IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ALBERT JONES

Defendant and Appellant

Case No. S056364

Riverside Superior Court
Superior Court No. CR-53009

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

The Honorable Judge Gordon R. Burkhart

MICHAEL J. HERSEK
State Public Defender

JESSICA McGUIRE
Deputy State Public Defender
Cal. State Bar No. 88563

801 K Street, Suite 1100
Sacramento, CA 95814-3518
Telephone (916) 322-2676

Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPELLANT'S OPENING BRIEF
STATEMENT OF THE CASE

This is an automatic appeal from a judgment of death. (Penal Code, §1239 (b).)[1]

On June 2, 1994, the Riverside County District Attorney filed an Information charging Albert Jones with the first degree murders of James Florville and Madalynne Florville on or about December 13, 1993. (§ 187.) It was alleged that Albert Jones personally used a deadly weapon, a sharp object in the commission of these murders. (§ 12022(b).) The District Attorney further alleged the special circumstances that Jones committed multiple murders (§ 190.2, subdivision, (a) (3)), and that the murders of James and Madalynne Florville occurred during the commission of a robbery (§ 190.2, (a)

[1] Unless otherwise indicated, all statutory references are to the California Penal Code.

(17) (i)), and a burglary. (§ 190.2 (a) 17) (vii).) The information also alleged that Mr. Jones had suffered four prior felony convictions, one of which was a robbery. (1CT 62-65.)[2]

On December 14, 1993 Jones was arrested on the above charges. (17RT 2711.) He was arraigned on December 29, 1983, and pleaded not guilty to all counts and denied all special allegations and enhancements. (1CT 15-16.)

On January 24, 1994, the Riverside Public Defender declared a conflict in representing. Jones, and the Court appointed a conflict defense panel attorney, James Bender, to represent him. (1CT 18-19.) On April 8, 1994, Grover Porter was appointed as second counsel. (1CT 29.) Mr. Porter actually served as lead counsel during the guilt phase of the trial.

The preliminary hearing was held on May 23, 1994, and Jones was bound over to stand trial. (1CT 32-61.) On June 3, 1994, Jones appeared with counsel and pleaded not guilty to all counts, and denied all special allegations, enhancements and prior convictions. (1CT 68-69.)

A number of pretrial motions were heard by the trial court. This appeal addresses the prosecution's motion to admit evidence of appellant's prior criminal offenses, which was actually captioned "Trial Brief: Admissibility of Evidence" (1CT 255-268), and was granted in part on February 23, 1996. (2CT 382; 3RT 334.) The court also granted appellant's Motion That Defense Objections

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[2] The following abbreviations will be used in this brief for citations to the record: "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript; and "CST" or "RST" the augmented Clerk's or Reporter's Transcript, respectively.

Include State and Federal Constitutional Objections on that date. (2CT 298-303, 383; 3RT 286.)

Appellant filed a Petition for Writ of Mandate in the Fourth District Court of Appeal on February 28, 1996, challenging the trial court's February 23rd ruling, admitting evidence of appellant's prior robbery conviction, which was summarily denied on February 29, 1996. (1CST 1; 2CT 393.)

Voir dire began on February 26, 1996. (2CT 387; 4RT 389.) Appellant's oral "Wheeler" motion was heard and denied on March 12, 1996 (2CT 398; 10RT 1731), and the jury and alternates were sworn on March 13, 1996. (11RT 1763-1764.) Guilt phase opening statements were given the same day. (11Rt 1767-1793, 1801-1821.) During the guilt phase of the trial, the court heard and denied appellant's Motion to Conduct Jury View of the Scene of the Crime (2 CT 428-432; 23RT 3576-3579), as well as his oral request to admit a videotape of the crime scene. (21RT 3263.) Closing arguments began on April 29, 1996, and concluded on April 30, 1996. (27RT 4101-28RT 4318.) The jury was instructed and began deliberations the same day. (28RT 4318-4359.) On May 1, 1996, following a total of approximately six hours of deliberations, the jury returned a verdict of guilty on all counts and also found the special circumstances to be true. (2CT 447, 450-452; 3CT592-600.)

Appellant waived his right to a jury trial on the alleged prior convictions. (2CT 452.) On May 6, 1996, the trial court heard the prosecution's evidence of the alleged prior convictions, and found the allegation of the four prior convictions to be true. (2CT 475-477.) The same day, the trial court also heard and denied appellant's Request for Foundational Hearing Pursuant to *People v. Phillips*

(1985) 41 Cal.,3d 29 and Opposition to Introduction of Evidence in Aggravation. (2 CT 459-463; 29RT 4450.)

Penalty phase opening statements were given on May 13, 1993. (30RT 4581-4594.) Juror Phillips was excused prior to the presentation of evidence, and Alternate Juror Lichtenberg was sworn as a regular juror to replace him. (30RT 4686-4687; 31RT 4702.) The prosecution rested its case on May 15, 1996 (32RT 4783), as did the defense. (32RT 4827.) Closing arguments were given on May 20, 1996. (33RT 4927-4978.) The jury was instructed the same day (33RT 4978-4998), and the jurors retired to deliberate at 2:30 p.m. (3CT 636.) On May, 22, 1996, the jury returned a verdict of death. (3CT 738.)

Appellant's Motion for New Trial (3CT 753-765), and his Motion to Reduce the Penalty to Life Imprisonment Without the Possibility of Parole (3CT 746-752), were heard and denied on September 20, 1996. (3CT 792-793.) He was sentenced to death the same day. (3CT 794-801.) This appeal is automatic. (§1239(b).)

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STATEMENT OF FACTS

A. Introduction

Albert Jones, a black man, was convicted by a nearly all white jury in Riverside County of robbing and stabbing to death an elderly white couple, Madalynne and James Florville, in their home, on December 13, 1993. No murder weapon was found, no property belonging to the Florvilles was recovered, and there were no fingerprints or any trace evidence linking Jones to the crime.

The evidence against Jones consisted of (1) the testimony of a teenage runaway and thief, who claimed to have witnessed Jones enter and exit the victims' mobile home on the day of the crime, and (2) the testimony of four other teenagers who lived near the victims – two of whom also had a history of theft offenses -- regarding incriminating statements allegedly made by Jones before and after the crime.

After excluding all but two of the prospective black jurors – only one black juror and one black alternate were left at the end of voir dire --,[3] the prosecutor, over strenuous defense objection, opened his case-in chief in the guilt phase with testimony regarding a robbery committed by Jones in 1985, involving an entirely distinct set of circumstances than the crime for which he was on trial. In that case, Jones and two accomplices held up three men at gunpoint, on a city street in broad daylight.[4]

Jones' defense was that he was falsely accused as the instigator and perpetrator of the robbery and murder of the Florvilles,

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[3] See Argument I.

[4] See Argument II.

and that the teenage boy who claimed to have seen him enter and later exit the victims' home, was lying. However, the trial court barred Jones' attorneys from introducing a videotape that would have impeached this alleged eyewitness's testimony, and also denied the defense's motion for a jury view of the crime scene, which would have further discredited that testimony.[5]

The prosecution's case against Jones in the penalty phase focused on the circumstances of the crime, in particular, its impact on the victims' family members, and otherwise consisted mainly of instances of unadjudicated criminal conduct. One such instance was a robbery of a grocery store in Delano California. Items taken in the robbery were later found in the apartment where Jones was arrested, but Jones was not identified as a perpetrator of the robbery by the eyewitnesses.[6] The prosecutor in Kern County offered Jones a plea bargain, and he was convicted of a misdemeanor charge of receiving stolen property.

The defense presented minimal mitigating evidence. Its case in mitigation consumes less than forty pages of transcript, and was limited to four witnesses, only one of whom – a sister – had known Jones for any period of time. The testimony primarily concerned Jones lack of aggressive behavior during his incarceration in the county jail and in state prison, and the jury heard virtually nothing about his background and social history.

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[5] See Argument III.

[6] See Argument V.

B. Guilt Phase

(1) The Capital Crime

In December 1993, Jones was living with his girlfriend, Judy Johnson, in the Good Hope area of Perris, in Riverside County. (16RT 2603.) Judy was employed at Starcrest Industries. She had a 17 year old nephew named Alon Johnson (15RT 2522), who sometimes spent the night at her house. (15RT 2523.) Alon lived with his grandmother, Hattie Johnson, on Souder, in Mead Valley, a rural section of Perris, in Riverside County. (12RT 1932; 14RT 2289.) Alon regularly socialized with a tightly-knit group of teenagers in his neighborhood, that included Jack Purnell, Mary "Shababy" Holmes, Debbie Russell Ryan McElroy, and Ryan's brother, Dorrell Arroyo, at the home of Rochelle Timmons, Holmes' aunt. Purnell, Russell and Arroyo had records of juvenile delinquency.

Jones drove Judy to work early in the morning on December 13, 1993. (15RT 2524.) When they left home, Alon was there, asleep on the couch. (15RT 2537.) Before she went to work, Judy gave Jones some money to do their laundry. (15RT 2531.) When Judy got home from work that afternoon, her clothes, her son's clothes and Albert's clothes had all been washed. (15RT 2529.)

Judy clocked in at her place of work, Starcrest Industries, at 5:23 a.m. (15RT 2524.) Ricky White, another Starcrest employee, who clocked in one minute later, saw Jones in the parking lot and waved to him. (22RT 3439; 24RT 3605.)

At approximately 11 a.m. the same morning, Madalynnne and James Florville, an elderly, white couple who lived on Souder, across the street from Alon's grandmother, were found dead in their mobile home, by Beth Hunnicutt, their next door neighbor. (12RT 1970,

1976.) Hunnicutt went to check on them after their son, James Florville, Jr. and various other relatives were unable to reach them by phone. James Florville had started calling his parents at 6:20 that morning, before he left for work, but no one answered. (12RT 1901-1904.) The elder Florvilles were lying face down on the floor with their hands tied behind their backs with copper wire. Their feet were also bound with copper wire. They each had a number of stab wounds in the chest. (17RT 2705.)

When the sheriff's officers arrived, they found no evidence of forced entry. (13RT 2063.) The living area did not appear to have been ransacked. (16RT 2615.) A man's wallet with $50 was found on the couch. A woman's purse was sitting in the in the dining area. Inside the purse there was about $5.00 and some credit cards. (16RT 2615-2616.) The southeast bedroom had been ransacked, but the officers found $100 in cash in a book in a dresser drawer. (16RT 2618.) A .22 caliber gun was found in the closet. (*Ibid.*) A sliver of a latex, surgical glove was found on the floor in front of the the sliding glass door. (13RT 2077). The fingertip of a latex glove was also caught up in the wire binding James' Floreville's wrists. (13RT 2088.) No latent fingerprints were found at the crime scene. (13RT 2081.) There were also no discernible footprints. (13RT 2083.) According to the Florvilles' two children, James Florville and Karen Anderson, nothing was missing, except for a toy safe containing some coins, a metal box containing documents, and cash that was kept in an envelope taped to the bottom of a dresser drawer. (12RT 1904, 1908 1939.) Detective Eric Spidle of the Riverside County Sheriff's Department was assigned to investigate

the crime, assisted by Detective Robert Joseph, who was in charge of the crime scene. (13RT 2055.)

The next day, December 14, 1993, Detective Spidle received a call from Lillie McElroy, a neighbor of the Florvilles, who stated that her son, Dorrell Arroyo, had information about the homicide. McElroy was a good friend and regular bingo partner of Madalynne Florville. (12RT 1894; 18RT 2866.) Spidle interviewed Arroyo and Debbie Russell, a 16 year old girl who lived with McElroy and her boyfriend, Clifford Holmes. (17RT 2707-2709.) A tape recording of Arroyo's interview was played for the jury. (22RT 3466.)

Arroyo was 15 years old. He had run away from home, and was staying with Beth Brown, who lived about a block away from Arroyo's mother, Lillie, and her boyfriend, Clifford Holmes. (13RT 2036; 14RT 2225.) Arroyo had a history of theft offenses, including bike theft (14RT 2376-2381), attempted car theft (23RT 3516-3521), and theft of property from an uninhabited rental home. When he was caught by a neighbor stealing Venetian blinds and other items from the rental property, he lied and told the neighbor that he and his mother were renting the home. (23RT 3558-3563.)

Arroyo said that he spent the night of December 12th with his dog in a camper parked in Beth Brown's yard. (14RT 2226.) He had been "goofing around" in the camper with his friend Ray Butler, who lived in the house next door with his mother, Dakota Whitney. (14RT 2227.) Arroyo initially told Spidle that Butler was with him in the camper all night, but later said he had been there only earlier in the day. (14RT 2302-2305, 2310.)

Arroyo claimed that between 5:00 and 6:00 a.m, the morning of December13th, he looked out of the window of the camper and

saw Jones' car drive past the Florvilles' mobile home across the road, and park across the street. Arroyo exited the camper and went to get a drink of water from a fountain in Brown's yard. He saw Jones and Alon Johnson get out of the car. (14RT 2227-2229.) Jones walked through the Florville's front gate up to the sliding glass door that served as the front door of their mobile home. The door slid open and Jones disappeared. Alon jumped over the side gate and also disappeared from sight. (14RT 2231-2232, 2237-2239.) Arroyo stated that Jones was wearing a dark, long-sleeved shirt, white pants and "floppy shoes." (14RT 2325-2327.)

After about 15 to 30 minutes, Arroyo saw Jones come out of the front gate. (14RT 2244-2246.) Jones made a motion that looked like he was scratching or clawing at his hands. (14RT 2247.) Alon reappeared, carrying a square object that he threw over the fence. He jumped over the fence, picked up the square object and put it in the back seat of the car. Jones and Alon then got in the car and drove away. (14RT 2248-2249.) Arroyo watched the car until it stopped at Rochelle Timmons' house and parked. (14RT 2249-2250.) At that point, Arroyo jumped over the fence between Beth Brown and Dakota Whitney's yards. He knocked on Whitney's door and she opened it and let him inside. (14RT 2250.) Whitney testified that she let Arroyo in between 5:45 and 6:00 a.m., and that Arroyo picked up a blanket and lay down on the couch in the livingroom. (19RT 3087-3088.) Arroyo testified that from Whitney's couch, he looked out a window and watched Jones get out of his car in Rochelle's driveway. However, Arroyo could not say what Jones did after that because he stopped watching at that point. (14RT 2317-2318.) Arroyo was impeached on cross-examination by his

testimony from a prior proceeding in which he stated that he did *not* see anyone get out of the car when it was parked at Rochelle's. (14RT 2321-2324.)

Arroyo repeatedly insisted that there was enough daylight for him to make the above-described observations, despite the fact that the sun had not yet risen. (14RT 2281, 2285, 2298, 2316, 2342, 2345.) He did not recall that any outside lights were on at the Florvilles' motor home (14RT 2332), but did notice that the motion detector light on Beth Brown's house kept going on an off after he exited the camper. (14RT 2239.) When on, the light lit up parts of Beth Brown and Dakota Whitney's yards. (14RT 2295.)

Janet Whitford, a crime scene technician, measured the distance between where Arroyo was standing in Beth Brown's yard and the Florvilles' front door as 166 feet, and eight inches. (24RT 3661-3662.) The distance between where Arroyo was standing and the gate was 127 feet. (24RT 3666.)

On December 13, 1993, the sun rose at 6:46 a.m. Gerald Monahan, a defense investigator, went to Souder and Una in Mead Valley at about 5 a.m. on December 14, 1994 and December 12, 1995 to determine what the natural lighting conditions were. He chose these particular dates because the times of sunrise were almost exactly the same as on December 13, 1993. Monahan positioned himself in a field below Beth Brown's house across the road from the Florvilles' mobile home. Monahan testified that on both occasions it was "pitch black" out until after 6:04, when he began to be able to see dark outlines of trees. He could not see the road in front of him or his surroundings clearly until 6:17. (21RT 3282.) According to Dr. Elizabeth Carter, an atmospheric physicist,

this was the time when "civil twilight" occurred. Dr. Carter explained that civil twilight is the stage of dawn just before sunrise, when the sun is less than six degrees below the horizon, and one can carry on outdoor activities without artificial light. From 5:53 a.m. until that time, there was "nautical twilight," the stage of dawn when only the outlines of large land forms can be seen and colors cannot be discerned. Prior to that was "astronomical twilight," the earliest stage of dawn, when it is still "pitch black" outside. (21RT 3296-3307.)

Beth Hunnicutt testified that she came home from visiting friends at 3 a.m. on December 13, 1993, and the outside light on the the Florvilles' mobile home was turned off. She went outside briefly at 4 a.m. when her husband left for work, and the light was on. Sometime between 5:00 and 6 a.m. she heard her dogs barking outside. She looked out of her window towards the street and saw a German shepherd walking by. She saw no car headlights. (12RT 1981-1985.) Hunnicutt explained that in order for someone to jump over the Florvilles' back fence, he would have to go through Hunnicutt's yard, and her dogs would bark at him. (12RT 1989.)

Mary "Shababy" Holmes was the daughter of Clifford Holmes, but lived with her aunt, Rochelle Timmons. She testified that on December 13, 1993, she left the house to go to school about 6:20 a.m., and found a bloody latex glove on the ground in front of Rochelle's house. She took the glove inside and flushed it down the toilet. (18RT 2901.)

At first, Holmes told the detectives that she had only *heard* that a glove was found, but did not say that she was the one who found it. Next, she told them that she found the glove in front of her neighbor Leonard's house, but later changed her story and said that she found

it in front of Rochelle's mobile home. She claimed that she lied because she was afraid of Jones. (18RT 2898-2903.) Holmes also initially stated that she found the glove at 6:05 a.m.(18RT 2935), but later claimed that she had looked at her watch and it was 6:19. (18RT 2939.)

Detective Spidle had the septic tank emptied and a latex glove was found. All fingertips of the latter glove were intact, so that the latex glove fingertip found at the crime scene could *not* have come from that glove. (19RT 3127.) A Department of Justice criminalist who analyzed the various gloves and fragments of gloves, testified that he could not determine whether or not the other fragment found at the crime scene came from the glove retrieved from the septic tank. (19RT 3129.)

Jones and Alon Johnson were arrested on December 14, 1993. Jones' car – a brown Oldsmobile Cutlass, was impounded and searched. (16RT 2610-2612.) No blood or other forensic evidence tying Jones to the crime was found inside the car, which did not appear to have been cleaned "for some time." (16RT 2635-2637.)

A search of Jones' residence also failed to disclose any such evidence. The murder weapon was not found.[7] Neither were any items belonging to the Florvilles. A pair of wet tennis shoes that might have been washed, or possibly just left out in the rain, were

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[7] A hunting knife in a brown leather sheath was found in a utility closet. The blade was rusty, and subsequent testing revealed that there was no blood on it. (19RT 3081-3084; 24RT 3662.) The pathologist who performed the autopsy on James Floreville testified that he could not say with any degree of medical certainty that this knife was the murder weapon (19RT 3063.)

sitting on top of the washing machine. (16RT 2606, 2621.) Subsequent testing of the shoes failed to reveal any blood or other trace evidence. (22RT 3363.) Two latex gloves were found inside a trash bag in the back of a Chevy pickup truck, and another latex glove was found in the back yard by the fence. However there was no blood on any of these gloves, and they all were fully intact. (16RT 2623.) Neither of the glove fragments recovered from the crime scene came from any of the three gloves found during the post-arrest search of Jones' residence. (19RT 3135.) Also each of the gloves taken from Jones' residence was a different size, color and thickness than the septic tank glove. (19RT 3135-3137.)

At 11 a.m., on February 24, 1994, over a year after the crime, Detective Spidle drove first from Starcrest Industries to Jones' and Judy's residence on Club Drive, and then from the crime scene back to the Club Drive residence. This was an "experiment" designed to estimate the amount of time it would have taken to drive from Starcrest Industries to Jones and Judy's residence (to pick up Alon) and then to the Florvilles'. Spidle testified that it took him 16 minutes to drive from Starcrest to Club Drive, which was 10 miles, and that it took 11 minutes to drive from the crime scene to Club Drive, which was 7.9 miles. (17RT 2781-83.) He admitted on cross examination that there were several possible routes that could have been taken, and that he had no idea what the traffic and road conditions were at 5:30 in the morning on December 13, 1993, on any of these routes. (17RT 2805-2809.)

The autopsy of Madalynne Florville was performed by Dr. Chris Swallwell, and the autopsy of James Florville was performed by Dr. Robert DiTraglia, both forensic pathologists. Both victims died

of multiple stab wounds. (18RT 2992; 19RT 3053.) Neither doctor offered an estimate as to time of death. Dr. DiTraglia testified that a forensic pathologist cannot reliably calculate the time of death within a given 24 hour period. (19RT 3075.) He stated that none of the four factors used to make such a calculation – rigor mortis, livor mortis, gastric emptying time and potassium levels in vitreous humor – is a reliable indicator. (19RT 3071-3073.)

Dr. Cyril Wecht, a nationally renowned pathologist, was hired by the defense to review the scientific data available to Drs. Swallwell and DiTraglia and determine the Florvilles' likely time of death. (25RT3782.) Dr. Wecht calculated that time of death as having been sometime between midnight and 4:30 a.m., most likely between 2:00 and 2:30 a.m. (25RT 3792-3793.) He disagreed with Dr. DiTraglia that time of death cannot be reliably determined based on the factors listed above. He explained that while individually, these factors might not be reliable, the combination of all four factors together with the fact that there were two bodies in the same environment that had not been moved, made it possible to make a reliable calculation in this case. (26RT 3860.)

Mary Holmes, and three of her teenage friends, testified that they overheard Jones on Sunday December 12, 1993, discussing plans to rob the Florvilles. They also testified to statements he allegedly made after the Florvilles were murdered.

Debbie Russell, was a 17 year-old runaway who lived with Lilly McElroy and Clifford Holmes. She had a juvenile record for theft. (13RT 2034, 2131-2132.) Russell testified that the day before the crime she overheard Jones discussing plans to commit a residential burglary with Alon and Alon's friend Jack Purnell. The discussion

took place at Rochelle Timmons' house. Russell and her friends, Mary Holmes and Ryan McElroy were in the bathroom getting dressed for church and Jones, Alon and Purnell were in the next room. (13RT 2119-2122.) Later the same day, Jones drove the teens to the store, and they passed the Florvilles' home. Jones pointed it out to Alon and Purnell, and instructed them to look it over and note the fences and gates. (13RT 2122-2125.)

Russell testified that on December 13th, she received a phone call from Jones telling her to look out the window. Jones said he heard about the murders from Alon's grandmother, and told Russell that the people had been tied up and thrown in the closet and shot. Russell testified that Jones told her to be careful because next it could be her. (13RT 2126-2127.)

Russell stated that later that day, she, Jones, Alon and Mary Holmes were at Rochelle's house and Mary told them about finding and flushing a latex glove. Jones asked Alon what he had done with his gloves and Alon replied that he had thrown them in the back seat. Jones then told Mary that she had done the right thing by disposing of the glove she found. (13RT 2127-2129.)

Mary Holmes also testified she overheard Jones, Alon and Purnell planning the crime at Rochelle Timmons' house on Sunday December 12th. According to Holmes, the plan was that Jones would go to the Florvilles' door and ask them to call 911 because his mother had a heart attack. Purnell was to tie the couple up and put them in the closet. Alon was to go around the back and enter through a window. They discussed the fact that the Florvilles' dog was timid and would not bite them. (18RT 2898-2900.) Holmes further testified that she was at Rochelle's after school with Russell,

Jones and Alon on the day of the crime. Russell told Jones about Holmes finding and flushing the glove, and Jones told Holmes, "good job." (18RT 2906.)

Jack Purnell had a history of juvenile delinquency and dishonesty. He stole shoes from a Famous Footwear store in May 1995. (15RT 2502.) When detained by a security guard, he gave a false last name and birth date. (15RT 2504-2505.) Also in May 1995, Purnell brutally beat a 15 year old boy and stole money from him. When interviewed by a probation officer about the incident, Purnell lied and told him that the victim had instigated the incident by throwing rocks at him. (22RT 3427-3434.) Purnell was sentenced to a juvenile honor camp, but escaped before his sentence was completed. (15RT 2510.)

Purnell testified that he visited Rochelle Timmons' home daily, and was close friends with Alon Johnson, Mary Holmes and Ryan McElroy. He met Albert Jones through Alon Johnson. Jones talked about doing robberies and explained how to do them. (15RT 2424-2427.)

On December 12, 1993, Purnell was in the back room at Rochelle's with Jones and Alon, and Jones started talking about doing robberies, but did not say whom he planned to rob. (15RT 2430.) Jones subsequently drove to the store, and Purnell, Mary Holmes, Alon and Ryan McElroy rode with him. (*Ibid.*) Holmes and Alon rode in the front seat with Jones. Purnell and McElroy rode in the back. (15RT 2431, 2487.) On the way back from the store Jones talked to Alon about robbing a house on the corner, and slowed down as he passed the Florevilles' mobile home. He talked

about escape routes and how the robbery would go down. (15RT 2432-2433.)

