addiction].)

In effect, the California legislature has extended steps of the eligibility phase into the penalty phase of the trial. The selection phase does not begin until Step 4, where the jury considers all of the circumstances of the case and defendant, and determines whether to impose death.

The highest courts of Colorado, Missouri, Nevada, Connecticut, Arizona, and Maryland have concluded that steps wholly analogous to Step 2 of California's process involve factual determinations and are therefore subject to the requirements of *Ring*, and all but Maryland have further concluded that steps analogous to Step 3 of California's process the determination of whether aggravation outweighs mitigation is also a factual determination that must be made beyond a reasonable doubt.

(See *Woldt v. People* (Colo. 2003) 64 P.3d 256, 263-267; *State v. Whitfield* (Mo. 2003) 107 S.W.3d 259; *Johnson v. State* (Nev. 2002) 59 P.3d 450, 460; *State v. Rizzo* (Conn. 2003) 833 A.2d 363, 406-407; *State v. Ring* (Ariz. 2003) 65 P.3d 915, 942-943; *Oken v. State* (Md. 2003) 835 A.2d 1105, 1122.) California is alone among the states in holding that the determination of whether aggravating factors are present need not be made by the jury unanimously and beyond reasonable doubt. Yet in *Prieto*, this Court stated that the high cour reasoning in *Ring* does not apply to the penalty-phase determination in California. (See also *People v. Snow*, *supra,*. 30 Cal.4th at p.126, fn. 32.) In *Prieto*, this Court recognized that a California sentencing jury is charged with a duty to find facts in the penalty phase: While each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. This is true *even though the jury must make certain factual findings* in order to consider certain circumstances as aggravating factors. (*Prieto*, *supra*, 30 Cal.4th 226 at p. 263, emphasis added.)

Thus, California's statutory law, jury instructions, and this Court's previous decisions leave no doubt that facts must be found, and

fact-finding must occur, before the death penalty may be considered. Yet, this Court has attempted to avoid the mandates of *Ring* by characterizing facts found during the penalty phase as facts which bear upon but do not necessarily determine which of these two alternative penalties is appropriate. (See *People v. Snow, supra*; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.) This is a meaningless distinction. There are no facts either in Arizona's scheme or in California's scheme that are necessarily determinative of a sentence; in both states the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. The jury's role in the penalty phase of a California capital trial requires that it make factual findings regarding aggravating factors that are a prerequisite to a sentence of death. *Ring* clearly applies. California's statute, as written, applied, and interpreted by this Court, is unconstitutional and must fall.

B. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden For Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose sentence without the firm belief that whatever considerations underlie their sentencing decisions have been at least proved to be more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to base "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and*

Improvement Co. (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Cal. R. Ct. 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments, and the Sixth Amendment's guarantee to a trial by jury. (See e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra,* 122 S.Ct at 1443.)

Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a

defendant. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S.343, 346.)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and does not apply at all to the finding of the existence of aggravating factors. There is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the state had the burden of proof beyond a reasonable doubt regarding the existence of any factor in aggravation, and the burden of persuasion regarding the propriety of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth and Fourteenth Amendments, and is reversible *per se*. (*Sullivan v. Louisiana, supra.*) That should be the result here, too.

C. The Trial Court's Failure To Instruct The Jury on Any Penalty Phase Burden of Proof Violated Appellant's Constitutional Rights To Due Process And Equal Protection Of The Laws, And To Not Be Subjected to Cruel And Unusual Punishment

Appellant's death sentence violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances exist beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on any burden of proof at all when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358.)

Appellant has argued above that the appropriate burden of proof for the requisite findings that one or more aggravating factors are present, and

that such factors outweigh the mitigating factors, is beyond a reasonable doubt, and that the prosecution has the burden of persuasion in all sentencing proceedings. (See, Section A, *ante*.) In any event, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; emphasis added.) The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do

exist.[69] This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes, supra,* 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455

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69. See, e.g., *People v. Dunkle*, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at p. 725.

U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida, supra*, 428 U.S. at p. 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either. Such chaos is not allowed for factual findings in non-capital cases, or even in sentencing proceedings before a judge after all essential foundational factors have been found by a jury.

The error in failing to instruct the jury on what the proper burden of proof is or is not, is reversible per se. (*Sullivan v. Louisiana, supra.*) In cases in which the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the burden of persuasion to the state, and another assigns it to the defendant.