They discussed robberies again later that day (15RT 2433-2434.) Jones said that the old people on the corner might have money and guns, and might have a safe. The plan was that Jones was going to go up to the door, Purnell was to follow Jones, and Alon was to follow Purnell. (15RT 2435.) Purnell was to tie the people up and then look for money, a safe and some guns. If the people saw him he was supposed to stab them (15RT 2436), however, Jones did not tell them to bring knives or say that he would bring one. (15RT 2466.) Jones told Purnell and Alon that they needed gloves to avoid leaving fingerprints, and rope to tie the people up. Purnell mentioned the Florvilles' dog, but said it would be no problem. He told them that he once went to retrieve a football from the Florvilles' yard, and the dog ran away from him. (15RT 2437.) During this discussion, Purnell was drinking malt liquor supplied by Jones. Purnell testified that he got home shortly before 10, and got up at 7:00 the next morning to go to school. Alon was late for school that day. (15RT 2438-2439.)

On the morning of Tuesday, December 14,1993, Purnell attended a funeral with Jones, Alon, Holmes and Ryan McElroy. (15RT 2440.) At one point Purnell was alone in the car with Jones and Alon, and Alon said, "we did the lick [robbery]." Jones said nothing. (15RT 2443.)

Purnell admitted that he lied when he was initially interviewed by the detectives, but claimed that he did so out of fear. (15RT 2496.)

Ryan McElroy, the daughter of Lilly McElroy and sister of Dorrell Arroyo, testified that Jones told her that she, Shababy, Alon, Purnell and he were part of a "clique" whose purpose was to rob people. (18RT 2842-2843.) McElroy claimed that Jones said he would harm the loved ones of anyone who talked to outsiders about the clique. (18RT 2843.) Jones told them he was Robin Hood, and they were the poor people. He was going to steal from the rich and give to the poor. (18RT 2848.)

On direct examination, McElroy testified that she was getting ready for church at Rochelle Timmons' house on Sunday, December 12th, and overheard Jones, Alon and Purnell discussing a robbery. (18RT 2844.) On cross-examination, she said that she did not recall hearing a conversation Sunday morning about a robbery, and conceded that had she heard such a conversation she would have told Detective Spidle about it when he interviewed her the day after the crime. (18RT 2853.) She also did not recall having heard any discussion of a robbery on Sunday night, when she was at Rochelle's with Jones, Alon, Purnell, Holmes and Russell. (18RT 2861.)

McElroy went to school with Alon, and noticed on Monday, December 13th, that he was late to his second period class. She learned about the Florvilles' murder in the afternoon when she phoned home and spoke to Debbie Russell. After school, she went to Rochelle's and Jones and Dorrell were both there. (18RT 22845.) She overheard Alon or Jones say that they lost a glove (18RT 2847), and heard Jones tell Holmes that it was good that she flushed the glove she found. (18RT 2865.) She also overheard Jones tell Dorrell that if Alon told him to tie people up he would have to do it or

something bad would happen to his loved ones. (18RT 2848.) On cross-examination, she said that Jones had made this statement on Sunday evening, the day *before* the crime. (18RT 2861.)

McElroy testified that on Tuesday, December 14th, she went to a funeral with her friends and Jones went with them. She claimed that in the car, Jones said that the Florvilles would not have been stabbed had they cooperated. (18RT 2849.) According to McElroy, Alon, Purnell and Holmes were also in the car when Jones made this statement. (18RT 2850.) McElroy and Holmes were in the front seat with Jones and Purnell and Alon were in the back seat (18RT 2894.)

McElroy claimed that on December 18th, she picked up the phone and overheard part of a conversation in which Albert said, "that's the bitch rat on me, start those rumors about me. (18RT 2886.)

Kimberly Brown, Alon's math teacher at the Val Verde Career Center during the fall of 1993, testified, over defense objection,[8] that one day in November, 1993, she spotted Alon heading into the "baby care" classroom at the school, even though she knew he was due in another class. She watched him and he opened the door and reached around the door and came out stuffing a handful of latex gloves into his jacket pocket. Brown told him to put the gloves back and he did. She did not search him to see if any gloves were still in his jacket pocket. (16RT 2592-2594.) Jack Purnell, Ryan McElroy, and Ray Butler attended the same school during that time period. (16RT 2596-2597.)

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[8] See Argument IV.

(2) The Vernon Robbery

Raymond Latka testified that in the early afternoon of August 3, 1985, he, Robert Valdez and Randy Vasquez were leaving work at a furniture company in Vernon, when they were robbed on the street at gunpoint by two men who drove up in a white LeBaron. One of the robbers had a gun, and demanded money from Latka and his two companions. The man with the gun threatened to kill them if they did not cooperate. The other robber proceeded to collect money from the three victims and also hit Randy Vasquez. (11RT 1840-1843.) Latka subsequently identified one of the perpetrators in a photo lineup, but could no longer remember what the man looked like sufficiently to say whether it was Jones. The man who robbed him was black and in his early twenties. (11RT 1843-1844.)

Robert Valdez testified that he, Latka and Vasquez left the furniture factory about 1:00 or 1:30 that afternoon. As they were leaving, a white LeBaron pulled up with three men inside. Two jumped out and one was holding a gun. The man with the gun told Valdez and his companions it was a robbery and that if they did not cooperate they would be shot. The man asked for their wallets, but when Vasquez refused to turn over his wallet, the robber who was not holding the gun, frisked Valdez and found a wad of dollar bills in Vasquez's pocket. The robber then slugged Vasquez behind his ear. Valdez had been able to identify the man with the gun in both a photo lineup and in court, but was no longer able to do so. He was only able to recall that the man was black and in his early twenties. (11RT 1846-1850.)

Vernon police officer William Waxman testified that Latka and Valdez identified Jones in a photo lineup as the robber with the gun.

(13 RT 2109.) Waxman stated that there were three other suspects, who were appellant's cousins. (13 RT 2108.)

C. Penalty Phase

(1) Prosecution Case

The prosecution's penalty phase evidence fell into three categories: (1) incidents of unadjudicated criminal conduct involving violence or threats of violence; (2) Jones' prior felony convictions for robbery possession with intent sell marijuana; (3) and testimony of family members concerning the impact of the Florvilles murder on their lives.

(a) Unadjudicated Criminal conduct

The prosecution presented evidence of three separate incidents of unadjudicated criminal conduct.

The first incident was an armed robbery that took place on July 21, 1992, in Delano, California. Two black men entered the Fairway Market in Delano at 8:30 in the morning. One pointed a gun at the clerk working at the cash register and demanded money. He then stole cash from the register, cigarettes and lighters and the clerk's purse. (30RT 4616-4617.) The other man pointed a gun at the clerk working in the meat department, and when the clerk went to activate the store's alarm, struck him on the head with the gun. The robber emptied the contents of the clerk's pockets and then locked him in the bathroom. (30RT 4638-4639.)

The two men fled the store and were reported to be heading towards a nearby apartment complex. A S.W.A.T. team was called in, and entered a second floor apartment, where they found Jones and another man. (30RT 4601.) The only weapon found was a BB gun. (30RT4605.) The store clerk's purse was found in a bedroom

closet (30 RT4602), and a carton of cigarettes and 21 Bic lighters were found in another part of the apartment. (30RT 4611.) The clerk's driver's license, ATM card and Social Security card were found in an attack space shared by several apartments in the building. (30RT 4658-4659.) Jones was arrested, and initially told the police his name was "John Paul Jones." (30RT 4662.)[9]

After Jones was arrested, the two store clerks and a third, off-duty clerk who was in the store at the time of the robbery, were each shown photo lineups that included Jones' photograph, and later attended a live lineup that also included Jones. Neither the cash register clerk nor the meat department clerk identified Jones in either lineup. (30RT 4620, 4639-4640.) The off-duty clerk picked Jones' photograph from among the photographs she was shown, but said she was at most 50 percent certain that he was one of the robbers. She did not identify Jones in the subsequent live lineup. (30RT 4663, 4665.) While this clerk claimed to recognize Jones at the time she testified in the instant case (30RT 4650), the prosecutor conceded that her in-court identification was not reliable. (33RT 4949.)[10]

The second incident involved an altercation at the Riverside County Jail, in September 1995. Three deputies from the Riverside

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[9] Jones was on parole at the time of his arrest. (29RT 4425.)

[10] When the case was prosecuted in Kern County, Jones was offered a plea bargain, and pled guilty to a misdemeanor charge of receiving stolen property under Penal Code section 496, in exchange for the prosecution's dismissal of the felony robbery charge. (29RT 4416.) The jury in the instant case was not informed of this disposition.

County Sheriff's Department testified that during Jones' pretrial incarceration in the county jail, he punched his cellmate one night. The latter sustained a split lip and also apparently fell to the floor and hit the back of his head. When questioned, Jones admitted striking the other inmate three times in the face with a closed fist, and a couple times in the ribs. Jones explained that he wanted the man "to get out of his face," but the man "just kept running his mouth off ," and finally Jones "snapped" and hit him. Jones was upset because he felt his cellmate, who was younger than Jones, was being disrespectful towards him. The deputies testified that Jones was fully cooperative as soon as they interceded. (31RT 4703-4722.)

The third incident consisted of a threat Jones allegedly made to Deborah Russell on December 12, 1993, the day before the Florvilles were murdered.[11] Apparently, Jones and Russell had been

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[11] The prosecutor introduced this evidence to establish a violation of Penal Code section 422, Criminal Threats, which provides in pertinent part as follows:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

(continued...)

dating, and Jones was upset because Russell had gone to the store with a male friend named "Jam." According to Russell, Jones called her a "bitch" and told her he could get a gun and shoot her and Jam. He told her that she would never see her son again. On cross-examination, Russell admitted that she had not seen Jones with a gun, that she did not know if he had one, and that she did not tell anyone about Jones' threats until after the Florvilles were murdered and she was being interviewed about that crime by Detective Spidle. (31RT 4722-4730.)

(b) Felony Conviction

A fingerprint expert testified that he compared Jones' fingerprints to those on the Department of Corrections finger print cards from Jones' 1985 conviction for robbery, and that the two sets of fingerprints matched. (31RT 4730-4738.) The prosecutor also introduced documents into evidence establishing Jones' felony conviction for that offense and for felony possession of marijuana. (31RT 4772.)

(c) Victim Impact

Five members of the Florvilles' family testified about their respective close relationships with the Florvilles and the traumatic impact of the crime on each of their lives. These witnesses included the Florvilles two children, James Florville, Jr. and Karen Anderson, two grandsons, Kendrick Wallace and Emil Florville, and their niece, Patricia Valenzuela. (31RT 4739-4761.)

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[11](...continued)
(29RT 4453-4454.)

(2) Defense Case

As noted above, the defense case in mitigation consisted of the testimony of only four witnesses, consuming less than 40 pages of transcript.[12]

The first two witnesses were Riverside County Sheriff's deputies assigned to the county jail. They both testified that Jones had always been respectful and never aggressive towards them during his incarceration. (32RT 4783-4785; 4792-4793.)

Anthony Casas, a former associate warden at San Quentin Prison and former deputy director of the California Department of Corrections, testified that he was hired by the defense to review Jones' state prison records and determine whether he had a history of aggressive or violent behavior while incarcerated. Casas testified that Jones' prison records reflected no such behavior. (32RT 4815-4824.)

Jones' older sister, Connie Jones, testified that Jones was the seventh of nine siblings. She listed the places they had lived during Jones' youth, which included various locations in Southern California and Oregon. She also testified that Jones attended schools in each of these locations. Connie stated that she had visited Jones while he was in prison. She further testified that Jones had a seven year-old daughter who lived with her mother, but that the child had stayed with him when he was living with Judy Johnson in Riverside County. (32RT 4794-4803.)

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[12] The court's minute order reflects that the defense called its first witness at 10:15 a.m. and its fourth and final witness at 11:22 a.m. Court was adjourned for the day at 11:45 a.m. (3CT 614.)

Relying on the guilt phase evidence, defense counsel argued for a life sentence based on lingering doubt. Defense counsel also argued that Jones would not pose a threat to society if allowed to serve the rest of his life in prison. (33RT 4953-4978.)

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ARGUMENT

I.

THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN PROSPECTIVE JURORS FROM THE JURY VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND TO A JURY CONSISTING OF A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY

A. Introduction

Appellant is black and the victims in this case were white. (5RT 454.) The trial court found a prima facie case of racial discrimination after the prosecutor used peremptory challenges to strike three of the five black jurors on the panel. For each of the three peremptory challenges, the prosecutor proffered several reasons. As appellant will show below, in the case of one of the excluded jurors, the prosecutor cited four reasons, two of which were inherently discriminatory on their face, and the other two of which were plainly refuted by the record of voir dire, and thus demonstrably pretextual. The prosecutor's stated reasons for the exclusion of the other two black jurors were also patently pretextual.

Despite the fact that the prosecutor was unable to come up with even a single, unassailable reason for striking the three black jurors, the trial court denied the defense's motion for mistrial without acknowledging that some of the reasons given by the prosecutor were facially discriminatory, and without making specific findings regarding *any* of the reasons. Under these circumstances no deference should be accorded the trial court's ruling, which appellant will demonstrate was clearly erroneous.

Appellant accordingly seeks reversal of his conviction and death sentence, both of which were obtained in violation of his rights to a fair trial by an impartial jury drawn from a representative cross-section of the community, due process of the law, equal protection and to reliable guilt and penalty verdicts, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States and Article 1, Sections 1, 7, 13, 15, 16 and 17 of the California Constitution. (*Snyder v. Louisiana* (2008) __ U.S. __, 128 S.Ct.1203; *Miller-El v. Dretke* (2005) 545 U.S. 231, 239-241; *Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky* (1986) 476 U.S. 79, 96-98; *People v. Johnson* (1989) 47 Cal.3d 1194, 1218; *People v. Wheeler* (1979) 22 Cal.3d 258, 276-277.)

B. Overview of Record Pertaining to Appellant's *Batson/Wheeler* Motion

During jury selection, the prosecutor used his peremptory challenges to remove two of the first three black jurors called into the box, Gary Gaither and Norman Culpepper. (10RT 1700, 1702.) The defense thereupon moved for a mistrial under *People v. Wheeler*, *supra*, 22 Cal.3d 358, arguing that the prosecution was excluding these jurors based upon their race. (10RT 1707.)[13] When asked by

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[13] Defense Counsel invoked the "*Wheeler* line of cases". (RT 10:1707.) This is an abbreviated way of saying that he was moving for a dismissal of the venire due to the prosecutions systematic exclusion of blacks, which is prohibited under *People v. Wheeler* (1978) 22 Cal.3d 358 and *Batson v. Kentucky, supra*, 476 U.S. 79. In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge, and thus an objection on the basis of *Wheeler* is sufficient to preserve both state and federal constitutional claims. (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d. 1073, 1075; (continued...)

the trial court to explain his strikes, the prosecutor admitted he was "not prepared at this time" to provide the court with race-neutral reasons for the peremptory challenges he had just used. (10RT 1708.) The prosecutor said he needed to review his notes. (*Ibid.*)

At that point, the court decided to select alternate jurors "and take up [the] *Wheeler* motion afterwards." (10RT 1708.) However, the day's proceedings were adjourned immediately after the alternate jurors were selected, and the prosecutor did not have to justify his peremptory challenges until the next morning. (10RT 1708-1722.) Meanwhile, during the selection of alternates, the prosecutor struck yet another black juror, Deborah Ladd. (10RT 1713.) The prosecutor thus used his peremptory challenges to exclude three of the five prospective African American jurors called into the jury box.

The next morning, after reviewing the transcript of voir dire (RT 1723), the prosecutor came to court with a list of reasons for each of his peremptory strikes. (10RT 1725-1731.)[14] He claimed that he had excused Norman Culpepper because (1) he believed Culpepper's son had been accused of murder or attempted murder; (2) he was "troubled" by Culpepper's responses to defense counsel's voir dire

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[13](...continued)
McClain v. Pruty (9th Cir. 2000) 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985, 987 (citing *People v. Jackson* (1992) 10 Cal.App.4th 13, 21 n. 5); *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

Prior to the commencement of the trial, the defense also filed a motion to federalize all objections, which was granted.

[14] Defense counsel Grover Porter was not present in court during these proceedings. (10RT 1723.)

regarding false accusations; and (3) he felt Culpepper had hesitated too long in answering defense counsel's question to him about whether he would try to help appellant because they were both black. (10RT 1727.)

The prosecutor stated that he struck Gary Gaither because he was concerned about the fact that Gaither had unemployed children. (10RT 1728.) The prosecutor additionally claimed that he was troubled by the fact that Mr. Gaither was a bus company supervisor in the area where the crime occurred, because the prosecutor anticipated disputes about the timing of routes to the crime scene and how much sunlight there was when the crime allegedly occurred. (*Ibid.*) The prosecutor further claimed that Gaither was "buying into" the defense's theory that appellant was falsely accused. (*Ibid.*)

The prosecutor also listed several reasons for striking potential alternate juror Deborah Ladd. (10RT 1729-1730.) First, the prosecutor claimed that he was "real concerned" about the fact that Ms. Ladd had not responded to a question in the jury questionnaire regarding whether she had any close friends or family members who had been accused of a crime. (10RT 1729.) Next, he stated that Ladd's church, the African Methodist Episcopal ("A.M.E.") Church, which he assumed was "up in L.A.," was "constantly controversial," and he did not "want anyone controversial on [his] panel." (10RT 1730.) He also thought Ms. Ladd would "look down" upon some of this witnesses whom he described as "rough, *black* kids." (*Ibid,* emphasis added.) In addition, he asserted that Ms. Ladd had responded to defense voir dire about being falsely accused in a "defensive" and "overbearing manner." (10RT 1730) The prosecutor

commented that he thought there were "better" jurors to follow Ms. Ladd. (10RT 1730.)

The trial court ruled that a prima facie case of racial discrimination had been established (10RT 1731),[15] but further ruled, without any additional inquiry or analysis, that the prosecutor's peremptory strikes were racially neutral. The court thereupon denied the defense's motion for mistrial. The court stated as follows:

> [N]ow having heard from the prosecution, it appears that the reasons that these persons were excluded from the jury was for nonracial purposes and racially neutral purposes. Therefore, the Court feels that the motion pursuant to *Wheeler*, in [sic] its progeny, should be denied.

(*Ibid.*)

As will be demonstrated below, the trial court erroneously found that the prosecutor had sustained his burden of justification, without conducting a constitutionally adequate evaluation of the prosecutor's proffered explanations for his peremptory challenges of the three African American jurors.

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[15] Although there is no indication in the record that the trial court actually compared the percentage of black jurors to the percentage of white jurors struck by the prosecutor, the record reveals that these strike rates were in fact significantly disproportionate. As set forth in detail in an appendix to this brief, 150 prospective jurors completed questionnaires. Of these, 79 survived hardship and for-cause excusals. The prosecutor struck 50% of the remaining black jurors and only 25.8% of the remaining white jurors. He struck 60 % of the black jurors who were actually called into the jury box, and only 34% of the white jurors called into the jury box. The prosecutor's strike rate of black jurors was thus nearly twice that of white jurors. (See Appendix.)

C. Applicable Legal Standards

Under the Fourteenth Amendment's Equal Protection Clause and the California Constitution, prospective jurors must not be peremptorily challenged because of their race. (*Batson v. Kentucky, supra,* 476 U.S. at pp. 98-99; People *v. Wheeler, supra,* 22 Cal.3d at p. 276.) Even a single peremptory challenge made because of a prospective juror's race results in an error of constitutional magnitude and requires reversal. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

To prevail on a *Batson/Wheeler* motion, a defendant must first show that the prosecutor has peremptorily challenged one or more members of a cognizable group, and that the totality of the circumstances raises an inference that the challenge was racially motivated. If the defendant makes this prima facie showing, then the prosecutor has the burden of articulating legitimate, race-neutral reasons, supported by the record, for his peremptory challenges. Once the prosecution has satisfied this burden of production, the trial court must then proceed to a third step and determine, in light of the defendant's prima facie case and the prosecutor's proffered reasons, whether the defendant has proved purposeful discrimination. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. At p. 1207; *Johnson v. California*, *supra,* 545 U.S. at p. 168; *Batson v. Kentucky, supra,* 476 U.S. at pp. 96-98; *People v. Johnson, supra,* 47 Cal.3d at p. 1218; *People v. Silva, supra,* 25 Cal.4th at p. 386; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277, 280-282.)

This third and final step of the *Batson* analysis requires that the trial court determine whether the justifications offered by the prosecution are credible and more than just "a mere exercise in

thinking up any rational basis" for the use of peremptory challenges. (*Miller-El, supra,* 545 U.S. at p. 252.) The trial court has a pivotal role in evaluating *Batson* claims (*Snyder*, *supra*, 128 S.Ct. at p. 1208), and the evaluation can only be made after conducting a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (*Batson, supra,* 476 U.S. at pp. 96-98; quoting *Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 266.) In other words, the trial court must "evaluate meaningfully the persuasiveness of the prosecutor's" stated explanations." (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969.) This Court has interpreted *Batson* to require that the trial judge in considering a *Batson* objection, make a 'sincere and reasoned attempt to *evaluate each stated reason* as applied to *each challenged juror.*'" (*People v. Silva*, *supra,* 25 Cal.4th at p. 386, emphasis added.) In addition, "all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Snyder v. Louisiana*, *supra,* 128 S.Ct. at p. 1208; *Miller-El. v. Dretke*, *supra*, 545 U.S. at p. 239.)

The trial court's inquiry involves an evaluation of the prosecutor's credibility. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 325.) Where the race-neutral reasons invoke a juror's demeanor, the trial court must also evaluate whether the juror's demeanor credibly exhibited the basis for the challenge asserted by the prosecutor. (*Snyder*, *supra*, 128 S.Ct. at p. 1208.)

Justifications that are found implausible after this inquiry may -- and probably will -- be deemed pretexts for purposeful discrimination. (*Snyder, supra* 128 S.Ct. at p. 1212, citing Purkett *v. Elem* (1995) 514 U.S. 765, 768.) "The prosecution's proffer of a pretextual explanation naturally gives rise to an inference of discriminatory intent." (*Snyder* at p. 1212.) For this reason, it is not required that a court "find all nonracial reasons pretextual in order to find racial discrimination. In fact, 'if a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed pretext for racial discrimination'." (*Kesser v. Cambra* (9th Cir. 2005) 465 F.3d 351, 360; quoting *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830.) Thus, where *any* of the proffered reasons are not believable, discriminatory intent may be inferred. (*Snyder, supra*, 128 S.Ct. at p. 1212, emphasis added.)

It is therefore crucial for the trial court to conscientiously evaluate each justification stated by the prosecutor, because a consciously or subconsciously biased prosecutor can simply add traits to a shopping list in the hopes of justifying the improper use of a peremptory strike. Other jurisdictions have looked upon these shopping list justifications provided in response to *Batson/Wheeler* with disfavor (see, e.g., *United States v. Stewart* (11th Cir. 1995) 65 F.3d 918, 926; *United States v. Alvarado* (2nd Cir. 1991) 951 F.2d 22, 25; *United States v. Chinchilla, supra,* 874 F.2d at pp. 698-699,) and at least one court has held that prosecutorial reliance on even one false reason makes all other reasons irrelevant. (*Chinchilla,* 874 F.2d at p. 699.)

Particularly relevant to the manner in which the prosecutor has exercised his peremptory challenges is a comparative analysis of the seated and stricken jurors. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.) This is "a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." (*Turner v. Marshall* (9th Cr. 1997) 121 F.3d 1248, 1251.) Recently, while reviewing a *Batson* claim raised on federal habeas corpus, the United States Supreme Court plainly stated that, if "a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. [citation omitted]." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 241.)

After *Miller-El*, this Court deferred the question of whether a comparison of seated and improperly challenged jurors' complete voir dire answers (i.e., in-court and questionnaire responses)[16] similar to that approved in *Miller-El*, must be undertaken in *Batson/Wheeler* challenges raised on direct appeal, while nonetheless employing comparative juror analysis in cases presenting *Batson/Wheeler* issues similar to those presented here.[17]

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[16] See *Miller-El v. Dretke,* supra, 545 U.S. at p. 241, fn. 2.

[17] In *People v. Johnson* (2003) 30 Cal.4th 1302, this Court held that a reviewing court should not attempt its own comparative analysis for the first time on appeal. (*Id.* at pp. 1324-1325.) Appellant submits that this holding in Johnson conflicts with the decision of the United States Supreme Court in *Miller-El,* and urges this Court to reconsider this issue and to once again explicitly approve the use of comparative analysis by California reviewing

(continued...)

(See *People v. Williams* (2006) 40 Cal.4th 287, 312 ["Assuming without deciding that appellate courts are obliged to undertake comparative analysis in the present case (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 241; *People v. Avila, supra,* 38 Cal.4th at p. 546), we disagree that the comparative analysis that defendant presents in this court assists his case."]; *People v. Huggins* (2006) 38 Cal.4th 175, 232 ["Assuming without deciding that comparative analysis for the first time on appeal is constitutionally required in these circumstances, in which the trial court found a prima facie case of discrimination [citation omitted], we undertake that analysis."].) This Court should apply the same analysis here.