D. California Law Violates The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Unanimous Jury Agreement On Aggravating Factors.

Jury Agreement

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord, People v. Bolin* (1998) 18 Cal.4th 297, 335-336; *People v. Miranda* (1988) 44 Cal.3d 57, 99.) Consistent with this construction of California's capital sentencing scheme, no instruction was given requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warrants the sentence of death. Indeed, on the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty which would have lost by a 1-11 vote, had it been put to the jury as

a reason for the death penalty.

It is inconceivable that a death verdict would satisfy the Eighth and Fourteenth Amendments if it were based on (I) each juror finding a different set of aggravating circumstances, (ii) the jury voting separately on whether each juror's individual set of aggravating circumstances warrants death, and (iii) each such vote coming out 1-11 against that being an appropriate basis for death (for example, because other jurors were not convinced that all of those circumstances actually existed, and were not convinced that the subset of those circumstances which they found to exist actually warranted death). Nothing in this record precludes such a possibility. The result here is thus akin to the chaotic and unconstitutional result suggested by the plurality opinion in *Schad v. Arizona* (1991) 501 U.S. 624, 633 [plur. opn. of Souter, J.].

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefore, including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See, *Murray's Lessee, supra*; *Griffin v. United States,*

supra.) And it violates the Fifth, Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty. A death sentence under those circumstances would be so arbitrary and capricious as to fail Fifth, Eighth and Fourteenth Amendment scrutiny. (See, e.g., *Gregg v. Georgia, supra,* 428 U.S. at pp. 188-189.)

Under *Ring v. Arizona, supra,* it would also violate the Sixth Amendment's guarantee of a trial by jury. The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical elements of California's sentencing scheme, and a prerequisite to the weighing process in which normative determinations are made. The U.S. Supreme Court has held that such determinations must be made by a jury, and cannot be somehow attended with fewer procedural protections than decisions of much fewer consequences. See Section A, ante.

For all of these reasons, the sentence of death violates the Fifth,

Sixth, Eighth and Fourteenth Amendments.

Jury Unanimity

Of the twenty-two states like California that vest the responsibility for death penalty sentencing on the jury, fourteen require that the jury unanimously agree on the aggravating factors proven.[70] California does not have such a requirement.

Thus, appellant's jurors were never told that they were required to agree as to which factors in aggravation had been proven. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from the factors relied on by the other jurors, i.e., with no actual agreement on why appellant should be condemned.

The United States Supreme Court decision in *Apprendi v. New Jersey*, *supra*, confirms that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantees of the Sixth

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70. See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(I) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (*Id.*, 530 U.S. at 478.) In *Apprendi* the high court 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 to the jury's satisfaction beyond a reasonable doubt. Under California's capital sentencing scheme, a death sentence may not be imposed absent findings (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) Accordingly, these findings had to be found beyond a reasonable doubt by a unanimous jury.

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor*, *supra*, 52 Cal.3d at 749.) This holding was overruled by *Ring v. Arizona, supra*, which held that any factual findings prerequisite to a death sentence must be found beyond a reasonable doubt by a unanimous jury. (See Section A, *ante*.)

The U.S. Supreme Court has held that the verdict of a six-person

jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[71] *accord Johnson v. Mississippi, supra,* 486 U.S. at p. 584), the Fifth, Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

The finding of an aggravating circumstance is such a finding. An enhancing allegation in a non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) Since capital

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71.The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. `It is of vital importance' that the decisions made in that context `be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique `in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the `qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) (`[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." *(Monge v. California, supra,* 524 U.S. at 731-732.)

defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. at 957, 994), and certainly no less (*Ring, supra,* 536 U.S. 617-618) and since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst,* (9th Cir 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.[72]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[73] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or

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72. Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C., § 848, subd. (k).)

73.The first sentence of Article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational

matter. Instead, jury unanimity is mandated only on a final verdict or special finding." (*People v. Miranda, supra*, 44 Cal.3d at p. 99.) But unanimity is not limited to final verdicts. For example, it is not enough that jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281-282.) It is only fair and rational that, where jurors are charged with the most serious task with which any jury is ever confronted – determining whether the aggravating circumstances are so substantial in comparison to the mitigating as to warrant death – unanimity as to the existence of particular aggravating factor supporting that decision, and as to the fact that such factors outweigh the mitigating factors, likewise be required. These "foundational factors" of the sentencing decision are precisely the types of determinations for which appellant is entitled to unanimous jury verdicts beyond a reasonable doubt. (See *Ring v. Arizona, supra.*)

This claim must be considered in light of *Cunningham v. California* (2007) 549 U.S. 270. *Cunningham* supports appellant's contention that the

aggravating factors necessary for the imposition of a death sentence must be found true by the jury beyond a reasonable doubt and by unanimous decision of the jury. Because of *Cunningham*, this Court's effort to distinguish *Ring v. Arizona, supra,* and *Blakely v. Washington* (2004) 542 U.S. 296 should be re-examined. (See *People v. Prieto* (2003) 30 Cal.4th 226, 275-276 [rejecting the argument that *Blakely* requires findings beyond a reasonable doubt] and *People v. Morrison* (2004) 34 Cal.4th 698, 731 [same].)

The *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi v. New Jersey, supra,* 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. The Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington, supra,* 542 U.S. at pp. 303-304.)

In *Cunningham v. California, supra,* the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law. The question was whether the Sixth Amendment

right to a jury trial require that the aggravating facts used to sentence a noncapital defendant to the upper term (rather than to the presumptive middle term) be proved beyond a reasonable doubt The High Court held that it did, reiterating its holding that the federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of fact finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.* at p.288) citing *People v. Black* (2005) 35 Cal.4th 1238, 1254) so that the upper term (rather than the middle term) is the statutory maximum. The majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in

deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth Amendment: "We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." (*Id.* at p.290)

Justice Ginsburg's majority opinion held that there was a bright line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Ibid.* citing to *Blakely*, *supra,* 542 U.S., at 305, and n. 8.)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (*People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; see also CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in

Cunningham dictates that California's death penalty statute falls under the purview of *Blakely*, *Ring*, and *Apprendi*.

In *People v. Prieto, supra,* 30 Cal.4th at p. 275, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 462, this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty sentencing is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the constitutional question whether the fact finding was something"traditionally" done by the sentencer. The only question relevant to the Sixth Amendment analysis is whether a fact is essential for increasedpunishment. (*Cunningham v. California*, *supra*, 549 U.S. at p. 290.)

This Court has also held that California's death penalty statute is notwithin the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People v. Prieto*, *supra*, 30Cal.4th at p. 275), or because a death penalty decision involves the "moral assessment" of facts "as reflects whether defendant should be sentenced to death." (*People v. Moon* (2005) 37 Cal.4th 1, 41, citing

People v. Brown (1985) 40 Cal.3d 512, 540.) This Court has also held that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow, supra,* 30 Cal.4th at p.126, fn.32, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14.) None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts –it does not matter what kind of facts or how those facts are ultimately used.

Cunningham is indisputable on this point. Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly, a capital juror does not

have to consider aggravation if in the juror's moral judgement the aggravation does not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact of aggravation has to found beyond a reasonable doubt.

The United States Supreme Court in *Blakely* as much as said that its ruling applied to "normative" decisions, without using that phrase. As Justice Breyer pointed out, "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 v. Washington*, *supra*, 542 U.S. at p.328.) Merely to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring v. Arizona*, *supra*, 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of *Ring* and *Apprendi*: "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must

be found by the jury beyond a reasonable doubt."

Because California does not require that aggravation be proved beyond a reasonable doubt, it violates the Sixth Amendment.

A second recent United States Supreme Court case also supports appellant's argument that a sentence must be based on the findings beyond a reasonable doubt by a unanimous jury. In *Brown v. Sanders* (2006) 546 U.S. 212, the High Court clarified the role of aggravating circumstances in California's death penalty scheme: "Our cases have frequently employed the terms 'aggravating circumstance' or 'aggravating factor' to refer to those statutory factors which determine death eligibility in satisfaction of *Furman's* narrowing requirement.(See, e.g., *Tuilaepa v. California,* 512 U.S., at 972.) This terminology becomes confusing when, as in this case, a State employs the term 'aggravating circumstance' to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty." (*Brown v. Sanders*, *supra*, 546 U.S. at p. 216, fn. 2, italics in original.) There can now be no question that one or more aggravating circumstances above and beyond any findings that make the defendant eligible for death must be found by a California jury before it can consider whether or not to impose a death sentence. (See CALJIC No. 8.88.) As Justice Scalia, the author of *Sanders,*

concluded in *Ring:* "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 612.)