Without comparative analysis, even a seemingly neutral explanation may serve as a pretext for racial discrimination. For example, in *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, the prosecution claimed it challenged two Hispanics based on responses they had given during voir dire. The reviewing court found that the reasons advanced by the prosecutor would normally be adequately "neutral" explanations, but after the court compared them to the responses given by white jurors, they did not hold up. (*Id.* at p. 698-699; see also *People v. Hall, supra,* 35 Cal.3d at p. 168 [disparate treatment given jurors "is strongly suggestive of bias, and could in itself have warranted the conclusion that the prosecutor was exercising peremptory challenges for impermissible reasons"].) Comparative analysis will similarly show disparate treatment of black and white prospective jurors in the instant case.

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[17](...continued)
courts.

D. Two of the Prosecutor's Four Asserted Reasons for Exercising a Peremptory Challenge Against Prospective Alternate Juror Deborah Ladd Were Not Race-Neutral, and One of Those Reasons Was Also Based on Impermissible Religious Bias; The Other Two Reasons Were Demonstrably Pretextual

1. The Record Below

Deborah Ladd was a married, forty-year-old woman who had two step-children, aged 12 and 10. (15CST 4186.) Employed as an insurance rate analyst, she was working on her M.B.A. at the University of the Redlands. (15CST 4187.) She stated in her questionnaire that she was moderately in favor of the death penalty, and felt that it should be imposed in cases of premeditated murder, "gruesome" murder and multiple murder. (15CST 4195, 1497.)[18]

Ms. Ladd listed herself as a member of the African Methodist Episcopalian Church ("A.M.E"), and described herself as religious at "most times." (15CST 4189.) However she indicated that her religious beliefs would not affect her ability to sit in judgment of another person and would not influence her ability to impartially judge the credibility of witnesses. (*Ibid.*) Ms. Ladd stated that she did not know whether her church had taken a position on the death penalty. (15CST 4199.) By any standard, she was the kind of citizen who should have been welcome on any jury.

When Deborah Ladd was selected to serve as an alternate juror, the prosecutor struck her. (10RT 1713.) When asked for his reasons for striking Ms. Ladd, the prosecutor stated as follows:

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[18] Appellant was charged with multiple murders in the present case.

> Ms. Ladd had some very, very positive aspects. There were a couple of things that alerted me right away. She left question No. 20 blank. Again, that is the question about "Do you know or have known anybody in your family that's been accused?"[19] It was left blank. I was real concerned about her leaving that particular question blank.
>
> She answered another question that concerned me. And again, it wasn't a final thing. It was an additional thing. She mentioned her church was A.M.E., and I assume that it's the A.M.E. church up in L.A. I constantly see A.M.E. on television. They are constantly controversial, and I don't particularly want anybody that's controversial on my jury panel.
>
> Another thing that I responded to was, when she was asked about being falsely accused, she almost had a defensive, combined with an overbearing manner. And two things occurred to me: One, she was buying into some of this "falsely accused" business.... I had the feeling she was buying into it. But also, at the same time, I have many witnesses. The witnesses are *black* kids, and they are just kind of rough. And I had the feeling that she would look down upon those kids, and I can't have a juror that does that.
>
> So those were the things that – things that I considered, weighing Ms. Ladd. And also, at the same time, that Ms. Ladd came up – I think that was in the final six-pack...I had three of my best jurors that I liked best in that same six-pack. And when I saw the defense used up all of [their peremptory challenges], I figured I could gain my best jurors by kicking some of these other jurors who, by the way, I thought were pretty good jurors.

(10RT 1729-1730, emphasis added.)

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[19] Question 20 on the jury questionnaire asked: "Have you, a close friend, or a relative every been ACCUSED of a crime, even if the case did not come to court? If YES, who? What crime(s)? What happened? When? Was there a trial? If so, did you attend the trial? If so, how do you feel about what happened?" (15CST 4191.)

2. The Prosecutor's Discriminatory Intent Was Inherent in His Explanation That He Struck Ms. Ladd Because She Belonged to the African Methodist Episcopal Church, An African-American Denomination

The African Methodist Episcopal Church, or "A.M.E.," was established in 1787 and is the oldest African American denomination in the United States.[20] In the 1990s, the church included over 2,000,000 members, 8000 ministers, and 7000 congregations in more than 30 nations in North and South America, Africa, and Europe. [21] There were at least three A.M.E. congregations in the Riverside area, one in Riverside, one in Moreno Valley and one in Perris.[22]

In explaining why he did not want Ms. Ladd on the jury because of her membership in the A.M.E, the prosecutor assumed, without conducting any relevant voir dire, that she was referring to the "A.M.E. church *up in L.A.*". (10RT 1730, emphasis added.) He claimed that the A.M.E. is constantly on television and "constantly controversial", and declared that he did not want anyone "controversial on [his] jury panel." (*Ibid.*) In other words, the prosecutor told the court that he was striking a black woman because she belonged to a black church, which he characterized as "controversial," for some unspecified reason.

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[20] (http://www.ame-church.com/about-us/.)

[21] (http://www.ame-church.com/about-us/history.php.)

[22] (www.ladistsocal.org/files/LA_Dist_Churches_revised.doc; http://www.ame-church.com/directory/district.php?district=5.)

When facing a *Batson/Wheeler* challenge, a prosecutor "must give a 'clear and reasonably specific' explanation of his '*legitimate* reasons' for exercising the challenges." (*Batson v. Kentucky, supra,* 476 U.S. at p. 98, fn. 20; quoting *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 258, emphasis added.) "A legitimate reason is not a reason that makes sense, but a reason that does not deny Equal Protection." (*Purkett v. Elem* (1995) 514 U.S. 765, 769.) Where discriminatory intent is inherent in the proffered explanation, it fails this second prong of the *Batson* analysis. (*Id. at* 768; citing *Hernandez v. New York* (1991) 500 U.S. 352, 360.)

Relatively few reported cases exist where the proponent of a peremptory strike has lacked the imagination to conjure up a facially legitimate reason for excluding a juror, even if that reason is entirely pretextual. When faced with such rare circumstances, the trial court need not even proceed to *Batson's* third step where it "is required to evaluate 'the persuasiveness of the justification'." (*Purkett v. Elem, supra,* 514 U.S. at p. 768; *Kesser v. Cambra, supra,* 465 F.3d at p. 359.) Appellant's case is one of those rare cases in which the prosecutor actually articulated a race-based, rather than race-neutral reason for exercising a peremptory challenge that fails to satisfy the second prong of the *Batson* analysis.

In this case, the prosecutor's reliance on Ms. Ladd's A.M.E. membership as a reason for her exclusion is analogous to the prosecutor's reliance on a black juror's residence in Compton – a low-income, black neighborhood in South Central Los Angeles – as a reason for that juror's exclusion in *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820. The court of appeals in *Bishop* held that the

prosecution failed to satisfy the second prong of *Batson*, because its proffered reason for striking the black juror was nothing more than a surrogate for racial stereotyping. The critical factor noted by the court was that the prosecutor had cited the juror's residence in Compton in a *generic* sense, and did offer any reasons based on the juror's conduct or responses to questions during voir dire to justify his belief that there was something specific to *that juror's* residence in Compton that would make her unsuitable. The court went on to observe as follows:

> The prosecutor's justification in this case . . . referred to collective experiences and feelings that he could just as easily have ascribed to vast portions of the African-American community. Implicitly equating low-income, black neighborhoods with violence, and the experience of violence with its acceptance, it referred to assumptions that African-Americans face, from which they suffer on a daily basis. *Ultimately, the invocation of residence both reflected and conveyed deeply ingrained and pernicious stereotypes . . .Government acts based on such prejudice and stereotypical thinking are precisely the type of acts prohibited by the equal protection clause of the Constitution.*

(*Id.* at pp. 825-826, internal citations omitted, emphasis added.)[23] The prosecutor in the instant case similarly failed to cite reasons specific to Ms. Ladd to explain why her A.M.E. membership made her unsuitable in his opinion. Instead, his comments reflected a stereotypical assumption that all African-Americans who belong to this denomination are "controversial." (Compare *People v. Avila*

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[23] See also *People v. Calvin* (2008) 159 Cal.App.4th 1377, 1388 [If prosecutor had dismissed African-American jurors based merely on his assumptions about their attitudes, he would have demonstrated outlawed group-based discrimination].

(2006) 38 Cal.4th 491, 545 [prosecutor's challenge to juror was upheld as nondiscriminatory, because it was based on juror's personal experience that police officers lied, not a theoretical perception that juror, as a member of a minority group, might view the police with distrust].)

Striking a black juror because she belongs to a black church the prosecutor deems "controversial" for some undisclosed reason certainly is not the kind of clear, and reasonably specific explanation of a *legitimate* (i.e., non-discriminatory) reason that satisfies the burden of production placed upon the prosecution by *Batson's* second step.

3. Striking Ms. Ladd Because She Belonged to the A.M.E. also Constituted Impermissible Discrimination Based On Religious Affiliation

Not only was the prosecutor's exclusion of Ms. Ladd because belonged to the A.M.E. impermissibly based on racial stereotyping, it also violated the proscription against discrimination based on religious affiliation.

This Court has repeatedly stated that prospective jurors cannot be excluded from jury service based on the presumption that they are biased because they are members of an identifiable group distinguished on *religious* grounds. (*People v. Wheeler*, 22 Cal.3d at p. 276; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122; *People v. Schmeck* (2005) 37 Cal.4th 240, 266; *In re Freeman* (2006) 38 Cal.4th 630, 643) In addition, a number of federal and state courts have extended *Batson* to religious affiliation. (See, e.g., *United States v. Brown* (2d Cir.

2003) 352 F.3d 654, 668-669; *State v. Purcell* (Ariz. 2001) 18 P.3d 113, 120; *State v. Hodge* (Conn. 1999) 726 A.2d 531, 553; *United States v. Stafford* (7th Cir. 1998) 136 F.3d 1109, 1114.

The instant case is clearly distinguishable from those in which this Court has upheld dismissal of a juror whose religious beliefs might arguably have made it difficult for them to impose the death penalty. (Compare, e.g., *People v. Cash* (2002) 28 Cal.4th 703, 725 [excusing jurors who have a specific religious bent or bias that would make it difficult for them to impose the death penalty is proper ground for a peremptory challenge].) As noted above, the prosecutor herein did not identify any such specific concern regarding Ms. Ladd's religious beliefs.[24] All the prosecutor said was that Ms. Ladd was a member of a "controversial" church. He offered no explanation of why he felt the church was controversial or how Ms. Ladd's religious beliefs made her an unfavorable juror in the instant case.

Because exclusion of a prospective juror based merely on his or her religious affiliation is constitutionally impermissible, Ms. Ladd's membership in the A.M.E. church, standing alone, was not a legitimate reason to exclude her in this case. (*People v. Lewis* (2006) 39 Cal4th 970, 1016 ["Under *Batson*. . . and *Wheeler* . . . a party cannot assume in exercising its peremptories that because a prospective juror belongs to a cognizable minority group, that person

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[24] As indicated above, Ms. Ladd stated in her questionnaire that she did not know what position, if any, her church had taken on the death penalty. (15CST 4199.) Neither counsel asked her any questions about her religious beliefs, or her feelings about the death penalty.

holds biased views common to that group, and therefore is undesirable as a juror"].) The explanation the prosecutor gave for striking her was therefore inherently discriminatory. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768.)

4. The Prosecutor's "Feeling" That Prospective Juror Ladd Would "Look Down" On His "Young," "Rough," "*Black*" Witnesses Also Constituted Impermissible Racial Stereotyping

Another inherently discriminatory reason the prosecutor cited for striking Deborah Ladd was that many of the government's witnesses were "black kids" who were "just kind of rough," and he was afraid that Ms. Ladd "would look down upon those kids." (10RT 1730, emphasis added.)

No factual basis was offered or is apparent for this vague assertion, and, at a minimum, the trial court should have been suspicious and required further explication from the prosecutor as to the basis for his fear. Certainly, there is always a risk that older individuals with more stable, settled lives will disapprove of rough youths. However, that was a potential problem the prosecution faced with all of the seated jurors, whose ages ranged from 27 to 77 years.[25] Nothing in either Ms. Ladd's jury questionnaire or her statements on voir dire reveals any evidence to support the prosecutor's assumption that Ms. Ladd – as opposed to other potential, white jurors – would be biased against his juvenile

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[25] Juror Michael Lopiccolo was the youngest member of the panel at 27 years old. (10CST 2617.) Alternate Juror James Powell was the oldest at 77 years old. (1CST 231.)

witnesses. The only reasonable conclusion is that the prosecutor was engaged in impermissible racial stereotyping.

Indeed, the prosecutor's proffered reason shows that he was not merely concerned about the fact that Deborah Ladd would look down upon *rough kids*. What worried the prosecutor was that his witnesses were "***black*** kids" who were "just kind of rough", and Deborah Ladd – presumably because she was a successful, middle-class black woman – would look down upon members of her own race who were less educated and affluent than she was. (10RT 1730, emphasis added.) That is exactly the kind of impermissible racial stereotype that *Wheeler* and *Batson* sought to eliminate. (*People v. Lewis, supra,* 39 Cal.4th at p.1016 ["*Batson* and *Wheeler* are intended to limit reliance on stereotypes about certain groups in exercising peremptory challenges"].) Therefore, it simply cannot serve as the kind of "'permissible racially neutral selection criteria" that is required of the prosecutor by *Batson's* second step. (*Batson v. Kentucky, supra,* 476 U.S. at p. 94; quoting *Alexander v. Louisiana,* 1972 405 U.S. 625, 632.)

The prosecutor's unsupported, stereotypical assumption that educated African Americans who have enjoyed some economic success are incapable of relating to less affluent African Americans with anything other than a sense of superiority is reasoning that is not only primitive and offensive, it is also similarly impermissible. The Supreme Court has held that the Equal Protection Clause clearly prohibits "the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." (*Batson v. Kentucky, supra,* 476 U.S. at p. 98.) The exclusion of older, educated and successful blacks from juries because the government

believes they will look down upon poor, 'rough' blacks is as much a stereotypical assumption based upon their race as it is to conclude that black jurors will not convict black defendants.

However, even assuming this particular reason for striking Ms. Ladd were not based on racial stereotyping, at the very least it was patently prextual. First, as noted above, the prosecutor did not explain why he thought that Ms. Ladd – as opposed to educated, affluent *white* jurors – would "look down" on his witnesses. Reliance on a factor or characteristic that applies equally to minority and non-minority jurors is indicative of pretext. (*Miller-El v. Dretke*, *supra*, 535 U.S. at p. 241.) Second, the prosecutor's alleged apprehension that Ms. Ladd would be biased against his witnesses was purely speculative and had no basis in either Ms. Ladd's jury questionnaire or any of her responses on voir dire. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1210-1211 [speculative nature of prosecutor's claimed objection to black prospective juror was evidence of pretext].) Third, if Ms. Ladd disapproved of the prosecution witnesses because of their respective histories of delinquency, then she would certainly be at least as harsh, if not substantially harsher in her judgment of appellant once she learned of his much more serious criminal history.[26] Thus, even if the prosecutor's proffered explanation was not inherently discriminatory, it was highly

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[26] During the guilt phase the jury heard testimony establishing that appellant committed a prior armed robbery. (11RT 1840-1850, 13RT 2108-2109.) In the penalty phase the prosecution presented evidence of appellant's prior felony convictions for armed robbery and felony drug possession (31RT 4772), as well as evidence of uncharged crimes of violence (30RT 4595-4681; 4703-4731.) The jury also learned that appellant was in a gang. (31RT 4721.)

implausible, and therefore should not have been credited by the trial court.

Discrimination based on race or religion cannot have a place in a prosecutor's decision to strike jurors from a criminal case. Evidence of even one discriminatory motive should suffice to establish a *Batson* violation. It cannot be acceptable for a prosecutor to discriminate on the basis of race and/or religion in discharging jurors, as long as it is not the only reason for the discharge. After all, "[t]he mere existence of discriminatory practices in jury selection casts doubt on the integrity of the whole judicial process." (*United States v. Degross* (9th Cir. 1990) 913 F.3d 1417, 1421 (quoting *Peters v. Kiff* (1972) 407 U.S. 493, 502-503.)

In this case the prosecutor articulated *two* reasons for rejecting Ms. Ladd based on impermissible group bias. His action in striking Ms. Ladd from the jury thus violated both the Equal Protection Clause and appellant's right to a representative jury, and mandates reversal of appellant's conviction and death sentence. (*Batson v. Kentucky,* supra, 476 U.S. at p. 100; *People v. Wheeler, supra*, 22 Cal.3d at pp. 276-277.)

5. Two Additional Facially Neutral Reasons The Prosecutor Offered For Exercising the Peremptory Challenge Against Ms. Ladd Were Demonstrably Pretextual and Should Leave Little Doubt Regarding the Prosecutor's Discriminatory Intent

In addition to the two race-based reasons discussed above, the prosecutor offered two additional reasons for striking Ms. Ladd: (1) that he was concerned about her failure to answer a question in the jury questionnaire asking whether she, or any friends or relatives had been accused of a crime, and (2) that her responses to defense

voir dire suggested that she was "buying into" the defense theory of false accusation. (10RT 1729-1730.) Although facially non-discriminatory, a conscientious evaluation of these purported reasons in light of the record of voir dire undermines their credibility and thus reveals their pretextual nature.

(a) The Prosecutor Asked No Questions of Ms. Ladd During Voir Dire Concerning Her Omission of a Response to Question 20 on the Jury Questionnaire, Undermining His Claim That He Was "Very Concerned" About Her Failure to Answer the Question

The prosecutor attempted to justify his exclusion of Deborah Ladd by stating that he was "*real concerned*" about the fact that she had not answered question 20 on the jury questionnaire blank. (10RT 1729.) When given the opportunity to question Ms. Ladd during voir dire, however, the prosecutor failed to ask her *any* questions at all about why she did not answer question 20 when filling out the questionnaire. (8RT 1315-1401.) The prosecutor's omission in this regard undercuts the credibility of his asserted intense concern.

This Court has previously held that "a prosecutor's failure to engage minority jurors 'in more than desultory voir dire, or indeed to ask them any questions at all' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." (*People v. Turner* (1986) 42 Cal.3d 711, 727; citing *People v. Wheeler, supra,* 22 Cal.3d at p. 281.) The United States Supreme Court has affirmed this principle, recently holding that "the

State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 246.)

Miller-El is similar to the instant case in this regard. The prosecutor there claimed to be concerned about the criminal histories of the families of two jurors. (*Id.* at pp. 246, 250 fn. 8.) The Court, however, did not find these reasons to be credible, noting that "the prosecution asked nothing further about the influence [the first juror's] brother's history might have had on [him], as it probably would have done if the family history had actually mattered." (*Id.* at p. 246.) In these circumstances, the Court held that a "failure to ask [questions on voir dire] undermines the persuasiveness of the claimed concern." (*Id.* at p. 250, fn. 8.)

It is quite possible that Ms. Ladd inadvertently neglected to respond to question 20, and that her failure to do so was not deliberate or indicative of a desire to withhold information about her own criminal history or that of someone close to her. A simple question during voir dire would have easily cleared this up, yet despite his purported "concern" regarding the matter, the prosecutor made no effort whatsoever to find out why Ms. Ladd had not answered the question.

In *People v. Turner, supra*, the prosecutor struck a black juror, on the purported basis that she had given a cryptic answer to the question of whether or not she could be impartial when sitting on the jury. As in the instant case, the prosecutor asked no questions of the juror on voir dire to clarify her ambiguous response. (42 Cal.3d at pp. 726-727.) This Court concluded that because the juror's cryptic

remark could have had several meanings, "at the very least, the remark called for a few follow-up questions that would have soon clarified the matter. Rather than asking such questions, however, the prosecutor immediately removed the last black juror from the box by peremptory challenge. In these circumstances we have little confidence in the good faith of his proffered explanation." (*Id.* at 727.)

Accordingly, the precedent of both the United States Supreme Court and this Court compels the conclusion that the prosecutor's alleged "concern" regarding Ms. Ladd's non-response to Question 20 was not genuine.

(b) The Prosecutor's Characterization of Deborah Ladd's Responses to Defense Voir Dire About "Being Falsely Accused" Is Not Supported By the Record

The final reason cited by the prosecutor for striking Ms. Ladd was that "when she was asked [by defense counsel] about being falsely accused, she almost had a defensive, combined with an overbearing manner." This, he claimed, led him to believe that she was "buying into some of this 'falsely accused' business." (10RT 1730.)

There is no part of the record of voir dire in which Ms. Ladd was asked any questions about being "falsely accused." The only voir dire that might arguably come close to that subject was the following exchange between defense counsel and Ms. Ladd:

> Q. (By Mr. Porter): Have you ever heard the term "scapegoat"?
>
> A. [Prospective Juror Deborah Ladd]: Yes.
>
> Q. What does it mean to you?

A. A person who takes responsibility for something that they may not be responsible for.

Q. Okay. Have you ever experienced that?

A. Certainly.

Q. Give me an example of the experience.

A. I manage a number of people. And if they do something wrong, I have to take the fall for it.

(8RT 1341.)

Assuming that the prosecutor was referring to this particular colloquy, it provides no support for the prosecutor's claim that Ms. Ladd was "buying into" the defense theory of false accusation. Indeed, since counsel only asked Ms. Ladd generic (i.e., non-case-specific) questions about whether she had ever been a scapegoat,[27] she had no opportunity to "buy into" a theory that appellant had been falsely accused in the instant case, because none was ever presented to her.

It is also far from apparent from the above-quoted exchange what, if anything, about Ms. Ladd's responses to defense counsel's questions could be fairly perceived as "defensive" or "overbearing." The record reveals nothing more than Ms. Ladd's concise, matter-of-fact answers to defense counsel's questions.

The situation herein is remarkably similar to that presented in *Snyder v. Louisiana*, *supra.* In that case, the prosecutor articulated

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[27] The term "scapegoat" has its origins in the Old Testament (Leviticus, Chapter 16), and refers to a goat sent into the wilderness after the Jewish chief priest had symbolically laid the sins of the people upon it. In its modern usage, the term is defined by Webster's Unabridged Dictionary as "a person, group or thing that bears the blame for the mistakes or crimes of others."

two reasons for having struck a black juror, one of which was that the juror appeared "nervous." (128 S.Ct. at p. 1208.) The Supreme Court noted that nervousness cannot be shown from a cold transcript, and that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike." (*Id.* at p. 1209.)[28] However, in that case – as in the instant one – the record failed to show that the trial judge actually made a determination regarding the juror's demeanor. As in the instant case, the trial judge was given more than one explanation by the prosecutor for his strike, and rather than making a specific finding on the record concerning the juror's demeanor, the trial judge simply allowed the challenge without explanation. Under these circumstances, the Supreme Court held that "we cannot presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." (*Ibid.*) Given the similar lack of specific findings on the part of the trial court in the instant case, this Court cannot presume that it credited the prosecutor's assertion that Ms. Ladd had a "defensive" or "overbearing" manner in responding to the voir dire questions.

The situation herein is also analogous to that in *Kesser v. Cambra*, *supra*, in which the prosecutor alleged that he struck a Native American juror because she appeared "misty" and "emotional" and had "teared up" in discussing her daughter's molestation. The

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[28] In *Snyder*, the Supreme Court observed that "race neutral reasons for peremptory challenges often invoke a juror's demeanor, "in which case "the trial court must evaluate . . . whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (*Id.* at p. 1208.)

court of appeals in that case discredited this purported justification, because it was not adequately supported by the record. The court stated as follows:

> It is difficult to see how the prosecutor can support his "emotional" justification on this record. The record does not indicate whether Rindels was emotional about "the system" or about her daughter's ordeal – or in fact whether she showed any emotion at all. It does show that she felt comfortable with a system that had prosecuted and incarcerated her father for the offense. When she was asked if she was "satisfied with [the] conclusion" of the proceedings, she answered "Yes." On her questionnaire, she also answered that she was satisfied with the response of the police, the district attorney, and the court system. Her testimony about the molestation reveals no dashes, interruptions, or false starts to indicate that she had difficulty talking about the incident.

(465 F.3d at p. 364.)

As in *Kesser*, the record in the instant case fails to support the prosecutor's purported justification. The questions presented to Ms. Ladd not only gave her no opportunity to be either defensive or overbearing, but also nothing in the record indicates that she had an emotional reaction to the questions she was being asked. There were no interruptions of counsel on her part, or any apparent attempts to overwhelm or dominate the discussion in an overbearing manner. To the contrary, her responses were brief and to the point. She did not use any particularly strong words or otherwise give any indication at all of the sentiments or behavior attributed to her by the prosecutor. Moreover, the prosecutor did not point specifically to any tone of voice, facial expressions or conduct on Ms. Ladd's part that he found objectionable. (Compare, e.g., *People v. Phillips* (2007)

147 Cal. App.4th 810, 814, 819 [upholding prosecution's peremptory challenge of minority juror because latter was rolling his eyes]; or *People v. Perez* (1994) 29 Cal.App.4th 1313, 1330 [prosecutor's observation that juror laughed at an inappropriate time during voir dire found to be credible, non-pretextual reason for striking her].) Nor did the prosecutor attempt to put any such tone of voice, expressions or conduct on the record. Accordingly, as was the case in *Kesser*, the lack of support in the record for the prosecutor's claim undercut its credibility, and, at a minimum, the trial court should have required a more detailed explanation from the prosecutor. (*People v. Silva, supra,* 25 Cal.4th at p. 386 [When prosecutor's stated reasons are supported by record trial court need not question prosecutor or make detailed findings. But when prosecutor's reasons are unsupported by record, more is required of the court than a global finding that reasons appear sufficient].)

The prosecutor's credibility was further undermined by the fact that when given the opportunity during voir dire to question Ms. Ladd, he asked her no follow-up questions regarding her views on the subject of "false accusation." As discussed at length above, both the United States Supreme Court and this Court have held that the prosecutor's failure to conduct voir dire regarding a matter of alleged concern prompting the prosecutor's peremptory challenge of a minority juror is evidence that the alleged concern was not genuine. (See Argument I. D. (4) (a), at 49-50.)

Finally, the fact that the prosecutor singled out African American jurors as "buying into" the defense theory of false

accusation,[29] is also suspicious, particularly when one compares Ms. Ladd's responses to those of seated white jurors. For example, seated juror Tammy Fawcett, when asked whether she had ever been falsely accused of anything, revealed that she had been falsely accused by a family member, and that the experience had "hurt" her. (10RT 1340.) In addition, seated juror Sherry Huey described having been made a scapegoat in her job. She stated that she was blamed for a problem by a supervisor when she had done nothing wrong. Although she was ultimately cleared of blame, she nevertheless felt frustrated because she was treated with hostility for a situation she had nothing to do with. (9RT 1584-1585.)[30] While Ms. Ladd's responses to the questions about being a scapegoat indicate simply that she viewed being held accountable for the mistakes or wrongdoings of others as an unavoidable component of being a supervisor, Ms. Fawcett's and Ms. Huey's statements reflect that they were emotionally traumatized by having themselves been victims of false accusation or unfair blame. This, too, indicates that the prosecutor's purported reason for striking Ms. Ladd was pretextual. (See *Kesser v. Cambra*, *supra*, 465 F.3d at p. 364-365

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[29] The prosecutor listed this as a reason for striking all three of the African-American jurors. As with Ms. Ladd, the record failed to support the prosecutor's representations with respect to the other two jurors. See Arguments I. E. and F., at 57-76.

[30] Other seated jurors and alternates who also stated they had been falsely accused or used as scapegoats, included David Vanverst (6RT 1718); Michael Fisher (6RT 720); Richard Capello (7RT 1075); William Black (7RT 1076); William Cowieson (7 RT 1077); and Trudy Lichtenberger (8RT 1339). Seated juror William Black stated that "It bothers me to be falsely accused by somebody of something." (7RT 1076).

[where prosecutor cited Native American juror's negative feelings about the criminal justice system as reason for striking her, but white, seated jurors had expressed far more negative feelings than the excluded juror, prosecutor's proffered explanation was deemed pretextual].)

(c) The Record as a Whole Demonstrates That Racial and Religious Bias Were the Predominant Motives for the Peremptory Challenge

The inquiry as to whether or not the prosecutor's proffered reason for striking a minority juror is legitimate and credible may not be conducted in a vacuum. Instead, "the court must evaluate the record and consider each explanation within the context of the trial as a whole because 'an invidious discriminatory purpose may often be inferred from the totality of the relevant facts'." (*Hernandez v. New York*, *supra*, 500 U.S. at p. 363.) In the present case, the fact that *two* of the four reasons the prosecutor came up with for his exclusion of Ms. Ladd were inherently discriminatory, coupled with the fact that each of the facially-neutral reasons, when carefully scrutinized, was demonstrably disingenuous, leads to the inescapable conclusion that the prosecutor's motive in striking Ms. Ladd was racial and religious bias. Reversal is therefore required.

E. The Prosecutor's Reasons For Striking Prospective Juror Gary Gaither Were Demonstrably Pretextual

1. Record Below

Gary Gaither was a 47 year old black man who had a high school diploma and had previously served in the military. (8CST 2113-2114). He was married and had three children – a 24 year old

son and two daughters, 21 and 18 years of age. (8CST 2113). The younger children were unemployed. (8CST 2113). The 18 year old lived with him, while the other two children resided elsewhere. (8CST 2113). He considered himself moderately in favor of the death penalty. (8CST 2122). Mr. Gaither was employed as a supervisor with the Riverside Transit Service. (8CST 2114.)

As with Deborah Ladd, the prosecutor struck Mr. Gaither very shortly after he was called up to the jury box. (10RT 1700). When asked to explain why he had exercised a peremptory challenge against Mr. Gaither, the prosecutor stated as follows:

> [S]ome of the things that the People considered was – and it wouldn't be a primary factor, but it was one of the factors I considered – and I -- considered what the children of people that had adult children were doing, and his children were unemployed. It was a concern. It wouldn't have been a final concern, because he had some other good things going for him.
>
> There was another concern I had with him, and that was that he was is in charge of buses that bus in the very area where this crime occurred. And what concerned me about that was, there may be some dispute on timing.
>
> The defense provided me with a videotape of a route from, I think, the defendant's place to the victim's place, and I was real concerned about his opinions regarding those routes.
>
> Likewise, what may be an issue in the case is how sunlight is in the morning. And because my witness is going to say that this happened at that time of morning before the sun comes up. And I had concerns about this bus driver, as well as other bus drivers, in this particular business.
>
> Finally, when defense counsel talked about a scapegoat, and I asked Mr. Gaither about a scapegoat, at first it appeared to me this response was, "Yes, this case could be about a

> scapegoat," even though there had been no evidence at all. That led me to think this particular juror was buying into something that the defense was trying to get across with their voir dire questions. So at that point it was when I finally made up my mind that he wouldn't be an acceptable juror either.
>
> Before that time, I would say he was, in my opinion – despite some strong things, he did have some very strong, sound things that I did like. But that scapegoat area troubled me a lot. I had the belief that he was buying into some sort of defense theory, without hearing any evidence, just based upon the voir dire questions.

(10RT 1728-1729.) While on their face, the foregoing reasons appear legitimate, had the trial court conducted a "sensitive inquiry into such circumstantial and direct evidence of intent as was available" (*Batson*, *supra*, 476 U.S. at pp. 96), it would have found compelling evidence of pretext.

2. The Prosecutor's Purported "Concern" About Mr. Gaither Working for the Bus Company Was Discredited by the Fact That Two, White, Seated Jurors Were Bus Drivers in the Area Where the Crime Took Place

Had Mr. Gaither been the only bus company employee among the prospective jurors, the prosecutor's claim that he did not want a juror who had personal knowledge of the time it would take to drive between specified locations and the lighting conditions at certain times of the morning, would appear plausible and legitimate. However, in the this case, *two* of the *seated* jurors were bus drivers in the *precise* area in which the crime took place. Both Tammy Fawcett and Cynthia Smith, residents of the same community as the victims, were employed at the time of the trial as school bus drivers. (1CST 176, 182; 10CST 2562.) They also were both white. The trial

court therefore failed to conduct the "sincere and reasoned attempt" to evaluate the prosecutor's explanation that this Court has recognized is required by *Batson* (*People v. Fuentes*, *supra*, 54 Cal.3d at p. 720), when it simply accepted the prosecutor's purported rationale for striking Mr. Gaither without even so much as noting the prosecutor's disparate treatment of these jurors, and asking him to justify it.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack, who is permitted to serve, that is evidence tending to prove purposeful discrimination." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 241.) In the instant case, Gary Gaither – as a bus supervisor – was certainly similarly situated to Tammy Fawcett and Cynthia Smith who were also bus drivers. The prosecutor's alleged concern -- that Mr. Gaither's familiarity with driving times and lighting conditions in the neighborhood of the crime scene would influence his assessment of the testimony regarding those disputed issues – was just as applicable to Ms. Fawcett and Ms. Smith. The prosecutor's apparent lack of similar concern about the two white jurors thus tends to prove his purposeful intent to discriminate against Mr. Gaither on the basis of his race.

3. The Prosecutor's Misrepresentation of Mr. Gaither's Statements During Voir Dire Demonstrates That He Had an Ulterior Motive for Exercising a Peremptory Strike

The prosecutor additionally cited his belief that Mr. Gaither was "buying into" defense counsel's implication during voir dire that

appellant might be a scapegoat – essentially the same complaint the prosecutor voiced about Deborah Ladd. The prosecutor stated that "when...[he] asked Mr. Gaither about a scapegoat, at first it appeared to [the prosecutor] his response was, 'Yes, this case could be about a scapegoat,' even though there had been no evidence at all." (10RT 1729.) This allegedly led the prosecutor to believe that Mr. Gaither was accepting as true a theory that the defense was trying to get across during voir dire. (*Ibid.*)

Had the trial court properly evaluated this claim by consulting the record of voir dire, however, it would have discovered that the prosecutor's description of Mr. Gaither's response to the prosecutor's questioning on this subject failed to accurately represent the colloquy that took place during voir dire. Review of the record indeed discloses *no* support at all for the prosecutor's claim that Mr. Gaither was somehow "buying into" the defense's theory of the case:

> Mr. Bentley: Defense counsel threw the word out, "scapegoat." I am not sure where that is going. I don't know what kind of evidence. But the question in my mind is, since you heard it – and I can't count them – maybe 100 times or 50 times, or something. Does anybody believe there is going to be evidence of a scapegoat in this case?
>
> Mr. Gaither? You are giving me a blank look, sir.
>
> Prospective Juror Gaither: No.
>
> Mr. Bentley: Is that an I-don't-know "No" or is it a No, "No"?
>
> Prospective Juror Gaither: I don't know "No."
>
> Mr. Bentley: Okay. I will come back to you. Ms. Whipple's got her hand up. Ms. Whipple?

Prospective Juror Whipple: I thought the defense was going to try that. I thought "that's a possibility" when he [defense counsel] did that. That's what I thought he was doing, anyways.

Mr. Bentley: Unless it has happened – there is no evidence on the witness stand.

Prospective Juror Whipple: No.

Mr. Bentley: Just like at this moment there is no evidence that two elderly people have been killed, until I call a witness to prove it. Would you agree with that, Mr. Gaither?

Prosepective Juror Gaither: Yes.

Mr. Bentley: If there is sufficient evidence, and the defense puts it on, so be it. If there's not, there's not. Can you live with that?

Prosepective Juror Gaither: Yes.

Mr. Bentley: Mr. Gaither, you are not going to be sitting there saying, "They mentioned it so many times, there's got to be something there"? You wouldn't do that, would you?

Prosepective Juror Gaither: No.

Mr. Bentley: You'd sit there and listen to what the witnesses have to say?

Prosepective Juror Gaither: The evidence, yes.

(8RT 1370-1372.) The prosecutor went on to conduct voir dire of the jurors on other topics and never asked any further questions of Mr. Gaither concerning the defense's scapegoat theory.

Contrary to the prosecutor's representation, Mr. Gaither *never* said that "this case could be about a scapegoat." Rather, having

heard no evidence, Mr. Gaither gave the only answer that was appropriate at that point in time which was "I don't know." He further assured the prosecutor that he would base his decision on the evidence presented and would not make assumptions based on defense counsel's insinuations during voir dire. In short, nothing that Mr. Gaither's said reflected any bias one way or the other.

The prosecutor's mischaracterization of Mr. Gaither's voir dire is very similar to that which occurred in *Miller-El II*. As described by the Supreme Court in that case, the prosecutor peremptorily struck "Billy Jean Fields, a black man who expressed unwavering support for the death penalty." (545 U.S. at p. 242.) Fields had indicated that he believed in the death penalty, and during voir dire stated "his belief that the State acts on God's behalf when it imposes the death penalty. . .[and] that he could sit on Miller-El's jury and make a decision to impose this penalty." "Although at one point during the questioning, Fields indicated that the possibility of rehabilitation might be relevant to the likelihood that a defendant would commit future acts of violence, he responded to ensuing questions by saying that although he believed anyone could be rehabilitated, this belief would not stand in the way of a decision to impose the death penalty." (*Ibid.*, citations omitted.) When the prosecutor struck Fields, he offered a race neutral reason, claiming that Fields had said he would only consider the death penalty if a person could not be rehabilitated and that anyone who finds God can be rehabilitated. (*Id.* at p. 243.)

The Supreme Court noted that the prosecutor had "simply mischaracterized" the juror's testimony, even though the juror had "unequivocally stated that he could impose the death penalty." (*Id.* at

p. 244.) The Court went on to state that "[p]erhaps [the prosecutor] misunderstood, but unless he had an ulterior reason for keeping [this juror] off the jury we think he would have proceeded differently." (*Ibid.*)

In the instant case, the prosecutor asked Mr. Gaither four times, in a variety of different ways, the same basic question; i.e., whether he would properly evaluate all the evidence presented before accepting as true any theory offered by the defense or the prosecution. (8RT 1371-1372.) Each time, without any equivocation or hesitation, Mr. Gaither confirmed that he was willing to do so. (*Ibid.*) The prosecutor's contention otherwise is therefore precisely the kind of mischaracterization that the Supreme Court in *Miller-El II* determined to be evidence of pretext. (*See also People v. Silva, supra*, 25 Cal.4th at p. 385 [where facts in record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of the prosecutor's reasons for exercising peremptory challenges are raised].)

4. The Prosecutor's Failure to (1) Ask Mr. Gaither Any Questions Regarding His Unemployed Adult Children and (2) Explain Why Their Lack of Employment Was Related to the Case Is Further Evidence of his Discriminatory Motive In Striking Mr. Gaither

The prosecutor claimed that when deciding how to use his peremptory challenges, he considered "what the children of people who had adult children were doing." (10RT 1728.) It weighed against Mr. Gaither that "his children were unemployed." (*Ibid.*)

According to his jury questionnaire, Mr. Gaither had three adult children. (8CST 2113.) He had one 24 year old son and two

daughters, 21 and 18 years of age. (*Ibid.*) The son was employed, and did not live with Mr. Gaither. (*Ibid.*) The older daughter was unemployed but lived on her own. (*Ibid.*) The 18 year old daughter was also unemployed and did live at home. (*Ibid.*)

The prosecutor did not explain why he felt a juror whose adult children were unemployed would be unsuitable in this case. *Batson* expressly requires that the prosecutor's proffered reasons must be "related to the particular case to be tried." (476 U.S. at p. 98.)

If the prosecutor was drawing negative inferences regarding the reasons for Mr. Gaither's daughters' lack of employment, he had no factual basis upon which to do that, and he failed to proffer any such inferences in support of the challenge. It was incumbent on the prosecutor to put his reasons for the challenge on the record, and "stand or fall on the plausibility of the reasons he gives." (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 252.) As the Supreme Court recognized, "If the *stated* reason does not hold up, its pretextual significance does not fad because a trial judge or an appeals court can imagine a reason that might not have shown up to be false." (*Ibid.*, emphasis added.)

Further, the prosecutor failed to ask any follow-up questions of Mr. Gaither to ascertain the reasons his daughters were unemployed, and thus, "on this record . . . we will never know" (*People v. Turner, supra,* 42 Cal.3d at p. 727), whether there was basis for the prosecutor to draw any negative inferences from their respective circumstances. As appellant previously discussed,[31] a prosecutor's citation of an ambiguous jury questionnaire response is

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[31] See Argument I. D. (4) (a), at 49-50.

evidence of pretext, where the prosecutor has failed to conduct any follow-up voir dire to resolve the ambiguity. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 246 ["the State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"].)

5. The Trial Court's Superficial Assessment of the Prosecutor's Reasons for Striking Mr. Gaither Was Constitutionally Inadequate

As demonstrated above, the reasons given by the prosecutor for striking Mr. Gaither were individually and collectively indicative of discriminatory intent, and, at a minimum, required further inquiry by the trial court. However, the trial court "failed to point out inconsistencies and to ask probing questions." (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.) In other words, the trial court failed to fulfill its duty under *Batson* to make a "sincere and reasoned attempt to evaluate each stated reason" proffered by the prosecutor for this peremptory challenge. (*People v. Stevens* (2007) 41 Cal.4th 182, 192.) Consequently, reversal is required.

F. The Prosecutor's Stated Reasons for Exercising a Peremptory Challenge Against Norman Culpepper Were Also Demonstrably Pretextual

1. The Record Below

Norman Culpepper was a 54 year old black man with a high school diploma. (15CST 4130-4131.) He was moderately in favor of the death penalty. (15CST 4139.) Mr. Culpepper had previously served in the military. (15CST 4133.) At the time of the trial, he was employed as a telephone operator at a hospital. (15CST 4131.) One

of his four children, Ricardo Culpepper, had been accused of a crime, the nature of which he did not specify. (15CST 4135.)

The prosecutor gave the following reasons for striking Mr. Culpepper:

> Mr. Culpepper, in my mind, would never have been a proper juror for the People in this case. There was a question that the People looked at very, very closely, and that was the question regarding, "You or a close friend or somebody in your family ever been accused?" That was question No. 20.
>
> In Question No. 20, he mentions his son's name, Ricardo Culpepper, that had been accused. I think it was attempt (sic) murder or murder.
>
> That was the one thing that really impressed upon the people that this could be a problem. When defense counsel kept talking about being falsely accused, I watched him, and his responses troubled me on that. And I took that in conjunction to Ricardo Culpepper, which I believed to be his son.
>
> Finally, when the defense attorney asked him – Mr. Culpepper if he could help Albert, I saw a pause – a gigantic pause. I could have counted to 25, I think, before he answered that question. And when he finally answered it, I didn't remember what the answer was, but at that point I was sure that it was something that he mulled over. And he mulled over it so seriously that he could not be a juror on this case.

(10RT 1727.)

While these reasons were facially race-neutral, the record demonstrates that they were entirely pretextual.

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(a) The prosecutor's proffered reason that Culpepper's son had been accused of murder or attempted murder, was not supported by the record and was accepted by the trial court without a proper inquiry

The prosecutor indicated that his primary reason for striking Mr. Culpepper was that his son, Ricardo Culpepper, had previously been accused either murder or attempted murder. (10RT 1727.) However, there nothing in the record substantiated the prosecutor's claim. While Mr. Culpepper indicated on his jury questionnaire that his son had previously been accused of a crime, he failed to identify the crime, and therefore the questionnaire was incomplete. (15CST 4135.) Because the prosecutor did not conduct any voir dire on the subject, it is not clear how he arrived at the conclusion that Mr. Culpepper's son had been accused of murder or attempted murder. (See 6RT 852-881.) What is clear is that an important part of the prosecutor's stated reason was wholly unsupported by the record, calling for more on the trial court's part than just "a global finding that the reasons appear sufficient." (*People v. Silva, supra,* 25 Cal.4th at p. 386.)

In *Silva*, the prosecutor used a peremptory strike against a Hispanic juror claiming that the juror had indicated "he thought [the death penalty] was the toughest penalty, and he would look for other options." (*Id.* at p. 376.) The prosecutor's claim was refuted by the record on voir dire, where the juror had actually claimed to lean towards the death penalty and had assured the prosecutor he could enforce the penalty if it was deserved. (*Id.* at p. 377.) Despite this discrepancy, the trial court ruled that the prosecutor's reasons satisfied *Batson's* third prong. This Court reversed Silva's death

sentence, taking the trial court to task for it's perfunctory evaluation of the prosecutor's representations. The Court stated as follows:

> 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.

(*Id.* at p. 386.) The Court held that "because the trial court's ultimate finding [was] unsupported...the defendant was denied the right to a fair penalty trial in violation of the equal protection clause of the federal Constitution and was denied his right under the state Constitution to a trial by a jury drawn from a representative cross-section of the community." (*Ibid.*)

As in *Silva*, the trial court in the instant case made no effort to verify the veracity of the prosecutor's representations regarding Mr. Culpepper's son, and to determine whether or not they were supported by the record. All the trial court had before it when it ruled were Mr. Culpepper's jury questionnaire in which he stated that his son had been accused of a crime, and the prosecutor's unsubstantiated representation that the crime was murder or attempted murder. As noted, Mr. Culpepper did not identify the particular crime in either his jury questionnaire or in his voir dire. For all the court and the prosecutor knew, it could have been a minor traffic violation. Despite the absence of any information on the record regarding the nature of the accusations, the trial court

apparently credited the prosecutor's unsubstantiated representation that the accusations were for a serious offense.[32]

The court should also have been suspicious that the prosecutor made no attempt to elicit any information about the incident from Mr. Culpepper on voir dire. As previously noted, a prosecutor's failure to conduct any voir dire pertaining to issues of alleged concern supports an inference of discriminatory intent. (*People v. Turner, supra,* 42 Cal.3d 711, 727.)

Finally, the fact that the prosecutor did not strike Sherry Huey, a white seated juror who revealed in her jury questionnaire that her brother had been accused and *convicted* of a serious offense -- assault while on speed and heroin -- and that the victim died a week after the trial (1 CST 152, 156), additionally should have alerted the trial court that the prosecutor's purported justification for striking Mr. Culpepper was pretextual. As discussed above, "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black, who is permitted to serve, that is evidence tending to prove purposeful discrimination." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 241.)[33]

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[32] In response to the trial court's question, the prosecutor acknowledged that his "primary concern" regarding Mr. Culpepper was that a family member had been convicted of a "serious offense." (10RT 1727.)

[33] It is significant that aside from the differences in their race, Mr. Culpepper and Juror Huey were otherwise quite similar. They had both graduated from high school. (1CST 148; 15CST 4131.) They were both gainfully employed - Juror Huey was a pharmaceutical wholesaler and Mr. Culpepper was a telephone operator for a hospital. (1CST 148; 15CST 4131.) Both the jurors

(continued...)

Under the circumstances, rather than accepting the prosecutor's explanation at face value, the trial court, at a minimum, should have questioned the prosecutor further and conducted a detailed inquiry into the truth of his assertions. The trial court erroneously failed to do so, and instead made exactly the kind of global ruling this Court condemned in *Silva*. (25 Cal.4th at p. 486; 10RT 1731.)

(b) The Prosecutor Misrepresented the Record with Respect to Mr. Culpepper's Response to the Question of Whether He Would "Protect" Appellant Because They Were Both Black

During voir dire, defense counsel asked the prospective jurors if they would jump to conclusions about appellant because he had an "afro," a hairstyle that had been considered "militant" in the 1960s. (6RT 826.) After several jurors had indicated that appellant's hairstyle would not bother them, counsel turned to Mr. Culpepper and engaged in the following colloquy:

> Mr. Porter: Mr. Culpepper, let me talk to you a little bit because you're black, also. And sometimes – sometimes people might feel that you might relate because you're black and Albert Jones is black. Do you think that you would have a tendency to protect Albert Jones on a case like this because you're black?
>
> Mr. Culpepper: Yeah. In a way, yes.
>
> Mr. Porter. Okay. Tell me why.

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[33](...continued)
were middle aged – Juror Huey was 42 years old, Mr. Culpepper was 54. (1CST 147; 15CST 4130.) They were also both moderately in favor of the death penalty. (1CST 156; 15CST 4139.)

Mr. Culpepper. Because I feel like they are downgrading the race.

Mr. Porter: Say that again.

Mr. Culpepper: They are being racist.

Mr. Porter: Who is being racist now?

Mr. Culpepper: Whoever is talking about the way he looks, his hair style.

(6RT 827.) It is readily apparent that Mr. Culpepper thought he was being asked if he would object to people judging appellant because the appellant wore his hair in an afro. In responding to that perceived question, he hesitated, hedged and answered, "Yeah. In a way, yes." (*Ibid.*)

Realizing then that Mr. Culpepper thought he was being asked if he would stand in the way of other jurors being racist, defense counsel then clarified his question:

Mr. Porter: But let me ask you this question: Let's go away from that for a second. Let's look at the fact Albert Jones is black. Let's forget his hair, forget this goatee. Let's forget all that. Do you feel that because he's black and you're black that you would have a tendency of trying to protect him in a sense that you would obstruct justice in a sense that you wouldn't look at the facts and be fair?

Mr. Porter. Oh, no.

(6RT 827.) Once the question had been taken out of the context of the appellant's physical appearance, Mr. Culpepper emphatically replied that he would be fair to both the prosecution and the defense, without regard to the fact that he was of the same race as appellant.

(6RT 828.) Defense counsel then proceeded to make certain that the record was unambiguous about Mr. Culpepper's position:

> Mr. Porter. Okay, do you understand what I'm saying? Tell me what you think I'm saying.
>
> Mr. Culpepper. Well, you're saying just because he's black and I'm black, would I try to protect him.
>
> Mr. Porter: Okay. Would you?
>
> Mr. Culpepper: No.

(*Ibid.*)

The prosecutor's charge that Mr. Culpepper gave "a gigantic pause" as he "mulled over" the defense counsel's original question therefore can easily be explained by the confusion evident in the record above. (10RT 1727.) It is obvious that Mr. Culpepper was uncertain about what, exactly, defense counsel was asking and so it is only logical that he took a moment to think about it. In fact, he said so as much when the prosecutor conducted voir dire on the subject:

> Mr. Bentley: Now, Mr. Culpepper, Mr. Porter kind of put you on the spot, and so I'm going to put you on the spot a little bit...[Defense counsel] was asking you a question, basically talking about his client and how you look at him . . .and at first it sounded like, to me, that you were saying you were going to give him some extra benefit, protect his race, or do something extra . . . I know when Mr. Porter asked you the question, you hesitated for an extra long time. He gave you some follow-up questions. It seemed like you reversed yourself. Could you explain your feelings to me?
>
> Mr. Culpepper: That's what you are dealing with, the Afro –
>
> Mr. Bentley: Yes. Yes, sir.