In light of *Brown* and *Cunningham,* this Court should re-examine its decisions regarding the applicability of *Ring v. Arizona* to California's death penalty scheme.

The error is reversible *per se*, because it permitted the jury to return a death judgment without making the findings required by law. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-281; *United States v. Gaudin*, *supra,* 515 U.S. at pp. 522-523 [aff'g 28 F.3d at pp. 951-952.]) In any event, given the difficulty of the penalty determination, the State cannot show there is no reasonable possibility (*Chapman v. California*, *supra,* 386 U.S. at p. 24; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259) that the failure to instruct on the need for unanimity regarding aggravating circumstances contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) As a result, the

penalty verdict must be set aside.

E. California Law Violates The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of such a provision does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are elsewhere considered by this Court to be an element of due process so fundamental

that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus, and is required to allege with particularity the circumstances constituting the state's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 267.)[74] The same reasoning applies to the far graver decision to put someone to death. (See also, *People v. Martin* (1986) 42 Cal.3d 437, 449-450 (statement of reasons essential to meaningful appellate review).)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth and Fourteenth Amendments,

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74. A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

capital defendants are entitled to more rigorous protections than those afforded non-capital defendants (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994). Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at 383, n. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes, supra*, 52 Cal.3d at 643) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43,79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems,

twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[75]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under

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75. See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances), and finding that these aggravators outweigh any and all mitigating circumstances. In some cases, the jury may rely upon aspects of a special circumstance found at the guilt phase trial as a penalty phase aggravating circumstance and conclude that it outweighs the mitigating circumstances, but there is no requirement that the jury treat a special circumstance finding as a penalty phase aggravating factor or that the jury accord such a factor any particular aggravating weight. Thus, absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

F. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing 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. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "`that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. 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, did note 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." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. 52, n. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see

section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304; *Thompson v. Oklahoma* (1988) 487 U.S. at 821, 830-31; *Enmund v. Florida* (1982) 458 U.S. 782, 796 n. 22 [102 S.Ct. 3368]; *Coker v. Georgia* (1977) 433 U.S.584, 596 [97 S.Ct. 2861].)

Thirty-one of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the Georgia Supreme Court determine

whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238 . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[76]

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76. See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

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 relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment. Categories of crimes that 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".[77] Categories of criminals that warrant such a comparison include persons suffering from insanity (*Ford v. Wainwright* (1986) 477 U.S. 399) or mental retardation; see *Atkins v. Virginia*, *supra*.)

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth,

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77. Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more that we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev.1, 30 (1995).)

Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

G. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As Factor In Aggravation Unless Found to Be True Beyond a Reasonable Doubt By A Unanimous Jury

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in § 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 ; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United State's Supreme Court's recent decisions in *Ring v. Arizona, supra,* and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (See Section A, ante.) The application of *Ring* and

Apprendi to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. See Section A, ante. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

H. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)), and "substantial" (see factor (g)), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

I. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976)

428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-aggravating factors and did so believing that the state – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, as well, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of sentencing calculus. In other cases, the jury may construe the "whether or

not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "arbitrary and capricious action,'" *Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, quoting *Gregg v. Georgia*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

J. California Law that Grants Unbridled Discretion to the Prosecutor Compounds the Effects of Vagueness and Arbitrariness Inherent on the Face of the California Statutory Scheme

Under California law, the individual county prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his

dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, this creates a substantial risk of county-by-county arbitrariness. There can be no doubt that under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible conditions, including race and economic status. Further, under *People v. Morales* (1989) 48 Cal.3d 527, the prosecutor is free to seek the death penalty in almost every murder case.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme-in charging, prosecuting and submitting a case to the jury as a capital crime- merely compounds, in application, the disastrous effects of vagueness and arbitrariness inherent on the face of the California st6atutory scheme. Just like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina, supra,* 428 U.S. 280, such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia, supra,* 408 U.S. 238.

XX. EVEN IN THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (*Monge v. California, supra,* 524 U.S. at 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural perfections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis

added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights...It encompasses in a sense, 'the right to have rights.'" (*Trop v. Dulles* (1958) 356 U.S. 86, 102.)

If the interest identified is "fundamental", then the courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra, Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The state cannot meet this burden. In this case, the equal protection guarantees of the state and federal constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the People of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more

reliable.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution therefore requires that capital defendant receive at very least the same procedural protections of proof beyond a reasonable doubt as do non-capital felons. By not so requiring, the California death penalty scheme is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

XXI. 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

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*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; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa has abandoned the death penalty.)