Mr. Culpepper: I know people look at the Afros as being militants; right? And stuff like that. I was saying I don't look at him as a militant.

Mr. Bentley: And what about this long hesitation?

Mr. Culpepper: *I was just trying to get it right.*

Mr. Bentley: Okay. So let me ask you this, then: You feel you could be fair to the People in this case?

Mr. Culpepper: Yes.

Mr. Bentley: Okay. And that hesitation was no reflection that you couldn't be fair to the People in this case?

Mr. Culpepper: No.

(6RT 872-873, emphasis added.)

After this exchange, the prosecutor should have been absolutely clear about that fact that Mr. Culpepper would not vote to acquit the appellant just because they shared the same race. Thus, suggesting that Culpepper's "mulling over" of the confusing question presented to him reflected a potential bias towards appellant was a clear misrepresentation of the record. (10RT 1727.) As previously discussed, the Supreme Court has held that the such misrepresentations of a juror's testimony create an inference of discriminatory intent. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 244.)

(c) The Prosecutor's Assertion That He Was Troubled by Mr. Culpepper's "Response" to Defense Voir Dire "About Being Falsely Accused" Was Not Credible

The prosecutor also cited Mr. Culpepper's response to defense counsel's voir dire concerning false accusations among his list of proffered reasons. He claimed:

> When defense counsel kept talking about being falsely accused, I watched him, and his responses troubled me on that. Just watching his body language and his response to that. And I took that in conjunction to Ricardo Culpepper, which I believed to be his son.

(10RT 1727.) This claim was suspect for several reasons.

First, defense counsel *never asked* Mr. Culpepper any questions about false accusations during his voir dire. (6RT 839.) Neither did the prosecutor. (6RT 852-883.) Consequently, Mr. Culpepper's "responses" to such voir dire could not have "troubled" the prosecutor, because there weren't any.

Second, to the extent that the prosecutor was referring to Mr. Culpepper's demeanor during the voir dire of *other* prospective jurors, he failed to describe any particular facial expressions or specific conduct on Mr. Culpepper's part that suggested a bias in favor of the defense. The prosecutor's vague assertion that Mr. Culpepper's "body language" was "troubling" thus failed to meet *Batson*'s requirement of a "clear and reasonably specific explanation" for this particular peremptory challenge. (476 U.S. 98, fn. 20.) More importantly, given the fact that the trial court did not make a specific finding on the record concerning Mr. Culpepper's "body language," this Court cannot presume that it credited the prosecutor's assertion. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1209.)

Finally, the fact that the prosecutor cited essentially the same vague, unsupported reason to justify striking all three black jurors should have given the trial court serious pause, particularly since the record failed to disclose – and the prosecutor failed to explain – how the excluded jurors reacted differently from the seated jurors in

response to defense counsel's voir dire concerning the subject of scapegoats and false accusations.

For all of the above reasons, the trial court ruling with respect to the prosecutor's exercise of the peremptory challenge against Mr. Culpepper should not be accorded any deference.

G. Because the Trial Court Failed to Conduct the Required Evaluation of the Prosecutor's Proffered Reasons For Striking the Three Black Jurors, Its Findings Should Not Be Accorded Any Deference

As stated above, *Batson* calls for a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (476 U.S. at pp. 96-98; quoting *Arlington Heights v. Metropolitan Housing Development Corp., supra,* 429 U.S. at p. 266.) Such inquiry allows the court to "evaluate meaningfully the persuasiveness of the prosecutor's" stated explanations." *(United States v. Alanis, supra,* 335 F.3d 965, 969.) Because step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility (147 U.S. at p. 98, fn. 21, this Court has interpreted *Batson* to require that the trial judge in considering a *Batson* objection, make a 'sincere and reasoned attempt to *evaluate each stated reason* as applied to *each challenged juror.*'" (*People v. Silva*, *supra,* 25 Cal.4th at p. 386, emphasis added.) In addition, "all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Snyder v. Louisiana*, *supra,* 128 S.Ct. at p. 1208; *Miller-El. v. Dretke*, *supra*, 545 U.S. at p. 239.)

In the instant case, not only were two of the reasons relied on by the prosecutor for striking Deborah Ladd facially discriminatory, but also each and every facially neutral reason he proffered for

having struck Ms. Ladd, Mr. Gaither and Mr. Culpepper was either unsupported by the record or otherwise demonstrably pretextual. However, in spite of the overwhelming evidence of the prosecutor's discriminatory intent, the trial court herein made no attempt whatsoever to evaluate whether the prosecutor's proffered reasons for striking the three black jurors were pretextual. The court asked not a single substantive question of the prosecutor about any of the reasons offered, made no effort to verify that they were actually supported by the record, and also made no specific findings regarding the genuineness of each reason. The court simply ruled in a perfunctory manner that the proffered reasons were "racially neutral." Thus, the court made precisely the kind of "global finding" that this Court held was unacceptable – under circumstances similar to those presented by the instant case -- in *People v. Silva* . (25 Cal.4th at p. 386), and which the U.S. Supreme Court held was not entitled to deference in *Snyder v. Louisiana* (128 S.Ct. 1208-1209.)

Because the trial court herein completely failed to discharge its duty to conduct a proper *Batson/Wheeler* analysis, its ruling is not entitled to deference from this Court. (*Ibid.; People v. Silva,* 25 Cal.4th at p. 386; see also *People v. Hall, supra,* 35 Cal.3d at pp. 168-169 [trial court declined any inquiry into or examination of the prosecutor's proffered explanation for challenging black jurors before denying *Wheeler* motion]; accord, *People v. Turner, supra,* 42 Cal.3d at pp. 727-728 [trial court listened to prosecutor's reasons for challenging black jurors without question and then denied the *Wheeler* motion without comment].)

H. Because the Prosecutor's Reasons for Challenging at Least One of the Black Jurors Was Racially Motivated, Reversal Is Required

The ultimate question to be resolved is whether "the record as a whole shows purposeful discrimination." (*Snyder v.* Louisiana, *supra*, 128 S.Ct. at p. 1207; People *v. Silva, supra,* 25 Cal.4th at 384.) The exercise of even one improper challenge is sufficient to establish a constitutional violation. "[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for striking some black jurors." (*People v. Fuentes* (1991) 54 Cal.3d 707, 715; quoting *People v. Battle* (8th Cir.1987) 836 F.2d 1084, 1086; see also *United States v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1514; *People v. Silva*, supra, 25 Cal.4th at p. 386.); *People v. Montiel* (1993) 5 Cal.4th 877, 909.)

As appellant has demonstrated the prosecutor's stated reasons for removing the three African-American prospective jurors overwhelmingly manifest his discriminatory intent. The prosecutor was unable to come up with a single legitimate, credible reason for striking any of these three black panelists. Even after he had a full day to consider the matter, he could not articulate reasons which passed even the most minimal scrutiny. Two of his reasons were inherently discriminatory on their face: the prosecutor's stereotypical assumptions that Deborah Ladd (1) was "controversial" due to her membership in the A.M.E. Church and (2) that she would "look down" on his rough, black witnesses. Other reasons were entirely baseless, without a shred of support in the record; i.e, the prosecutor's claim that Norman Culpepper's son had been charged

with murder or attempted murder, his claims that Deborah Ladd, Gary Gaither and Norman Culpepper had given responses during voir dire that indicated that they each were "buying into" the defense theory that appellant had been falsely accused in this case; and his assertion that Norman Culpepper had "seriously mulled over" the question of whether if sworn as a juror he would be inclined to help or protect appellant because they both were black.. In addition, the prosecutor's purported "concern" about such matters as Deborah Ladd's unanswered question on the jury questionnaire, Norman Culpepper's son's criminal history, and Gary Gaither's daughters' unemployed status was belied by the fact that he asked not a *single* question of any of these jurors about these issues. Finally, even a seemingly neutral reason offered by the prosecutor – that he feared Gary Gaither's employment as a bus company supervisor might lead him to second-guess evidence regarding disputed issues in the case, such as travel times and lighting conditions -- should have been viewed with suspicion by the court, because the prosecutor did not have the same concern about the two *white*, seated jurors who drove buses in the very same area in which the crime took place.

Accordingly, for all of the reasons stated above, the trial court committed clear error in denying appellant's *Batson/Wheeler* motion. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1207 [standard for reversal of denial of *Batson* motion on appeal is clear error].)

I. Conclusion

The unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing *Vasquez v.*

Hillery (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].) Reversal of appellant's conviction and death sentence are required, because the record clearly reveals the prosecution's purposeful discrimination against African American jurors, in violation of appellant's rights under the Equal Protection Clause of the federal Constitution (*Batson v. Kentucky*, *supra*, 476 U.S. 79), as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler, supra,* 22 Cal.3d 258.)

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II.

THE ADMISSION OF EVIDENCE DURING THE GUILT PHASE OF A PRIOR ROBBERY, PURPORTEDLY TO SHOW APPELLANT'S INTENT TO ROB THE FLORVILLES, WAS AN ABUSE OF DISCRETION AND A VIOLATION OF APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS

A. Introduction

Over strenuous and repeated defense objection, the prosecution was permitted, during the guilt phase, to introduce evidence that in 1985 – approximately eight years before the capital crime – appellant and two accomplices robbed three Hispanic men at gunpoint, in broad daylight, on a street in Vernon, California. The purported relevance of this evidence was to prove appellant entered the Florvilles' residence with the specific intent to rob and kill them. However, the killers' intent to rob and/or kill was not disputed at trial. Appellant's defense was that he had been falsely identified as one of the perpetrators; thus, the only contested issue at trial was the identity of the perpetrator(s). The evidence of appellant's prior robbery conviction had a greater tendency to improperly and unfairly influence the jury's resolution of that issue than the question of the perpetrator's intent, and as appellant will show, the record demonstrates that the prosecutor sought to capitalize on that.

The defense vigorously opposed admission of the above-described evidence, arguing that the two crimes were both too remote from each other in time and too dissimilar in nature, for the prior crime to have any relevance to establish appellant's criminal

intent with respect to the capital crime. The defense further argued that because there was ample evidence of the perpetrator(s)' intent to rob and kill the Florvilles, whatever probative value the prior crime evidence might have would be dramatically outweighed by the prejudice to appellant engendered by its admission. The defense urged that there was a high probability that the prior robbery would be considered by the jury as evidence of appellant's criminal propensity, which, in turn, would improperly influence their determination on the question of identity, and that, therefore, the evidence was so much more prejudicial than probative that its admission would violate appellant's right to a fair trial. The trial court nevertheless ruled that under this Court's opinion in *People v. Ewoldt* (1994) 7 Cal.4th 380, evidence of the prior robbery was admissible to prove appellant's intent to rob the Florvilles.

Before presenting *any* evidence concerning the crime for which appellant was on trial, the prosecution opened its guilt phase case with testimony from the victims of the prior robbery. By placing appellant's prior robbery conviction front and center in this manner, the prosecution revealed that its true purpose in introducing such evidence was to show appellant's criminal propensity, specifically his propensity for committing robberies. In his opening statement, the prosecutor told the jury that they could consider the fact that appellant committed a robbery eight years before as proof that appellant went to the Florville's home with the intent to commit a robbery. (11RT 1790-1791.) In his subsequent closing argument to the jury, the prosecutor failed to explain *how* this eight year-old hold-up of complete strangers on a city street in broad daylight, established appellant's intent to commit a home invasion robbery of

his neighbors during pre-dawn hours; the prosecutor simply argued that appellant's intent to rob the victims of the prior crime was proof of his intent to rob in the instant case. (27RT 1453-1454.)

As will be demonstrated below, the trial court misread *Ewoldt*, and abused its discretion in allowing the prosecution to present evidence of the prior robbery conviction in this case. The error was far from harmless; indeed, it was so prejudicial that it deprived appellant of both his state and federal constitutional rights to a fair trial.

B. Procedural History

The prosecution filed a motion on January 26, 1996, seeking a ruling on the admissibility of three prior criminal offenses. (CT 255-268.)[34] The prosecution argued that the 1985 and 1992 incidents (hereinafter the "Vernon robbery" and the "Delano incident"), were relevant to prove that appellant had the intent to rob the Florvilles. It argued that the 1984 marijuana incident was relevant because both that incident and the capital offense involved the criminal use of a minor. (*Id.*)

The defense filed a brief in opposition on February 20, 1996, arguing that the prior crimes evidence should be excluded, because (1) there was more than ample proof of the perpetrator(s)' intent to

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[34] These offenses included a 1985 conviction for armed robbery in the city of Vernon, California (1CT 261-262); a 1992 conviction for receiving stolen property in the city of Delano, California (1CT 262-263; 2CT 357); and a 1984 arrest for use of a minor to sell marijuana and sale of marijuana, (1CT 263.) Because only the Vernon robbery evidence was ultimately introduced, appellant will only discuss the proceeding below related to the admission of that evidence.

rob and kill without the prior crimes evidence; (2) that such intent was not going to be disputed by the defense at trial; and (3) that, in any event, appellant's prior offenses were too dissimilar from the capital offense to establish the requisite intent to rob and kill in the instant case. Thus, on the issue of intent the evidence was not only cumulative of other evidence that would be presented, but also any probative value it might arguably have would be grossly outweighed by the prejudice its admission would cause. (2CT 349-362.)

The motion was heard on February 23, 1996. The prosecutor argued that because appellant had entered a "not guilty" plea, the prosecution would be required to prove that he not only committed the crime, but that he possessed the requisite criminal intent, and that appellant's 1985 conviction for robbery was relevant to prove that appellant entered the Florvilles' home with the intent to rob them. He further argued that the prior robbery was relevant to prove that appellant intended to kill the Florvilles, because appellant had threatened to shoot the victims of the Vernon robbery. (3RT 317-319.)

Defense counsel argued that because the perpetrator(s)' intent to rob and kill was not disputed and was self-evident, any conceivable probative value the prior robbery might have on that issue would be substantially outweighed by the prejudice resulting from its admission. Counsel pointed out that prior crimes evidence has been held admissible to establish intent in cases where there is no question as to whether the defendant committed an act, but there is a dispute as to his state of mind at the time the act was committed; e.g., the defendant claims that the killing was accidental, but prior crimes evidence tends to show otherwise. Moreover, counsel noted,

there was more than ample evidence to show both intent to rob and kill the Florvilles, so admission of the prior robbery evidence would be "tremendously cumulative." Finally, the defense argued that the facts of the Vernon robbery and those of the instant case were too dissimilar to establish the requisite intent in the instant case. (3RT 319-324 .)

The court ruled that, "[o]n the issue of intent, and using the logic and reasoning of the *Ewoldt* decision, I am going to allow it." (3RT 334.) Defense counsel urged the court to exclude the evidence under Evidence Code section 352. Counsel argued that the potential prejudice resulting from admission of such other crimes evidence was enhanced by the fact that appellant was black and the victims were white; i.e., there was a substantial risk that evidence establishing appellant's commission of a prior robbery would tend to reinforce negative racial stereotyping of minorities as criminals. (3RT 341-344.)[35] The Court thereupon repeated its ruling denying the motion to exclude the Vernon Robbery evidence, and added that it considered Evidence Code section 352 in making its decision. (3RT 344.)

In rejecting the defense's argument that the evidence was cumulative on the issue of intent, the court reasoned that the Vernon robbery evidence was admissible because the prosecution's evidence of intent was merely "circumstantial." (3RT 345.) The

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[35] Defense counsel also requested that the court defer its final ruling until after the other evidence was presented, so that the court would have a sufficient basis upon which to weigh the probative value of the Vernon robbery evidence against its prejudicial effect. (3RT 340-341.)

court acknowledged that it was clear the killings were intentional because the victims were tied up and repeatedly stabbed, (3 RT 347), but it found there was some ambiguity as to whether the perpetrators had entered the victims' home with the intent to rob them, because there was no evidence of forced entry. The court then stated, "I believe that the –that the Vernon incident is sufficient under EWOLDT and 1101(b) to be permitted to be used by the prosecution . . . for purposes of intent." (3RT 348.) The court did not explain how the particular facts of the Vernon robbery were probative of the perpetrator(s)' intent in the instant case.

The defense sought reversal of the court's ruling by petition for writ of mandate, which was denied by the Court of Appeal without opinion. (1CST 1-191; 5RT 416.) Subsequently, they asked the court to reconsider its prior ruling, arguing that the prosecution's offer of proof in support of its motion to introduce evidence of the Vernon robbery, had contained several material factual allegations that were inaccurate. (5RT 420-421.)[36] The defense argued that without the inaccurate facts, there were no relevant similarities between the Vernon robbery and the crime for which appellant was being tried. The court declined to reverse its prior ruling, stating that "I still think there is (sic) sufficient similarities under the EWOLDT standard of the least of the three types of evidence that can be brought in under

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[36] These inaccurate factual allegations were (1) that appellant's accomplices in the Vernon robbery were related to him; (2) that the Vernon robbery was committed early in the morning; (3) that appellant threatened to kill the victims; and (4) that he struck one of the victims. (*Ibid.*)

1101(b). I think there's still sufficient similarities that it can come in for the purpose of intent." (5RT 423-424.)

The prosecution opened its case in chief in the guilt phase by calling as witnesses two of the three victims of the Vernon robbery. Raymond Latka testified that in the early afternoon of August 3, 1985, he, Robert Valdez and Randy Vasquez were leaving work at a furniture company in Vernon, when they were robbed on the street at gunpoint by two men who drove up in a white LeBaron. One of the robbers had a gun, and demanded money from Mr. Latka and his two companions. The man with the gun threatened to kill them if they did not cooperate. The other robber proceeded to collect money from the three victims and also hit Randy Vasquez. (11RT 1840-1843.) Mr. Latka subsequently identified one of the perpetrators in a photo lineup, but could no longer remember what the man looked like sufficiently to say whether it was appellant. The man who robbed him was black and in his early twenties. (11RT 1843-1844.)

Robert Valdez testified that he, Latka and Vasquez left the furniture factory about 1:00 or 1:30 that afternoon. As they were leaving, a white LeBaron pulled up with three men inside. Two jumped out and one was holding a gun. The man with the gun told Valdez and his companions it was a robbery and that if they did not cooperate they would be shot. The man asked for their wallets, but when Vasquez refused to turn over his wallet, the robber who was not holding the gun, frisked Valdez and found a wad of dollar bills in Vasquez's pocket. The robber then slugged Vasquez behind his ear. Valdez had been able to identify the man with the gun in both a photo lineup and in court, but was no longer able to do so. He was

only able to recall that the man was black and in his early twenties. (11RT 1846-1850.)

The prosecutor subsequently called a Vernon police officer, William Waxman, who testified that Latka and Valdez identified appellant in a photo lineup as the robber with the gun. (13 RT 2109.) Waxman stated that there were three other suspects, who were appellant's cousins. (13 RT 2108.)

At the conclusion of the guilt phase, the prosecutor argued to the jury that appellant's commission of the Vernon robbery proved his intent to rob the Florvilles. (27RT 4153-4154.) The prosecutor argued as follows:

> You know, I started this trial with an incident up in Los Angeles or Vernon, I guess, to be more exact. What happened was that in 1985, Albert Jones and two others come (sic) drive up in a car. There's Mr. Latka, Mr. Valdez, I think Mr. Vasquez. And Albert Jones and one of the others gets out of the car. Albert Jones has a gun. He pulls that gun, says, Give me your money or I'll kill you.
>
> So I called Mr. Latka. I called – I think it was Mr. Valdez. I called a couple of police officers to tell you about this. I've got a certified copy of the conviction of Albert Jones for that robbery. Got that in the evidence.
>
> I presented that to you for one reason. One reason was to show the intent of Albert Jones. Now it turns out we know plenty about his intent. I mean, he says it beforehand many times, we're going to do robberies. 1985 his intent was to do a robbery. He intended to rob. That's why you heard that, to show what kind of intent he had. That was his intent. Nothing more. Nothing less. (*Ibid.*)

After the closing arguments, the court gave CALJIC 2.50, modified as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. Further, it may not be considered by you unless you find beyond a reasonable doubt that the defendant is the person or one of the people who committed the acts charged in the Florville residence.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show the existence of the intent which is a necessary element of robbery and burglary.

(2CT 513; 28RT 4327-4328.)[37]

Following the penalty verdict, appellant filed a Motion for New Trial, in which he argued that his state and federal constitutional rights to due process of law and a fair trial had been violated by admission of the Vernon robbery evidence in the guilt phase of the trial. (3CT 753-765.) The trial court denied the motion, stating as follows:

> I believe that the Court allowing that was appropriate. And I believe there are a number of reasons why it is appropriate. First of all, I do believe and I do agree with Mr. Bentley, that placing or entering a plea of not guilty does place intent in issue. So obviously, the People have the duty to present evidence concerning intent. Mr. Bentley points out I believe it's on page 6, that it could be construed that an intent could be derived at or

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37 The instruction given was requested by the defense. (2CT 513.)

arrived at at sometime other than entering a residence, that intent to steal or rob or burglarize could have been derived at sometime later. Therefore, they had a duty to show an intent through the evidence. And I believe that the use of 1101 (b) is an appropriate means to do that. Because by showing it through the 1101 (b) evidence or by using the 1101 (b) evidence, they are able to show that he did have an intent to commit a robbery or a burglary. Okay. Couple other things that he mentions as well along those lines. I won t rehash that. I believe both of you have addressed that the Court has to weigh the evidence to determine its probative value versus prejudicial effect. And basically talking a 352 weighing. And I believe the Court did enter into a 352 weighing. And if I didn't indicate that earlier for the record, I will indicate it now that I did consider the weight of the evidence - - I' m sorry, not weight --the prejudicial effect versus the probative value and did allow it after making that weighing. Certainly one of the issues is whether or not there' sufficient similarities. And I believe that there are sufficient similarities to where it is appropriate evidence. Those similarities being, among other things, that on each occasion Mr. Jones utilized an accomplice. On each occasion some kind of arming was involved, although different types of arming. On each occasion there was money taken and escape with money. And on each occasion a vehicle was utilized to effectuate that escape. And there are other similarities as well, which I won't go into. But I think that's sufficient to indicate that -- that there are sufficient similarities to where the 1101 (b) evidence, specifically the Vernon robbery, is appropriate evidence to have had heard by this trier of fact. So the motion for new trial is denied.

(34RT 5019-5021.)

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C. Legal Principles Governing Admissibility of Prior Crimes Evidence

Evidence of a person's character - including evidence in the form of specific instances of misconduct - is inadmissible to prove the conduct of that person on a specified occasion unless it is relevant to establish some fact *other* than the person's character or disposition. (Evid. Code § 1101, subds. (a) and (b); *People v. Ewoldt* (1994) 7 Cal.4th 380.) "The primary reasoning that underlies this basic rule of exclusion is not the unreasonable nature of the forbidden chain of reasoning. Rather, it is the insubstantial nature of the inference as compared to the 'grave danger of prejudice' to an accused when evidence of an uncharged offense is given to a jury." (*People v. Thompson* (1980) 27 Cal.3d 303, 317; internal citation omitted.) In other words, "[t]he reason for this rule is not that such evidence is never relevant; to the contrary, the evidence is excluded because it has too much probative value." (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.)

The rule is absolute where it applies: "However probative to common sense, evidence must be excluded under section 1101, subdivision (a), if the inference it directly seeks to establish is solely one of propensity to commit crimes in general, *or of a particular class*. (*People v. Alcala* (1984) 36 Cal.3d 604, 631; *People v. Thompson*, *supra*, 27 Cal.3d at p. 317, emphasis added.) Evidence Code section 1101, subdivision (a) does not permit a court to balance the probative value of the evidence against its prejudicial effect. The inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with a material fact. If no theory of relevancy can be

established without this pitfall, the evidence of the uncharged offense is simply inadmissible." (*People v. Thompson* , *supra*, 27 Cal.3d at p. 317.)

Evidence is relevant to prove a material fact other than criminal disposition when it is admitted to prove that, if the defendant committed the alleged act, he or she did so with the intent that comprises an element of charged offense. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243-1246.) However, evidence of prior criminal conduct "'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' (*People v. Smallwood* (1986) 42 Cal.3d 415, 428, 228 Cal.Rptr. 913, 722 P.2d 197; see also *People v. Thompson* (1988) 45 Cal.3d 86, 109, 246 Cal.Rptr. 245, 753 P.2d 37.) 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have substantial probative value.' (*People v. Thompson* (1980) 27 Cal.3d 303, 318, 165 Cal.Rptr. 289, 611 P.2d 883, italics in original, fn. omitted.)" (*People v Ewoldt*, supra, 78 Cal.4th at p. 404.) Any doubts as to relevancy for a purpose other than as proof of a defendant's disposition, propensity, or character trait should be resolved in favor of the defendant and against admissibility. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 724.)

Even if evidence of uncharged criminal conduct is relevant, to be admissible it "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]' (*People v. Thompson*, *supra*, 45 Cal.3d at p. 109, 246 Cal.Rptr. 245, 753 P.2d 37.)" (*Ibid.*) Thus, such evidence may not be admitted if its probative value "'is substantially outweighed by the probability that its admission [would] ... create substantial danger of

undue prejudice, of confusing the issues, or of misleading the jury.' (Evid.Code, § 352.)" (*Ibid.*)

Erroneous admission of evidence of uncharged acts may render a trial fundamentally unfair and thereby violate a defendant's right to due process. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Henry v. Estelle* (9th Cir.1994) 33 F.3d 1037, 1042, revd. on other grounds in *Duncan v. Henry* (1995) 513 U.S. 364; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381.) Indeed, as the United States Supreme Court noted in *Michelson v. United States* (1948) 335 U.S. 469, "the state may not show defendant's prior trouble with the law ... not ... because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*Id.* at pp. 475-476.)

On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 370.)

D. The Facts of the Vernon Robbery Were Not Probative of the Perpetrator's Intent in the Instant Case, Other Than to Establish That Appellant Had a Propensity to Commit Armed Robberies

In order to have any substantial probative value to prove intent, prior criminal conduct must be similar to the crime charged in respects that are actually *relevant* to the issue of intent. In other words, there must be a *direct relationship* between the prior offense and the intent element of the charged offense, in order for introduction of the prior offense evidence to be proper on that issue.

"If the connection between the [prior] offense and the ultimate fact in dispute is not clear, the evidence should be excluded." (*People v. Daniels* (1991) 52 Cal.3d 815, 857; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 15 [probativeness of other crimes evidence on issue of intent or motive depends on whether offenses have a direct logical nexus].) "[I]t is imperative that the trial court determine specifically what the proffered evidence is offered prove, so that the probative value of the evidence can be evaluated for that purpose." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 406 .)

Thus, for example, in *People v. Denis* (1990) 223 Cal.App.3d 563, 566-568, evidence that the defendant admitted to committing several prior robberies with his alleged accomplice at the precise location as the robbery for which he was being tried, was held to be highly probative to refute his testimony that he had not intended to rob anyone and had only gone along with his accomplice to humor him. In *People v. Demetrulias*, *supra*, 39 Cal.4th, at pp.13-19, evidence of an assault and robbery of an elderly man on the same evening that the defendant killed the victim in the case for which he was on trial – also an elderly man -- was found probative to refute the defendant's claim that he had killed the victim in self-defense and had not attacked him with the intent to rob him. Similarly, in *People v. Lewis* (2001) 25 Cal.4th 610, 635-637, a case charging robbery murder and burglary murder special circumstances, this Court held that evidence of the defendant's assault and robbery of a man to obtain money for drugs, that occurred several hours prior to the capital crimes in the same apartment complex as the capital crimes, was probative of the defendant's intent to steal money for drugs from the victims of the capital crimes when he attacked them. Also, in

People v. Daniels, *supra*, 52 Cal.3d at p. 858, a case involving the killing of a police officer, this Court held that it was proper for the trial court to have admitted evidence that the defendant had been shot by the police and rendered a paraplegic during a post-bank robbery chase, over a year before the crime. The Court held that this evidence was probative of appellant's intent to kill, stating that:

> In the instant case there is a direct relationship between the events surrounding the bank robbery, particularly the shooting of defendant, and issues in the charged offense. Despite the gap in time, there is a direct relationship between the police rendering defendant a paraplegic and defendant murdering the officers in retribution. This is particularly true when coupled with other admitted evidence of defendant's antipathy toward the police.

(*Id.* at p. 857.) Finally, in *Rufo v. Simpson* (2001) 86 Cal.App. 4th 573, 586, it was held that evidence of prior incidents of domestic violence against the victim by the defendant were probative of his intent to kill her. The operative fact there was that the prior assaults and the murder were all perpetrated by the defendant against the same victim – his wife.

In the instant case, by contrast, the only conceivable relevance the Vernon robbery evidence could have had was to show that appellant had a history of committing armed robberies. The two offenses bore similarity only in that they both involved the same *class* of crime. The shared characteristics of the two crimes cited by the prosecutor in arguing the admissibility of the Vernon robbery evidence to the trial court, were in fact generic to probably *hundreds*, perhaps *thousands* of armed robberies. These were: (1) that appellant had accomplices; (2) that he and the accomplices were

black males; (3) that appellant and his accomplices drove to the scene of the crime in a late model sedan; (4) that appellant and his accomplices were armed during the course of the robbery; (5) that appellant and his accomplices fled with money belonging to the victims; (6) that appellant and his accomplices fled in a vehicle; and (7) that appellant and his accomplices lived in the same neighborhood and general vicinity as the victims.

The prosecutor never explained specifically how these "similarities" between the two crimes were probative of appellant's intent to rob the Florvilles. He simply argued to the jury that because appellant had the intent to rob the victims in the Vernon case, they should conclude that he had the same intent when he entered the Florvilles' home. (27RT 4154.)[38] In other words, the prosecutor asked the jury to infer appellant's guilt of the instant offense from the fact that appellant had previously committed a similar *class* of crime. The prosecutor's argument thus reveals that his true purpose in introducing this evidence was to show appellant's propensity to commit robberies.

In contrast to all of the cases discussed above, where the prior crimes evidence was directly relevant to establish the requisite

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[38] The prosecutor argued to the trial court that the similarities between the Vernon robbery, which took place in 1985, and the instant crime, which occurred in 1993, were probative of the fact that appellant entered the Florvilles' home with the intent to rob them. The jury was required to find such intent in order to find true the robbery murder and burglary murder special circumstances. (*People v. Green* (1980) 27 Cal.3d 1, 59-62.) In arguing to the jury, however, the prosecutor stated only that the prior crime was an armed robbery, during which appellant aimed a gun at the victim and said "give me your money or I'll kill you." (27RT 4153.)

criminal intent in the case being tried, the purported "similarities" between the Vernon robbery and the instant case have no bearing on the question of whether the intent to steal property from the Florvilles was formed *before* or *after* the murder. As this Court explained in *People v. Bigelow* (1984) 37 Cal.3d 731, 748, the motive for robbery is generally to obtain the victim's property, and proof that the defendant has committed prior robberies with the same motive, is not probative of any contested issue. Indeed, the only inference created by the facts of the Vernon robbery was that appellant had a history of armed robbery, and therefore was probably guilty of perpetrating the charged offenses. This is precisely the sort of "criminal propensity" evidence barred by Evidence Code section 1101, subdivision (a).

The trial court's failure to consider whether the purported similarities between the Vernon robbery and the instant offense had any actual bearing on the intent element of the charged offense, other than to show appellant's propensity to commit armed robberies, reflects a fundamental misunderstanding of the correct legal standards to be applied. Because evidence of the Vernon robbery had no substantial probative value to prove the requisite intent in this case, and was really offered for the impermissible purpose of creating an inference of guilt based on appellant's prior bad acts, it should never have been presented to the jury, and the court thus abused its discretion when it ruled the evidence admissible.

E. The Vernon Robbery Evidence, Even if Probative of Appellant's Intent to Rob the Florvillees, Was Cumulative, and Therefore Should have Been Excluded

In proving intent, the act is conceded or assumed: what is sought is the state of mind that accompanied it. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2) Although intent to rob the Florvilles was an element of the offense and special circumstance the prosecution was required to prove (*People v. Daniels, supra*, 52 Cal.3d at pp. 857-858 [a defendant's plea of not guilty puts in issue all elements of the offenses, including his intent]), there could be little doubt from the crime scene evidence that whoever entered the Florvilles' home, before dawn, did so with the intent to commit a robbery. As defense counsel pointed out, the victims were bound with wire, one of the rooms in their mobile home was ransacked, and property belonging to them was missing. (16RT 2518; 12RT 1904, 1908, 1909.) It is thus readily apparent that the perpetrator(s)' intent was to steal money or property from the Florvilles, and to accomplish this by force or fear. Moreover, there was testimony from multiple witnesses who claimed to have either participated in, or overheard, pre-crime discussions in which the plan to rob the Florvilles was discussed. (13RT 2119-2122; 15RT 2431-2437; 18RT 2898-2900.) Consequently, appellant's not-guilty plea notwithstanding, no one could reasonably say that there was any actual dispute that the perpetrator or perpetrators formed the intent to rob the Florvilles before they killed them. The only truly disputed issue in the case was the identity of the individual or individuals who committed the

crime and whether the witnesses who implicated appellant were telling the truth.

For purposes of the analysis to be applied, the situation presented in the instant case is analogous to that in *People v. Balcom* (1994) 7 Cal.4th 414, 423. In that case, the defendant was charged with raping the victim at gunpoint, and the defendant, though he admitted having sexual intercourse with the victim, claimed that she had consented and denied that the victim's claim that he held a gun to her head. The prosecution was allowed, over defense objection, to introduce evidence of the sexual assault of another woman in another state to prove the defendant's intent to rape the victim in the case for which he was being tried. This Court held the evidence was cumulative on the issue of intent:

> [B]ecause the victim's testimony that defendant placed a gun to her head, if believed, constituted compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue.

(*Ibid.*) Similarly, in *People v. Ewoldt, supra*, this Court held that evidence of prior similar offenses was inadmissible to prove the defendant's intent as to the charges of committing lewd acts upon a child. The Court stated:

> Evidence of intent is relevant to establish that, assuming the defendant committed the alleged conduct, he or she harbored the requisite intent. In testifying regarding the charges of lewd conduct, Jennifer stated that defendant repeatedly molested her, fondling her breasts and genitals and forcing her to touch his penis. *If defendant engaged in this conduct, his intent in doing so could not reasonably be disputed.*

(7 Cal.4th at p. 406, emphasis added.)

In *Ewoldt*, this Court made clear that where the primary issue to be determined is identity, and the defendant's intent, assuming he was the one who committed the conduct alleged to constitute the charged offense, could not reasonably be disputed, the prejudicial effect of evidence of similar criminal acts would outweigh the probative value of such evidence to prove intent. (*Ibid.*) In other words, even if evidence of prior criminal conduct has some relevance to prove intent, because of the inherently prejudicial nature of such evidence, it should be admitted only when the defendant's mental state is actually in dispute. "If it is beyond dispute that the alleged crime occurred, [evidence of prior, unrelated criminal conduct by the defendant] would be merely cumulative, and its prejudicial effect would outweigh its probative value." (*Ibid.*)

In the instant case, there was no dispute that the alleged crimes occurred. The only dispute was whether or not appellant was the perpetrator. As in *Balcom* and *Ewoldt*, the prosecutor herein did not need evidence of the Vernon robbery to prove the requisite criminal intent. Thus, even assuming that appellant's commission of the Vernon robbery was relevant to establish appellant's intent to rob the Florvilles, such evidence was cumulative of other evidence and should have been excluded. The court therefore abused its discretion in allowing its admission.

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F. Admission of the Vernon Robbery Evidence was Highly Prejudicial and Violated Appellant's Constitutional Rights to Due Process, a Fair Trial and a Reliable Determination of Guilt

As spelled out above, prior crimes evidence is inherently prejudicial because it tempts "the tribunal . . . to give excessive weight to the vicious record of crime thus exhibited, and either allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." (*People v. Alcala*, *supra*, 36 Cal.3d at p. 631.) Therefore, under Evidence Code section 352, such evidence should only be admitted if its probative value is substantial and outweighs the prejudice to the defendant is admission will engender. "Evidence of [prior] offenses 'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

Appellant has demonstrated above that the facts of the Vernon robbery shed little, if any, light on the issue of whether the intent to steal the Florvilles' property was formed before or after the perpetrators entered their house and killed them, and that there was already ample evidence of such intent. On the other hand, evidence establishing appellant's guilt of a prior crime of violence – armed robbery – was undeniably prejudicial. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125 ["Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant"].)

A discussed above, the dispute in this case was whether appellant was the perpetrator of the offense, or whether he simply had been framed by the witnesses who testified against him.

Notwithstanding the fact that the jury was instructed to consider the Vernon robbery evidence only if it found appellant was in fact the perpetrator, and then only on the issue of his intent (2CT 513; 28RT 4327-4328), it is still highly probable that the Vernon robbery evidence influenced the jury's decision on the issue of identity. First, because the prior offense was too dissimilar in nature and remote in time to be probative of the narrow issue of the whether the perpetrator(s) entered the Florvilles' home with intent to rob them, the jury could not legitimately consider the evidence for that purpose, and there was no other legitimate purpose for which it could be considered. (See *People v. Thompson* (1980) 98 Cal.App.3d 467 [where there was no legitimate way for the jury to use the evidence of the defendant's prior criminal activity for the purpose instructed by the court, it could only be concluded that the jury used the evidence for an inadmissible purpose to find that the defendant had the propensity or disposition for committing the crime charged].) Second, the jury's knowledge that appellant had previously committed an armed robbery – albeit one that was very different from the home invasion crime for which appellant was on trial – unfairly bolstered the credibility of the prosecutions' witnesses on the disputed issue of identity.

Although jurors are presumed to follow the court's instructions (*People v. Young* (2005) 34 Cal.4th 1149, 1214), the jurors in the instant case received no limiting instruction concerning the Vernon robbery evidence until the conclusion of the guilt phase, *after* they had already heard all of the evidence and argument. The jury was initially told that appellant had a criminal history during voir dire, and heard the testimony of the Vernon robbery victims prior to hearing

any evidence concerning the crime for which appellant was on trial. Thus, it would be entirely unreasonable to assume that by the point the jurors received instructions regarding the permitted use of the Vernon robbery evidence, that evidence had not already influenced them in judging the credibility of the prosecution's witnesses on the issue of identity. (Compare *People v. Daniels*, *supra*, 52 Cal.3d at p. 858 [prejudicial impact of evidence of defendant's prior bank robbery sufficiently mitigated by limiting instruction given *before* evidence received by jury].) As the court of appeal sagely observed in *People v. Fritz* (2007) 153 Cal.App. 4th 949, 962, "[a] limiting instruction warning jurors they should not think about the elephant in the room is not the same thing as having no elephant in the room." (See also *Dunn v. United States* (5th Cir.1962) 307 F.2d 883, 887, ["if you throw a skunk into the jury box, you can't instruct the jury not to smell it."].) The situation herein is analogous to that in *People v.McDaniel*, (2008) 159 Cal.App. 736, a shackling case, in which the court of appeals held that it would be unreasonable to presume that the jury could and would have followed an admonition to disregard the defendant's shackles given *after* he had testified. The court stated:

> While we consider it reasonable to presume that jurors can follow an admonition to to disregard shackles that is given at the beginning of the trial, before they have heard any evidence, we question whether it is reasonable to presume that jurors can and will follow such an admonition when it is given after the defendant has testified and they have already had a chance to react to and draw negative inferences from seeing him or her shackled.

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(*Id.* at p. 747.) In the instant case, as in *McDaniel*, the jury was not admonished until *after* the jury had a chance to react to and draw negative inferences from the Vernon robbery evidence.

The jurors' consideration of inadmissible, highly inflammatory evidence unfairly swayed them in their guilt determination, and thus denied appellant "a fair opportunity to defend against [the] particular charge[s] against him." (*Michelson v. United States*, *supra*, 335 U.S. at p. 476.) The error in admitting such evidence rendered appellant's trial fundamentally unfair, and consequently deprived him of his right to due process of law guaranteed by both the U.S. and California Constitutions. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1384 [admission of evidence from which no permissible inferences can be drawn violates due process].) It also deprived him of his Eighth Amendment right to reliable guilt and penalty determinations. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [greater reliability required when death sentence imposed]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [extending Eighth Amendment reliability requirement to guilt determination in capital cases].) Respondent cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

However, even if the error did not violate appellant's federal constitutional rights, reversal of appellant's conviction is still required under state law, because it is reasonably probable that the jury would not have convicted appellant had they not been told of his prior criminal history of armed robbery. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Absolutely *no* physical evidence tied appellant to the crime. The evidence implicating him as a perpetrator consisted of eyewitness and informant testimony, the credibility of which was

hotly disputed by the defense. The entire thrust of the defense case was to show that these informants and alleged eyewitnesses – teenagers with their own histories of delinquent behavior --were unreliable witnesses, whose stories kept changing and were contradicted by other evidence. As discussed above, the fact that appellant had previously committed an armed robbery simply could not have been ignored by the jurors in weighing the credibility of that testimony, particularly since they were not instructed until the very *end* of the case that they could not consider it for that purpose. It is therefore reasonably probable that at least one juror was improperly influenced by the evidence, and would have voted to acquit had this highly inflammatory evidence been excluded. Reversal is therefore required.

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III.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT DENIED HIS MOTION TO HAVE THE JURY VIEW THE CRIME SCENE AND EXCLUDED A DEFENSE VIDEOTAPE THAT WOULD HAVE IMPEACHED THE TESTIMONY OF DORRELL ARROYO

A. Introduction

A disputed issue at trial was the credibility of key prosecution witness Dorrell Arroyo, who testified that he saw appellant and Alon Johnson arriving at and departing from the victims' residence the morning they were murdered. Arroyo provided critical testimony for the prosecution, as it constituted the *only* evidence actually placing appellant at the crime scene. Arroyo's credibility depended on whether or not he could have seen what he claimed he saw.

Appellant filed a "Motion for Jury View of Scene," arguing that the jury would be unable to assess the veracity of Arroyo's purported observations from photographs and diagrams, and could only effectively determine whether Arroyo could have seen what he said he saw, by actually standing where Arroyo said he was standing when he made these observations. (4CT 428-432.)

The defense also sought to introduce a videotape to establish that on the day of the crime, it was still completely dark outside between 5:00 a.m. and 6:00 a.m. – the time period within which Arroyo claimed to have made his observations. The tape was offered to impeach Arroyo's testimony that there had been enough natural light (i.e., daylight) for him to identify appellant and Johnson and see what they were doing. (14RT 2281, 2285, 2291, 2316, 2342, 2345) The defense argued that the tape would assist the jury in evaluating

the testimony of a defense expert witness who would be testifying as to when sunrise occurred on December 13, 1993, and explaining the times of, and degree of perceptible daylight at, the various stages of twilight prior to sunrise on that date. (21RT 3218.) The defense emphasized that the tape was not intended to replicate the actual lighting conditions on the date of the crime (i.e., whether or not Arroyo might have been able to see appellant and Alon Johnson by way of artificial light), but simply to refute Arroyo's claim that he witnessed the events by way of daylight. The defense offered to stipulate to a limiting instruction on this point. (21RT 3208, 3210, 3212-13, 3261-3263.) The defense further indicated that it would not need to show the entire tape, but could fast forward through much of it in order to save time. (21RT 3228.)

The Court denied the jury view motion on the grounds that photographs taken of the "general scene" on the day of the crime, "together with the various descriptions that we've had," made it unnecessary for the jury to view the crime scene in order to get a perspective of what Arroyo would or would not have been able to see. (23RT 3579.) In addition, the court excluded the defense videotape under Evidence Code section 352, on the grounds that (1) it would entail an undue consumption of time to show the tape, and (2) that the tape would confuse or mislead the jury. Notwithstanding the defense's offer to stipulate to a limiting instruction, the court found that the tape would "unduly influence the jury" to believe that it replicated "what the actual light was" (i.e., the light available from natural and/or artificial sources) at the time of Arroyo's alleged observations. (21RT 3263.)

As will be demonstrated below, the court's rulings constituted an abuse of discretion and deprived appellant of his constitutional rights to due process of law and to present his defense. They also undermined the reliability of his conviction and death sentence.

B. The Court Abused Its Discretion When It Both Denied the Motion for a Jury View of the Crime Scene and Excluded the Defense Videotape

The standard of review for a court's decision to grant or deny a request for a jury view of the crime scene, as well as for its decision to admit or exclude evidence, is abuse of discretion. (*People v. Price* (1991) 1 Cal.4th 324, 422; *People v. Harrison* (2005) 35 Cal.4th 208, 234.) Under this standard, the trial court's denial of appellant's motion for a jury view and its exclusion of the defense videotape constituted prejudicial error.

(1) Motion for Jury View

Penal Code section 1119 authorizes a trial court to have a jury transported to view the scene of a crime.[39] This Court has held that

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[39] Section 1119 provides:

> When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; and the officer

(continued...)

there are three factors a trial court may consider in ruling on a motion for a jury view of the crime scene, when the purpose of such a view is to test the veracity of a witness's testimony about observations the witness made. These are (1) whether the conditions for the jury view will be substantially the same under which the witness made the observations; (2) whether there are other means of testing the veracity of the witness's testimony; and (3) the practical difficulties of conducting the jury view. (*People v. Price, supra*, 1 Cal.4th at p. 422.) In the instant case, the court denied appellant's motion on the sole grounds that a jury view was unnecessary because the jury could gauge the relevant distance from both photographs taken of the scene of the crime and aerial photographs. (23RT 3579.)[40]

However, knowing what the distance is between two points, and determining how much one could possibly see from that distance,

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[39](...continued)
must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

[40] The court found that security was not a potential problem because appellant offered to waive his presence should the court grant the motion. (23RT 3578.) Furthermore, notwithstanding the prosecutor's argument that there might be changes in the foliage given the passage of time (23RT 3577-3578), the court did not cite this as a factor in its ruling. However, even if there were changes impacting visibility, these could easily have been described by prosecution witnesses. (See *People v. Bolin* (1998) 18 Cal.4th 297, 325 [proper at jury view of crime scene for prosecution witness to point out that foliage differed in height from time of crime]; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 740 [proper for court to take testimony during jury view of crime scene].)

are distinct matters. Thus, contrary to the court's ruling, photographs alone were inadequate to assist the jury in resolving the pivotal question of what Arroyo would have been able to see. Whatever could be gleaned from photographs was simply too abstract for the jury to meaningfully evaluate the plausibility of Arroyo's testimony. The jurors actually needed to view the scene from Arroyo's alleged vantage point themselves in order to do that. (See *United States v. Skinner* (D.C. Cir. 1970) 425 F.2d 552, 555 [demonstration of greater evidentiary value than picture, because it portrays third dimension which picture lacks].) Given the importance of Arroyo's testimony to the prosecution's case, the court's decision not to allow a jury view was therefore prejudicial error.[41]

(2) Defense Videotape

The trial court also abused its discretion when it excluded the defense's proffered videotape of the natural lighting conditions between 5:00 a.m. and 6:00 a.m. at the crime scene on December 14, 1994, and December 12, 1995.

The videotape was prepared by defense investigators Gerald Monahan and James Hearn, in order to show the progression on these dates from darkness to daylight. (21RT 3207.) Monahan

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[41] Appellant is aware that in *People v. Williams* (1997) 16 Cal.4th 153, 212-213, this Court held that the trial court did not abuse its discretion in denying a defense motion for a jury view of the crime scene, which the defense argued would enable "the jury properly to appreciate the distance and angle" from which a prosecution witness claimed to have witnessed the defendant. However, in that case, unlike the present one, the court *did* at least allow the jury to be taken to a plaza in front of the courthouse to view the distances involved. That case is therefore distinguishable from the present one.

testified that the particular dates were selected for videotaping, because the time of sunrise on each of those dates was very close to that on December 13, 1993, the date of the crime. (21RT 3205-3207.) Defense counsel explained that the videotape was being offered strictly for the limited purpose of illustrating the absence of daylight between 5:00 and 6:00 a.m., in order to establish that there was not enough *natural* light at that time of the morning for Dorrell Arroyo to see what he said he saw during that period of time, and thereby impeach his testimony that he made his observations by daylight.[42] (21RT 3208, 3210, 3212-13, 3261-3263.) Counsel's narrowly circumscribed purpose in introducing this evidence, thus makes this case distinguishable from *People v. Boyd* (1990) 222 Cal.App.3d 541, 565-566, in which the court of appeal upheld the trial court's exclusion of a defense videotape purporting to replicate the precise lighting conditions at the time of the crime. (Compare also *People v.* Gonzalez (2006) 38 Cal.4th 932, 952-953 [upholding exclusion of a defense videotape introduced to show the actual lighting conditions at the time of the crime which did not accurately show those conditions].) Notably, this Court has upheld the admission of *prosecution* videotapes in cases where the defendant objected on the grounds that the videotape was not an accurate depiction of the conditions it was introduced to establish. (See, e.g. *People v. Mayfield*, *supra,* 14 Cal.4th at pp. 745-749 [rejecting defense argument that videotape of crime scene should be excluded on grounds it was not a fair and accurate depiction, because lighting

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[42] Arroyo testified that he made his observations by daylight. (14RT 2281, 2285, 2298, 2316, 2342, 2345.)

conditions and vegetation different from time of crime and video camera had distorted height of wall].)

Although the court ultimately allowed Monahan to testify regarding the absence of daylight during the relevant time periods on December 14, 1994 and December 12, 1995 (21RT 3275-3286), it would not permit him to illustrate his testimony with the videotape. Nor would the court allow the videotape to be displayed to illustrate the testimony of Dr. Elizabeth Carter, an atmospheric physicist, who described the lighting conditions during the various stages of predawn twilight and the times of each of those stages on December 13, 1993, December 14, 1994, and December 12, 1995. (21RT 3299-3307.) Because this testimony established the natural progression of daylight on the morning of the crime, the videotape was a visual aid that would have greatly assisted the jury in processing that information. "One does not need a law degree to understand that a picture is worth a thousand words." (*Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1291, fn.4 [videotape likely to contain a richness of detail that could not be successfully communicated by even the most articulate of observers]; see also *People v. Post* (2001) 94 Cal.App.4th 467, 476 ["If a picture is worth a thousand words, a moving picture is worth a million"].)