The nonuse 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" (Dec. 18, 1999), on Amnesty International website (www. amnesty. org)[78]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world

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78.These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

to inform our understanding. "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. of Field, J.]; *Hilton v. Guyot* (1895)159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 ; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 100; *Atkins v. Virginia, supra,* 536 U.S. at pp. 315-316.) It prohibits the use of

forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. 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. (Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina,* O.T.2001, No. 00-8727, p. 4.)

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.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of

our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311.]

Recently, the United States Supreme Court in *Roper v. Simmons* (2005) 543 U.S. 551, 567, struck down the death penalty for defendants who committed the capital crime as juveniles. In doing so, the Court made reference to the international community's disfavor of the death penalty for juveniles, signaling the High Court's inclination to bring this country more into line with international standards vis a vis capital punishment. (*Ibid.*)

Thus, the very broad death scheme in California, and death's use as regular punishment randomly imposed, violate the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

XXII. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

There were numerous penalty trial errors in this case. There were also significant guilt phase errors. This Court has recognized that guilt phase errors that may not otherwise be prejudicial as to the guilt phase may nevertheless improperly and adversely impact the jury's penalty

determination. (See, for example, *In re Marquez* (1992) 1 Cal.4th 584,605, 607-609.) This Court is also obliged to consider the cumulative effect of multiple errors on the sentencing outcome. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 ; *People v. Holt* (1984) 37 Cal.3d 436,459.)

The cumulative weight of the guilt and penalty phase errors was prejudicial to appellant. As demonstrated elsewhere in this opening brief with respect to various guilt phase errors, appellant's rights were violated under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the penalty trial, appellant was deprived of a fair and reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Together, the cumulative effect of the errors was prejudicial.

It is both reasonably probable and likely that both the jury's guilt and penalty determination were adversely affected by the cumulative errors. (*Chapman v. California, supra,* 386 U.S. at p. 24.) In the absence of the errors, the outcome would have been more favorable to appellant. It certainly cannot be said that the errors had "no effect" on the jury's penalty verdicts.

CONCLUSION

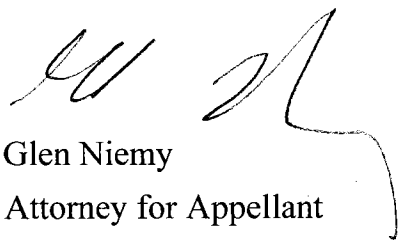
By reason of the foregoing, appellant Jamelle Armstrong respectfully requests that the judgment of conviction on all counts, the special circumstance findings, and the judgment of death be reversed and the matter remanded to the trial court for a new trial.

Appellant was denied his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The grievous errors deprived appellant of his right to a meaningful determination of guilt and a reliable determination of penalty.

The citizens of the State of California can have no confidence in the reliability of any of the verdicts rendered in this case.

June 21, 2011

Respectfully submitted,



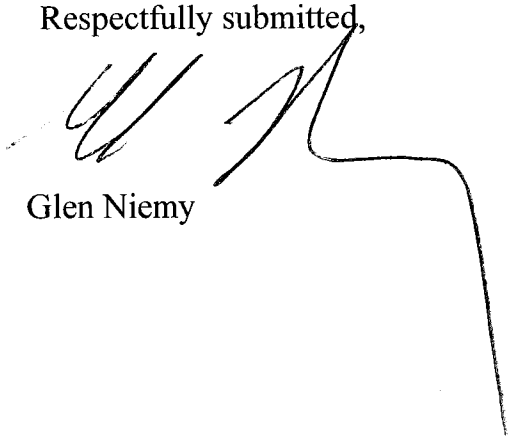
Glen Niemy
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief uses a 13 point New Times Roman type and is 104,894 words in length.

June 21, 2011

Respectfully submitted,



Glen Niemy

DECLARATION OF SERVICE

re: People v. Jamelle Armstrong
S126560

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Opening Brief,** on each of the following by placing the same in an envelop addressed (respectively)

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Each envelop was then on June 29th, 2011, sealed and placed in the United States Mail, at Bridgton, ME, County of Cumberland, the county in which I have my law office, with the postage thereon fully prepaid. I declare under the penalty of perjury and

the laws of California and Maine that the foregoing is true and correct this June 29th, 2011 at Bridgton, Maine.

Glen Niemy