Not only would the videotape have illuminated the testimony of the defense witnesses, the trial court's analysis in excluding it under Evidence Code section 352 was also profoundly flawed. Given the defense's offer to (1) show only portions of the tape and fast-forward through the rest, and (2) stipulate to a limiting instruction, the court lacked a legitimate basis to say that showing the videotape would involve an undue consumption of time or mislead the jury. Since the

prosecution bore the burden of proof, they had to establish that there was sufficient light – by *any* source – for Arroyo to see what he said he saw. Assuming that Arroyo was simply mistaken that he made his observations by way of *natural* light, then the prosecution was free to present rebuttal evidence to show that the *artificial* light was sufficiently illuminating to allow Arroyo to make these observations.

This Court has upheld admission of *prosecution* videotapes under similar circumstances. For example, in *People v. Harrison*, *supra,* 35 Cal.4th at pp. 233-234, the Court upheld the trial court's admission, over defense objection, of a videotape of the crime scene that was filmed under different lighting conditions than those at the time of the crime. The trial court in that case gave a limiting instruction, much like the one suggested by defense counsel in the instant case, telling the jury that the tape was not intended to show the actual lighting conditions or attempt to recreate the eyewitness's visual experience. This Court agreed with the trial court that the videotape could assist the jury in evaluating the witness's testimony.

Similarly, in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1114 the Court held that the trial court properly found admissible a prosecution videotape offered to show the relative locations of the perpetrators and an eyewitness, despite significant differences between the crime scene as depicted in the tape and as it appeared at the time the crime took place. The Court stated that in order for a videotape to be admissible, "'the physical conditions which existed at the time the event in question occurred need not be duplicated with precision, nor is it required that no change has occurred between the happening of the event and the time the [videotape] is taken' [citations omitted]." The videotape need only be a "reasonable

representation of that which it is alleged to portray." (*Ibid.*; accord *People v. Mayfield*, *supra,* 14 Cal.4th at p.747.)

In the instant case the videotape was a reasonable representation of *natural* lighting conditions on days when the sun rose at almost exactly the same time as on the day of the crime. To the extent that there may have been other sources of light available at the time of the crime that could have enhanced visibility, this should properly have gone to the evidentiary weight of the videotape, and not its admissibility. (*People v. Hughes* (2002) 27 Cal.4th 287, 331 [where defendant argued that videotape of interview of him, offered to show his lack of inebriation, was misleading because it failed to show that he was leaning against a wall instead of supporting him, Court held that any "incompleteness" would go to the weight of the videotape on the issue of the defendant's sobriety and not to its admissibility].)

The trial court's ruling was especially indefensible and unfair, in light of the fact that it allowed the prosecution to present testimony by their investigating officer, Eric Spidle, regarding the time it took him to drive from Star Crest Industries to Jones residence, and then to to the crime scene at 11 a.m. on February 23, 1994. (17RT 2781-2782.) The defense objected to the admission of that testimony on the grounds that there was no foundation laid to establish that appellant would have driven that particular route, and if so whether the road and traffic conditions were the same as when Spidle conducted his "experiment." (17RT 2687, 2689.)[43] However, applying an obvious

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[43] In a hearing conducted outside the presence of the jury, Spidle admitted that there were a number of possible routes that

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double standard, the trial court ruled that the fact that the prosecution could not establish a substantial similarity between the Spidle's experiment and the conditions at the time of the event in question, went to its weight, and not its admissibility. The court should therefore have similarly ruled that any discrepancies between the natural lighting conditions shown by the videotape and the actual lighting conditions generated by artificial sources went to the *weight* of the evidence not its admissibility.

C. The Court's Erroneous Rulings Deprived Appellant of His Constitutional Rights to Due Process of Law and to Present His Defense. They Further Undermined the Reliability of His Conviction and Death Sentence

As established above, Dorrell Arroyo's testimony was critical to the prosecution's case, constituting the only evidence that directly placed appellant at the scene of the crime, and yet the court's rulings denying appellant's motion for a jury view and excluding the defense videotape arbitrarily crippled appellant's ability to effectively challenge the veracity of Arroyo's testimony. The trial court's erroneous rulings thus deprived appellant of his right under the Sixth and Fourteenth Amendments to present his defense and his right under the

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[43](...continued)
appellant could have taken and that he had no idea which route he actually took. He also conceded that he had no idea what the traffic or road conditions were at 5:30 a.m. on December 13, 1993. (17RT 2673-2683.) Although the prosecution claimed that Spidle's "experiment" was merely to establish the "average" amount of time it would take to travel to the locations in question, the defense argued that Spidle had no basis upon which to claim that his experiment had shown that. (17RT 2689.)

Fourteenth Amendment to a fair trial and due process of law. (*Washington v. Texas* (1967) 388 U.S. 14, 19; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44, 51, fn. 8.) These errors further deprived appellant of his right under the Eighth and Fourteenth Amendments to a reliable determination of guilt and penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (qualitative difference between death and other penalties calls for greater reliability when death sentence is imposed]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [applying Eighth Amendment requirement of reliability to guilt determination in capital case].)

D. The Court's Erroneous Rulings Were Prejudicial And Require Reversal Under Both Federal and State Law

The court's erroneous rulings were highly prejudicial because they completely undermined appellant's ability to subject the testimony of prosecution witnesses to meaningful adversarial testing, and thus effectively emasculated his defense. (*Crane v. Kentucky*, *supra*, 476 U.S. at p. [exclusion 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'"].) In his guilt phase closing argument, the prosecutor capitalized on the absence of the videotape and jury view by denigrating the testimony of the defense witnesses that it would still have been "pitch dark between 5 and 6 a.m., making it virtually impossible for Arroyo to have made the observations he claimed to have made, from the distance involved, by way of natural light. (28RT 4301-4302.) Had the jury been shown the defense videotape, and been allowed to view

the crime scene in person, that critical evidence would have provided a frame of reference within which to decide if the defense witnesses were correct, and if Arroyo could or could not have been telling the truth.

Under the circumstances, the state cannot establish that the violations of the above-enumerated constitutional rights were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Reversal is required even under *People v. Watson*, *supra*, 46 Cal.2d at p. 836, because it is reasonably probable that at least one juror would have had a reasonable doubt as to whether Dorrell Arroyo was telling the truth had the jury been taken to the crime scene and had it viewed the videotape. Without Arroyo's testimony, no evidence placed appellant at the scene of the crime. The only other evidence implicating Appellant was the testimony of the other teenage witnesses whose accounts of pre and post-crime discussions conflicted in material respects, and who were impeached with their own inconsistent statements and histories of juvenile delinquency. It is therefore reasonably probable that the court's denial of the defense's request for the jury view and its exclusion of the defense videotape tipped the balance towards appellant's conviction and death sentence.

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IV.

INTRODUCTION OF IRRELEVANT TESTIMONY THAT ALON JOHNSON ATTEMPTED TO STEAL LATEX GLOVES FROM THE "BABY CARE" CLASSROOM AT HIS SCHOOL DEPRIVED APPELLANT OF A FAIR TRIAL

A. Pertinent Facts

The prosecution sought an in limine ruling on the proffered testimony of Kimberly Brown, a teacher at Val Verde Career Center, the continuation high school Alon Johnson attended prior to his arrest, that one day during November, 1993, she caught Alon coming out of the school's "baby care" classroom, stuffing his pockets with latex, surgical gloves. Brown testified in an Evidence Code section 402 hearing that she told Alon to put the gloves back and that as far as she could tell, he did so. The prosecutor stated that he wanted to introduce Brown's testimony to show that Alon had access to latex gloves and that he "showed an unusual interest in them." (15RT 2544-2566.)

The defense argued that the evidence was irrelevant because (1) the incident in question occurred a month before the crime and before the alleged discussion between Jones, Purnell and Alon on December 12th, during which Jones told the boys they needed to get gloves, and was therefore too remote in time to allow an inference that Alon stole gloves from school to commit the crime; and (2) no inferences regarding *Jones'* culpability could properly be drawn from the incident. (15RT 2549-2550,2557-2558.)

The court ruled that Brown could testify that she caught Alon taking the gloves and told him to put them back, but that she could

not testify to the fact that about a week after this incident, a whole box of gloves disappeared from the classroom. (16RT 2589-2590.)[44]

Brown testified that she spotted Alon heading into the baby care classroom when she knew he was supposed to be going to her math class. She watched him come out of the room, stuffing a handful of latex gloves used for changing diapers into his pocket. Brown told Alon to put the gloves back, and watched him do so. She stated that she did not search him to see if any gloves remained in his pocket. (16RT 2592-2594.)

At the conclusion of the guilt phase, the prosecutor argued to the jury that there was a connection between the glove-grabbing incident, and the fact that latex gloves were used in the commission of the crime:

> I'm going to spend a little bit of time talking about these latex gloves. It was the plan to use latex gloves. Use gloves was the plan we know about. *We know that Alon was interested in latex gloves because at school he went in and made a grab, the teacher told him to put them back. We know he was interested in latex gloves.* We know that Mary Holmes found a latex glove. We know that Dorrell saw this motion (indicating) on Albert Jones. We know that latex gloves were used.

(27RT 4151-4152, emphasis added.) The prosecutor urged the jury to draw an inference of appellant's guilt from that connection (27RT 4152-4153.)

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[44] The prosecutor wanted to have Brown testify that a week or two after this incident, the entire box of gloves disappeared. The court disallowed this testimony on the grounds that any inference that the box was stolen by Alon would be speculative.

B. Brown's Testimony was Irrelevant and Therefore Inadmissible

It is extremely well-settled that only relevant evidence is admissible. (Evidence Code § 350; *People v. Heard* (2003) 31 Cal.4th 946, 972; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Garceau* (1993) 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) A trial court lacks discretion to admit irrelevant evidence. (*People v. Heard*, *supra*, 31 Cal.4th at p. 973; *People v. Crittenden*, *supra,* 9 Cal.4th at p. 132.) Relevant evidence is defined in Evidence Code section 210 as evidence "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 such as identity, intent or motive." (*People v. Heard*, *supra*, 31 Cal.4th at p. 973, citation omitted.)

As defense counsel argued below, the fact that Alon was caught taking some gloves a month before the crime occurred was irrelevant to prove any material, disputed fact in this case. The incident described by Alon's teacher was too remote in time from either the crime, or the alleged discussions leading up to it, to allow a proper inference to be drawn that either (1) Alon stole gloves from his school to commit the crime or (2) he was planning to commit the crime when he took the gloves.

The situation presented in the instant case is thus analogous to those cases finding reversible error where the trial court admitted irrelevant evidence of the defendant's possession of weapons that were not used in the commission of the crime. (See, e.g., *People v.*

Riser (1956) 47 Cal.2d 566, 556-577[where murder weapon, which was never recovered, was a .38 caliber revolver, evidence that defendant possessed two other .38 caliber revolvers at the time of the crime – neither of which could have been the murder weapon -- was irrelevant to prove that defendant had committed crime; admission constituted reversible error because jury was exposed to improper, highly prejudicial propensity evidence]; *People v. Archer* (2000) 82 Cal.App.4th, 1380, 1392 [knives that were determined not to have been the murder weapons were irrelevant to show planning or availability of weapons. and their admission constituted reversible error].)

The prosecutor made much of the fact that the testimony established that Alon had "access to gloves" (15RT 2556), yet latex gloves are hardly a unique or hard-to-obtain commodity, but are fairly ubiquitous in modern society. As the teacher testified in the 402 hearing, these gloves are readily available at stores like Wal-Mart. (16RT 2580.)

The prosecutor also maintained that the incident revealed that Alon was "interested" in latex gloves. (16RT 2586.) However, even assuming the truth of this assertion, it still does not tend to prove that Alon committed the crime in this case. More importantly, nothing about this incident in *any* way tends "logically, naturally and by reasonable inference" to establish *appellant's* guilt of the crime charged.

The trial court consequently erred in admitting this evidence and allowing the prosecutor to argue that it was proof of appellant's guilt. (See *People v. Slone* (1978) 76 Cal.App.3d 611, 631-632 [trial court committed prejudicial error in admitting testimony of criminalist

that blood stain was found on seat of defendant's car, where there was no evidence that blood was victim's or even came from a human, but prosecution was allowed to argue that blood belonged to victim].)

C. The Error Was Prejudicial and Deprived Appellant of His Constitutional Right to a Fair Trial

Admission of this irrelevant evidence was prejudicial, because it unfairly allowed the prosecutor to bolster the credibility of his teenage witnesses by urging the jury to draw an improper inference of guilt from the evidence. Given the absence of any physical evidence corroborating the testimony of these witnesses, the prosecutor was clearly desperate to influence the jury's credibility determination by any means he could – including waving a red herring in front of them.

The admission of this irrelevant yet highly prejudicial evidence thus deprived appellant of a fair trial. (*Acala v. Woodford* (9th Cir.2003) 334 F.3d 862, 886-888 [evidence that defendant's parents owned two sets of unused kitchen knives manufactured by same cutler that manufactured probable murder weapon was irrelevant and its admission deprived defendant of a fair trial]; *McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378, 1382-1383 [prejudicial due process violation requiring reversal where prosecution was allowed to introduce evidence of appellant's possession of knife that was not the murder weapon].) It also deprived him of his Eighth Amendment right to reliable guilt and penalty determinations. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [greater reliability required when death sentence imposed]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [extending Eighth Amendment reliability requirement to guilt

determination in capital cases].) Because the state cannot prove that the error was harmless beyond a reasonable doubt, reversal is required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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V.

INTRODUCTION DURING THE PENALTY PHASE OF TESTIMONY CONCERNING AN UNCHARGED ROBBERY AS EVIDENCE IN AGGRAVATION UNDER PENAL CODE SECTION 190.3, SUBDIVISION (B) DEPRIVED APPELLANT OF DUE PROCESS AND A RELIABLE PENALTY VERDICT

A. Introduction

At the penalty phase of a capital case, the jury is directed to consider evidence "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." (§ 190.3, factor (b).) This Court has consistently held "that evidence of other criminal activity" under factor (b) "must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips* (1985) 41 Cal.3d 29, 72; accord, e.g., *People v. Wright* (1990) 52 Cal.3d 367, 426.) Because of the requirement of reasonable-doubt instructions for proof of uncharged charges at the penalty phase (see *People v. Robertson* (1982) 33 Cal.3d 21, 53-55), the trial court may "not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a ""rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."" (*People v. Boyd* (1985) 38 Cal.3d 762, 778, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, and *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Under these standards, the trial court erroneously admitted evidence of a grocery store robbery that took place on July 21, 1992,

in Delano, California (hereinafter "Delano robbery"), because the prosecution could not show that there was substantial evidence of appellant's participation in the robbery – "that is, evidence which [was] reasonable, credible, and of solid value-such that a reasonable trier of fact could find [appellant] guilty beyond a reasonable doubt." (*People v. Johnson*, 26 Cal.3d at p. 578 [setting forth the test for whether or not the prosecution has sufficient evidence to meet its burden of proof].)

B. The Record Below

(1) *Phillips* Motion

Prior to commencement of the penalty phase, appellant filed a motion entitled "Request for Foundational Hearing Pursuant to *People v. Phillips* (1985) 41 Cal.3d 29 And Opposition To Introduction Of Evidence In Aggravation" (2CT 455-463), seeking exclusion of evidence of the Delano robbery. According to this pleading, the prosecution intended to introduce the evidence under factor (b), despite the fact the victims of the robbery had not identified appellant as one of the perpetrators, and he had therefore only been convicted (pursuant to a plea bargain) of a misdemeanor violation of Penal Code section 496 (receiving stolen property) arising from this incident, a crime that was not admissible as a factor in aggravation. (2CT 457-459.)

Appellant argued that before permitting the prosecution to present any testimony about the robbery to the jury, the court should conduct an evidentiary hearing to determine whether there was "'substantial evidence' to prove each element of the uncharged crime." (*Id.* at 459.)

The court heard oral argument prior to ruling on the motion. The prosecutor made an offer of proof based on police reports, which consisted of the following:

> [T]he defendant goes into the Fairway Market, he and another person. I think it's in Delano, California. He points a gun to one of the clerk's heads, robs him, takes a purse, identifying things like driver's licenses or credit card, something with identifying name on it, leaves the market, flees. And not too far away, the S.W.A.T. Team eventually enters the residence. Defendant is in this residence with one other person. When they go into that residence, they find the stolen property on the same day. One of the three persons was able to pick the defendant's picture out of a [photo] lineup. However, when asked how certain she was, she said about 50 percent certain. The – the – there was a subsequent live lineup and the witnesses, including several other people, couldn't identify them[45] in the live lineup.

(29RT 4418.) Although none of the witnesses could positively identify appellant as a perpetrator, the prosecutor insisted that he could nevertheless establish appellant's guilt through circumstantial evidence – i.e., the fact that (1) appellant was found in an apartment a short distance away from the crime scene later the same day, and

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[45] By "them," the prosecutor was presumably referring to appellant and the other person found by the S.W.A.T. team in the residence with appellant

(2) property taken from the victims of the robbery was also found in the apartment. (29RT 4418-4419, 4431-4432.)[46]

In response, defense counsel pointed out that appellant was not a resident of the apartment (29RT 4421,4424), and that the stolen property was recovered not from him directly, but from several hidden locations in the apartment complex, including an attic crawl space and a trash can. Further appellant's fingerprints were not on any weapons found in the apartment. Counsel stated that appellant had only pleaded guilty to the misdemeanor charge of receiving stolen property to avoid facing harsher charges. (29RT 4424.)

Defense counsel further argued that even without evidence directly tying appellant to the robbery, there was still a substantial undue risk that the jury would simply assume he was guilty of that offense because it had just convicted him of another robbery and also knew that he had been previously convicted of the Vernon robbery. Under these circumstances, counsel argued, it would be highly prejudicial and unfair to allow the prosecution to introduce the Delano robbery as a factor in aggravation if it did not have sufficient evidence to satisfy its burden of proving appellant's identity as one of the robbers. (29RT 4426.)

Counsel accordingly urged the court, pursuant to *People v. Phillips*, *supra*, to hold an evidentiary hearing outside the presence of the jury to hear the testimony of the prosecution's witnesses. Counsel argued that the court could not otherwise adequately

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[46] The trial court twice asked the prosecutor whether he believed "in good faith" that he could prove any more than a violation of Penal Code section 496, and both times the prosecutor stated that he was "absolutely sure" that he could. (29RT 4425, 4427.)

determine whether there was substantial evidence that appellant was one of the robbers. (29RT 4429-4430.)

The prosecutor argued that an evidentiary hearing was unnecessary; that the court could make its determination on the basis of the police reports, without hearing live testimony. (29RT 4432, 4434.) Defense counsel countered that the court could not find that there was sufficient evidence based solely on the information contained in the police reports. (29RT 4432.) Referring to the question of identity, counsel pointed out that there were significant factors that could not be resolved without an evidentiary hearing:

> There are too many issues such as clothing description, facial description. I didn't see any of that in the reports itself. The live lineup, the fact that they could not identify him in a live lineup. I mean, those are factors that I think are extremely important so the Court can make a determination as to whether or not this type of evidence should be brought in and given to the jury as an aggravated (sic) factor.

(29RT 4434.)

The court denied both appellant's request for an evidentiary hearing and his motion to exclude the evidence. (29RT 4450.) Accordingly, the jury heard the evidence described below.

(2) Testimony Regarding the Delano Robbery

Drake Massey, a Delano police officer, testified that on the morning of July 21, 1992, he and his partner were dispatched to the Fairway Market in Delano, where there was reportedly an armed

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robbery in progress. (30RT 4597.) On the way, they received information that the suspects ran from the market to an apartment complex a couple blocks away. (30RT 4598.) The suspects were reportedly brandishing handguns. (30RT 4603.) Massey and his partner went to the apartment complex and waited outside for approximately five hours until the S.W.A.T. team arrived. (30RT 4600-4601.) The S.W.AT. officers entered a second floor apartment and arrested the two people who were inside, after which Massey conducted a search of the apartment and found a blue purse in a bedroom closet. (30RT 4601-4602.) Massey's partner, Jeffrey Nacua, found a Daisy BB gun in the apartment, but there were no other weapons. (30RT 4605.) He also found 21 Bic lighters and a carton of Newport 100 cigarettes. The lighters were in a brown paper sack near a dresser in the southeast corner of the apartment. The BB gun was next to the sack. The cigarettes were in a dresser drawer. (30RT 4611.) Robert Aguero, a third Delano police officer who participated in the search, found a driver's license, a Versatel card and a Social Security card belonging to one of the robbery victims, stashed in an attic space shared by several apartments in the building. (30RT 4658-4659.) Appellant was one of the two people arrested. He initially gave an alias – stating his name as "John Paul Jones." (30RT 4662.)

Kyong Hui Yang, Jose Luis Plancarte and Maria Elena Game – Fairway Market employees who were in the store at the time of the robbery – also testified. Yang, who was working at the cash register that morning, testified that one of the two suspects pointed a gun to her head and ordered her to open the cash register. (30 RT 4617.) He stole Yang's purse, cash from the register, cigarettes and

lighters. (*Ibid.*) The suspect was approximately 29 or 30 years old, and was about 168-170 centimeters tall.[47] His hair was black, but she could not remember the style. (30RT 4618.) Yang saw the other suspect – a black man – hit Jose, the butcher. (30RT 4619.) Yang was unable to identify the suspects in either a photo lineup or a live lineup. (30RT 4620.) Yang could not remember what the man was wearing, whether or not he had a mustache or beard or was wearing glasses. (30RT 4622.) Although she was able to see the other suspect hitting the butcher with a handgun, she could not describe his clothing or features. (30RT 4623-4624.) Yang followed the suspects out of the store and saw them head in the direction of Garces Highway. After Yang testified, the parties stipulated that appellant was *not* the man who robbed her at the cash register. (30RT 4627.)

Jose Plancarte was working in the meat department when two men came up and asked him for some pigs feet. As he turned to get a plastic bag, one of the men jumped over a refrigerator and pointed a gun at Plancarte. The other man walked towards the cash register. When Plancarte moved to activate the alarm, the man who was pointing the gun at him hit Plancarte on the head with the gun. The suspect then pushed Plancarte towards the service room and pushed him to the ground. He emptied everything out of Plancarte's pockets, and then locked him in the bathroom. The suspect told Plancarte that if he came out of the bathroom he would be killed. Plancarte was shown a group of photos that included a photo of appellant, but was unable to identify anyone depicted in them as the

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[47] This is between 66 and 67 inches.

man who robbed him. (30RT 4638-4639.) He also did not pick the suspect out of a subsequent live lineup. (30RT 4640.) Plancarte described his assailant as a black man wearing a raincoat or long jacket, and having longer than shoulder-length hair. (30RT 4640-4641.) When he was interviewed by the police the day of the crime, Plancarte told them that he thought the assailant's gun was a .38 caliber revolver. (30RT 4642.)

Officer Aguera testified that he did not find any guns or raincoats in his search of the apartment where appellant was arrested. (30RT 4674.) Teresa Kanter, a Delano police officer who participated in the investigation and arrest, testified that appellant wore a t-shirt and tennis shoes, and further described him as having a mustache, a goatee and an "Afro" hairstyle. (30 RT 4634-4635.)

Maria Gamez, another employee of the market, was not working that morning, but had gone to the market to cash a check and buy some groceries. She was waiting near the cash register, when Kyong Yang told her to call the police. Gamez turned around and saw a black man pushing Plancarte in the back and pointing a pistol at Plancarte's head. When she turned back towards Yang she saw another man pointing a gun at Yang's head. Gamez managed to get out of the store without being noticed by the suspects. She ran home and called the police. (30RT 4645-4646.) Gamez testified that she identified appellant in a live lineup at the jail. However, when confronted with the police report stating that she had not been able to make an identification at that time, she responded, "Well, I'm really confused. I don't remember." (30RT 4647.) In spite of this, Gamez claimed that she recognized appellant (in court) as one of the

perpetrators. (30RT 4650.)[48] Gamez conceded that she left the store seconds after she became aware of the robbery. She could not see the man pushing Plancarte well enough to know what he was wearing, but he did not have long hair. (30RT 4653.) The man pointing the gun at Yang was not wearing a raincoat. She could not recall what type or color shirt he was wearing. (30RT 4654.)

Police Officer Aguera testified that Gamez picked appellant's picture out of a photo lineup, but she told Aguera that she was only 50 percent certain that appellant was one of the perpetrators. (30RT 4663.) In a live lineup conducted a month later at the county jail, Gamez did not identify appellant. (30RT 4665.)

C. The Delano Robbery Testimony Should Have Been Excluded Because It Was Insufficient to Prove That Appellant Was Guilty of Robbery

In passing on a claim of insufficient evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, 26 Cal.3d, at p. 578.) However, the "substantial evidence" standard does not mean that any evidence will be sufficient to support a verdict. To be "substantial," evidence must be "reasonable, credible, and of solid value." (*Ibid*; *Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153.) "Evidence which merely raises a strong suspicion of the

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[48] As discussed, *infra,* the prosecutor effectively conceded in his argument to the jury that Gamez in-court identification was not reliable. (33RT 4949.)

defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Although the court must review the record in the light most favorable to the judgment, it may not ignore evidence merely because it is favorable to the defense. Instead, "upon judicial review all the evidence is to be considered . . . ." (*Jackson* v. *Virginia*, *supra*, 443 U.S. at p. 319, emphasis in original.)

The evidence in the instant case was insufficient to prove that appellant robbed the Fairway Market. The prosecutor stipulated that appellant was *not* the man who held up Kyong Yang at the cash register. (30RT 4627.) In addition, neither Jose Plancarte nor Kyong Yang identified appellant in either the photo lineup or the live lineup as the Plancarte's assailant. (30RT 4638-4639, 4640.) Plancarte described that individual who robbed him as having shoulder-length hair (30RT 4641), while appellant had an "Afro." (30RT 4635.) When shown appellant's photograph, Gamez thought he was one of the robbers, but she said she could only be fifty-percent sure of this. (30RT 4663.) Gamez also did not pick appellant out of the subsequent live lineup. (30RT 4665.) Although Gamez testified (four years later) that she recognized appellant (30RT 4650), even the prosecutor acknowledged that under the circumstances – i.e., the fact that so much time had elapsed since the crime, and fact that the witness had not been able to make a positive identification closer in time to the crime -- an in-court identification would not be reliable.

(29RT 4422; 33RT 4949.)[49] (See *People v. Cuevas* (1995) 12 Cal4th 252, 265 and *People v. Gould* (1960) 54 Cal.2d 621, 626 ["[T]he [out-of-court] identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind"].)

While certain items stolen during the robbery were found in the apartment complex where appellant was arrested, there were no fingerprints or other evidence directly linking appellant to them. The only weapon found - a BB gun – also did not have appellant's fingerprints on it. Furthermore, the stolen property was not in plain view, but had been hidden in different locations, one of which was not even physically within the apartment itself. Thus, the evidence failed to prove that appellant even *knew* that the property was stolen.

"[I]t has been stated that " 'when a person is shown to be in possession of recently stolen property slight corroborative evidence of other inculpatory circumstances which tend to show guilt supports the conviction of robbery.' " (*People v. Hughes* (2002) 27 Cal.4th 287, 357, quoting *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 542.) However, this rule necessarily presumes not only that the defendant was in possession of the property, but also that he knew it was stolen, and therefore it does not apply in this case. However, even assuming the rule does apply, the record herein was devoid of even "slight corroborative evidence of other inculpatory circumstances" tending to show appellant's guilt of robbery.

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[49] In his closing argument, the prosecutor .specifically told the jury that he was not asking it to rely on Gamez' in-court identification of appellant. (33RT 4949.)

Because no rational fact-finder could find beyond a reasonable doubt that the evidence proved appellant was one of the actual robbers, it was insufficient to prove his commission of a robbery. Under the circumstances, the trial court's in limine ruling admitting the Delano robbery evidence was error. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1168 [abuse of discretion for court to admit evidence of other crimes unless, viewing totality of evidence presented, rational jury could conclude that defendant's criminal conduct involved force or violence].)

D. The Trial Court's Abused Its Discretion When It Allowed the Prosecutor to Introduce the Delano Robbery Evidence Without Holding an Evidentiary Hearing Under *People v. Phillips* to Determine Whether the Prosecutor Had Sufficient Evidence

(1) The Prosecutor's Offer of Proof Failed to Establish That a Reasonable Trier of Fact Could Find Appellant Guilty of Robbery Beyond a Reasonable Doubt

As noted above, in *People v. Phillips, supra*, this Court held that evidence of criminal activity introduced in support of factor (b) must be limited to evidence of conduct that demonstrates the violation of a penal statute. (41 Cal.3d at p. 72.) Further, such evidence must be excluded where that the evidence fails to "support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt." (*People v. Clair* (1992) 2 Cal.4th 629, 672-673.) Not only is that proposition "established as to the elements of the underlying crime" (see *People v. Boyd*, *supra*, 38 Cal.3d at p. 778), but also "as to the pertinent circumstances beyond

the elements themselves." (*People v. Clair, supra*, at p. 673, citing *People v. Kaurish* (1990) 54 Cal.3d 648, 707, as the source of the rule; see also *People v. Ashmus* (1991) 54 Cal.3d 942, 984-985.)

In *Phillips*, the Court stated that "in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity." (41 Cal.3d at p. 72, fn. 25.) Although this Court has held that a *Phillips* hearing is not automatically required before unadjudicated conduct evidence may be admitted (see, e.g., *People v. Jennings*, *supra*, 53 Cal.3d at p. 389), the prosecutor's offer of proof in the instant case did not pass the substantial evidence test, and without more, the trial court simply did not have a sufficient basis to conclude that evidence of the unadjudicated robbery was properly admissible.

The prosecutor conceded that none of the eyewitnesses positively identified appellant as one of the two robbers. (29RT 4418.) The only evidence the prosecutor could point to in his offer of proof connecting appellant to the crime, was that several hours after the robbery took place, appellant was present in an apartment belonging to someone else, where property taken in the robbery was discovered. (*Ibid.*) While this may arguably have been a sufficient factual basis for appellant's guilty plea to the misdemeanor offense of receiving stolen property, it was not sufficient to convince a reasonable trier of fact that appellant was guilty beyond a reasonable doubt of robbery.

(2) An Evidentiary Hearing Would Have Disclosed the Insufficiency of the Evidence

As demonstrated above, the testimony concerning the Delano robbery was insufficient to prove appellant's guilt of that offense beyond a reasonable doubt. Had the court conducted a pre-penalty phase evidentiary hearing as requested by the defense -- rather than simply relying on the prosecutor's asserted "good faith" belief that he could prove that appellant was one of the robbers -- it would have been able to determine that the evidence was insufficient as a matter of law, before the jury was permitted to hear it. Thus, this case presents the type of situation noted in *Phillips*, where an evidentiary hearing would have made clear that evidence of the previously unadjudicated conduct should be excluded. Under the circumstances, the trial court's refusal to conduct such a hearing in this case was an abuse of discretion.

E. Admission of the Delano Robbery Evidence Deprived Appellant of His Constitutional Rights to Due Process of Law and a Reliable Penalty Verdict

Because the jury's consideration of the Delano robbery as aggravating evidence violated California law (*People v. Clair*, *supra*, 2 Cal.4th at pp. 672-673; *People v. Boyd*, *supra*, 38 Cal.3d at p. 778), its use arbitrarily deprived appellant of his state law right to have his sentence determined without consideration of such evidence, in violation of due process. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343,346.)

In addition, the jury's consideration of "factors that [were] constitutionally impermissible or totally irrelevant to the sentencing

process" (*Zant v. Stephens* (1983) 462 U.S. 862, 885) undermined the heightened need for reliability in the determination that death is the appropriate penalty (U.S. Const., 8th and 14th Amends.), and requires reversal of the death judgment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585.)

F. The Error Was Prejudicial

Despite the weakness of the prosecution's evidence against appellant, there was nevertheless a reasonable possibility that at least one juror assumed appellant was guilty of the Delano robbery, simply because the jury had already found appellant guilty of the robbery-murder of the Florvilles, and because the jurors knew appellant committed the Vernon robbery.[50] Although the jury was instructed that it could not weigh the Delano robbery as a factor in aggravation unless it found that appellant's commission of that offense had been proven beyond a reasonable doubt (3CT **fill in**), the jury's instructions did not prohibit it from improperly considering appellant's other crimes as proof that he must also be guilty of the Delano robbery.

Furthermore, in his closing argument, the prosecutor argued that appellant's "attack" with a gun in the Delano robbery was part of a course of conduct manifesting appellant's violent character: "We have attacks with guns. He uses guns. We have the attack with knives. So we know how violent he is." (33RT 4931.) The prosecutor argued that appellant's conduct in that incident was part of an escalating pattern of violence making him deserving of the death penalty. (33RT 4948-4949.) Under the circumstances, there

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[50] See Argument B. 3. (b), *post*, challenging the constitutionality of allowing introduction of unadjudicated criminal conduct in the penalty phase of a capital trial.

is more than a reasonable possibility that at least one juror was persuaded to vote for death based on this improperly admitted evidence.

Admission of the Delano robbery evidence was therefore prejudicial error (*People v. Brown* (1988) 46 Cal.3d 432, 448), and the jury's consideration of this improperly-admitted aggravating evidence cannot be considered as harmless beyond a reasonable doubt in that "it did not contribute to the [sentence] obtained." (*Sochor v. Florida* (1992) 504 U.S. 527, 540, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

Accordingly, the judgment of death must be reversed.

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VI.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. *In People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing

A. THE BROAD APPLICATION OF SECTION 190.3(a) VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 3CT 665.) 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. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

B. THE DEATH PENALTY STATUTE AND ACCOMPANYING JURY INSTRUCTIONS FAIL TO SET FORTH THE APPROPRIATE BURDEN OF PROOF

1. Appellant's Death Sentence is Unconstitutional Because It is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (3CT 681.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, [127 S.Ct. 856, 868], now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 3CT

681.) Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p.589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra,* 36

Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (3CT 661-662), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury

instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, 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) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and applicaiton of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that

the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 3CT 666.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (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 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson, supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant (30RT 4595-4681; 31RT 4703-4731) and devoted a considerable portion of its closing argument to arguing these alleged offenses. (33RT 4933-4934. 4941, 4948-4950. 4953.)

The United States Supreme Court's decisions in *Cunningham v. California*, *supra*, 549 U.S.270 [127 S.Ct. 856], *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 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 unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward.*

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." ***(CT.)*** The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a

death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right

to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___ [127 S.Ct. 1706, 1712-1724]; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of

constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed On The Presumption Of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a

criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

C. FAILING TO REQUIRE THAT THE JURY MAKE WRITTEN FINDINGS VIOLATES APPELLANT'S RIGHT TO MEANINGFUL APPELLATE REVIEW

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

D. THE INSTRUCTIONS TO THE JURY ON MITIGATING AND AGGRAVATING FACTORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 3CT 661-662), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. These included factors (d) through (j). The trial court failed to omit those factors from the jury instructions (3CT 661-662), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Inclusion of these irrelevant factors in the instant case allowed the prosecutor to point to their absence in arguing that the defense had failed to establish mitigation. (33RT 4936-4939.) Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (3CT 661-662.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – 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. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's 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. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

E. THE PROHIBITION AGAINST INTER-CASE PROPORTIONALITY REVIEW GUARANTEES ARBITRARY AND DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY

The California capital sentencing scheme 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* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

F. THE CALIFORNIA CAPITAL SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be

differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

G. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed

their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

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VII.

THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 ['prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process']; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying Chapman standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Appellant has shown that a number of serious constitutional errors occurred in his case. Appellant's right to be tried by a jury drawn from a fair cross section of the community was violated by the prosecution's use of discriminatory challenges to strike all but one African-American from the jury. He was further deprived of a fair trial and reliable conviction and sentencing determination by the

admission, over strenuous defense objection, of improper, inflammatory character evidence and other irrelevant evidence, and by the trial court's erroneous exclusion of relevant evidence crucial to his defense. Finally, the court's admission of improper aggravating evidence of unajudicated criminal conduct undermined the fairness and reliability of the penalty determination.

Appellant submits that each of these errors individually requires reversal. However, even assuming that this court does not so find, the cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (*Donnelly v. DeCristoforo*, *supra*, 416 U.S. at p. 643. Appellant's conviction must therefore be reversed. (*Acala v. Woodford* (9th Cir. 2003) 334 F.3d. 862, 883 ["errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair"]; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204 ["even if no single error were prejudicial, where there are several substantial errors , 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *People v. Holt* (1984) 37 Cal. 3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing for cumulative prosecutorial misconduct].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial effect on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1985) 46 Ca.3d 432, 466 [error occurring at the guilt phase

requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error].)

In the instant case, the combined guilt phase errors not only undermine the reliability of appellant's conviction, together with the penalty phase error undermined the reliability of the jury's sentencing determination. Reversal is mandated because it cannot be shown that these errors either individually or collectively had no effect on the guilt and penalty determinations. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

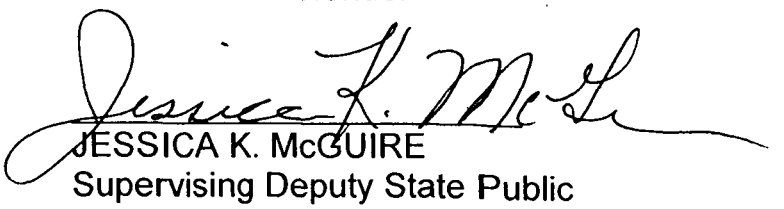
*****

CONCLUSION

For all of the reasons stated above, appellant's conviction and death sentence must be reversed.

Dated: June 20, 2008

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



JESSICA K. McGUIRE
Supervising Deputy State Public Defender

Attorneys for Appellant
Albert Jones

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, rule 36(b)(2))

I am the Deputy State Public Defender assigned to represent appellant, Albert Jones, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis generated word count, I certify that this brief excluding the tables and certificates is 42,327 words in length

Dated: June 20, 2008

Jessica McGuire
Attorney for Appellant

APPENDIX

Albert Jones' *Batson* Claim Statistics

150 prospective jurors completed jury questionnaires

39 of these were excused for hardship

32 were excused for cause

Of the 79 remaining jurors, six were black. Five of them were called into the jury box. The prosecutor struck three of them.

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Blacks comprised 6.6% of the venire (10 out of 150 venire members)

Prosecutor struck 30% of the total number of blacks on the venire (3 out of 10)

After hardship and for-cause excusals, blacks comprised 7.6% of the venire (6 out of 79 venire members)

Prosecutor struck 50% of the blacks left on the venire after hardship & for-cause excusals (3 out of 6)

Prosecutor struck 60% of the black venire members who made it into the jury box (3 out of 5)

****

Whites comprised 69.3% of the venire (104 out of 150 venire members)

Prosecutor struck 14.4% of the total number of whites on the venire (15 out of 104)

After hardship and for-cause excusals, whites comprised 73.4% of the venire (58 out of 79 venire members)

Prosecutor struck 25.8% of the whites left on the venire after hardship & for-cause excusals (15 out of 58)

Prosecutor struck 34.8% of the white venire members who made it into the jury box (15 out of 43).

****

After hardship and for cause excusals, Asians and Hispanics comprised 19% of the venire. (15 out of 79.) The prosecutor struck 26.6% of them (4 out of 15), and 50% of those who made it into the jury box (4 out of 8.)

Of the jurors remaining on the venire after hardship and for-cause excusal, a total of 21 were minorities. The prosecutor struck a total of seven – 33%. Of the 13 minorities who made it into the box, the prosecutor struck a total of 7 which constituted 54%.

Seated Jurors	Race as Stated on Questionnaire	Jury Questionnaire
William Black	White p. 63	Vol. 1 (CST 60 - 87)
Mabel Henry	White p. 119	Vol. 1 (CST 116 - 143)
Sherry Huey	White p. 147	Vol. 1 (CST 144 - 171)
Tammy Fawcett	White p. 175	Vol. 1 (CST 172 - 199)
Russell Lee Santos	White p. 203	Vol. 1 (CST 200 - 227)
David Vanverst	White p. 2477	Vol. 9 (CST 2474 - 2501)
Thomas Phillips	White p. 2505	Vol. 9 (CST 2502 - 2529)
Brad Jordan	White p. 2533	Vol. 10 (CST 2530 - 2557)
Cynthia Smith	White p. 2561	Vol. 10 (CST 2558 - 2585)
Michael Fisher	White p. 2589	Vol. 10 (CST 2586 - 2613)
Mike Lapiccolo	White p. 2617	Vol. 10 (CST 2614 - 2641)
Samuel Sullivan	**Black p. 91**	**Vol. 1 (CST 88 - 115)**
Alternate Jurors		
Trudy Lichtenberger	White p. 35	Vol. 1 (CST 32 - 59)
William Cowelson	White p.287	Vol. 2 (CST 284 - 311)
David Stuck	White p. 315	Vol. 2 (CST 312 - 339)
Richard Capello	White p.343	Vol. 2 (CST 340 - 367)
James Powell	**Black p. 231**	**Vol. 1 (CST 228 - 255)**
Steve Esquivel	Hispanic p. 259	Vol. 1 (CST 256 - 283)
Prospective Jurors and Alternates Peremptorily Challenged by Prosecutor		
Howard Platt	White p. 2057	Vol. 8 (CST 2054 - 2081)
Anne Rowe	White p. 2169	Vol. 8 (CST 2166 - 2193)
Patricia Cuozzo	White p. 2337	Vol. 9 (CST 2334 - 2361)
Lee Tracy	White p. 2449	Vol. 9 (CST 2446 - 2473)
Kimberly Dayter	White p. 2645	Vol. 10 (CST 2642 - 2669)
Peter Hermanowitz	White p. 3766	Vol. 14 (CST 3763 - 3790)
Kathey Irby	White p. 3794	Vol. 14 (CST 3791 - 3818)
Jeanne Reed	White p. 3850	Vol. 14 (CST 3847 - 3874)
Roger Wilson	White p. 3878	Vol. 14 (CST 3875 - 3902)
Arlene Staaf	White p. 3934	Vol. 15 (CST 3931 - 3958)
Gary Gunther	**Black p. 2113**	**Vol. 8 (CST 2110 - 2137)**
Norman Culpepper	**Black p. 4130**	**Vol. 15 (CST 4127 - 4154)**
Laura Duarte	Hispanic p. 2309	Vol. 9 (CST 2306 - 2333)
Evangelina Mirande	Hispanic p. 3346	Vol. 12 (CST 3343 - 3370)
Anne Clark	Asian p. 1916	Vol. 7 (CST 1913 - 1940)
Hideo Iwanage	Asian p. 3316	Vol. 12 (CST 3313 - 3342)
Deborad Ladd	**Black p. 4186**	**Vol. 15 (CST 4183 - 4210)**
Jacquelyn Flanders	White p. 2001	Vol. 8 (CST 1998 - 2025)

Leslie Bullock	White p. 2365	Vol. 9 (CST 2362 - 2389)
Jimmy Preslar	White p. 3458	Vol. 13 (CST 3455 - 3482)
Janet Oneal	White p. 3822	Vol. 14 (CST 3819 - 3846)
Jennifer Elliott	White p. 3962	Vol. 15 (CST 3959 - 3986)

Prospective Jurors and Alternates Peremptorily Challenged by Defense

Marilyn Sohn	White p. 1860	Vol. 7 (CST 1857 - 1884)
Mark Roedel	White p. 1888	Vol. 7 (CST 1885 - 1912)
Patricia Taylor	White p. 1973	Vol. 8 (CST 1970 - 1997)
Bonnie Searles	White p. 2141	Vol. 8 (CST 2138 - 2165)
Annette Mintum	White p. 2197	Vol. 8 (CST 2194 - 2221)
Linda Davies	White p. 2225	Vol. 8 (CST 2222 - 2249)
Deeann Nigles	White p. 2253	Vol. 9 (CST 2250 - 2277)
Jon Phelps	White p. 3402	Vol. 13 (CST 3399 - 3426)
Sherrie Young	White p. 3486	Vol. 13 (CST 3483 - 3510)
Robert Endicott	White p. 3542	Vol. 13 (CST 3539 - 3566)
Gwendolyn Hamilton	White p. 3626	Vol. 13 (CST 3623 - 3650)
Daniel McFarlin	White p. 3654	Vol. 14 (CST 3651 - 3678)
Steven Powell	White p. 3710	Vol. 14 (CST 3707 - 3734)
Melodee Melson	White p. 3738	Vol. 14 (CST 3735 - 3762)
Ralph Bell	White p. 3906	Vol. 14 (CST 3903 - 3930)
Ralph Murray	White p. 3990	Vol. 15 (CST 3987 - 4014)
Tracy Rininger	White p. 4018	Vol. 15 (CST 4015 - 4042)
Virginia Cabral	Hispanic p. 1803	Vol. 7 (CST 1800 - 1827)
Robin Torres	Hispanic p. 2421	Vol. 9 (CST 2418 - 2445)
Lewis Pedroza	Hispanic p. 3570	Vol. 13 (CST 3567 - 3594)
Katia Flores	Hispanic p. 3682	Vol. 14 (CST 3679 - 3706)
Billy May	Not Stated p. 3430	Vol. 13 (CST 3427 - 3454)

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Joseph Cleary	White p. 7	Vol. 1 (CST 4 - 31)
Stella Delker	White p. 371	Vol. 2 (CST 368 - 395)
Florence Mueller	White p. 427	Vol. 2 (CST 424 - 451)
Denise Merritt	White p. 680	Vol. 3 (CST 677 - 704)
Jeffrey Howard	White p. 765	Vol. 3 (CST 762 - 789)
Barbara Grubbs	White p. 849	Vol. 4 (CST 846 - 873)
James Gay	White p. 989	Vol. 4 (CST 986 - 1014)
Kathryn Castillo	White p. 1018	Vol. 4 (CST 1015 - 1042)
Dorothy Nelson	White p. 1187	Vol. 5 (CST 1184 - 1211)
Brenda Focht	White p. 1215	Vol. 5 (CST 1212 - 1239)
Walter Conser	White p. 1327	Vol. 5 (CST 1324 - 1351)
Pantera Peters	White p. 1551	Vol. 6 (CST 1548 - 1575)
Larry Evers	White p. 1635	Vol. 6 (CST 1632 - 1659)

Robin Hodge	White p. 1663	Vol. 6 (CST 1660 - 1687)
Ruth Davis	White p. 1691	Vol. 7 (CST 1688 - 1715)
Bruce Mattei	White p. 1944	Vol. 7 (CST 1941 - 1969)
Ernie Best	White p. 2029	Vol. 8 (CST 2026 - 2053)
Marlene Nixon	White p. 2813	Vol. 11 (CST 2810 - 2837)
Beatrice Lacomb	White p. 2869	Vol. 11 (CST 2866 - 2893)
John Hamilton	White p. 2925	Vol. 11 (CST 2922 - 2949)
Mary Madsen	White p. 2953	Vol. 11 (CST 2950 - 2977)
Denise Dodson	White p. 3009	Vol. 11 (CST 3006 - 3033)
Thomas Hyland	White p. 3232	Vol. 12 (CST 3229 - 3256)
Janet Ballard	White p. 3288	Vol. 12 (CST 3285 - 3312)
Larry Hill	White p. 3374	Vol. 13 (CST 3371 - 3398)
Stefani Zandel	White p. 4102	Vol. 15 (CST 4099 - 4126)
Sharon Beets	**Black p. 1831**	**Vol. 7 (CST 1828 - 1856)**
Benny Jordan	**Black p. 4046**	**Vol. 15 (CST 4043 - 4070)**
Maria Rodriguez	Hispanic p. 399	Vol. 2 (CST 396 - 423)
Juanita Mendoza	Hispanic p. 793	Vol. 3 (CST 790 - 817)
Marcella Delgado	Hispanic p. 1046	Vol. 4 (CST 1043 - 1070)
Miguel Ibarra	Hispanic p. 2673	Vol. 10 (CST 2670 - 2697)
Maunel Navarrette	Hispanic p. 2841	Vol. 11 (CST 2838 - 2865)
Ignacio Quiroz	Hispanic p. 2897	Vol. 11 (CST 2894 - 2921)
Ben Martinez	Hispanic p. 3260	Vol. 12 (CST 3257 - 3284)
Corina Joseph	Asian p. 2701	Vol. 10 (CST 2698 - 2725)
Evelynne Gonzales	Asian p. 3514	Vol. 13 (CST 3511 - 3538)
Anthony Nery	Asian p. 4074	Vol. 15 (CST 4071 - 4098)
Joann Burgos	Not Stated p. 1158	Vol. 5 (CST 1155 - 1183)

Prospective Jurors Excused for Cause

Robert Tackman	White p. 455	Vol. 2 (CST 452 - 479)
Boyd Briskin	White p. 653	Vol. 3 (CST 649 - 676)
Wayne Simpson	White p. 736	Vol. 3 (CST 733 - 761)
Evelyn Denholm	White p. 821	Vol. 3 (CST 818 - 845)
Joan Frost	White p. 877	Vol. 4 (CST 874 - 901)
Shirley Castillo	White p. 905	Vol. 4 (CST 902 - 929)
Martha Walzer	White p. 933	Vol. 4 (CST 930 - 957)
Donald Fawley	White p. 1074	Vol. 4 (CST 1071 - 1098)
Steven Collier	White p. 1102	Vol. 4 (CST 1099 - 1126)
Janette Johnson	White p. 1244	Vol. 5 (CST 1240 - 1267)
George Leavitt	White p. 1383	Vol. 5 (CST 1380 - 1407)
Linda Clark	White p. 1439	Vol. 6 (CST 1436 - 1463)
Jonna Shaffer	White p. 1467	Vol. 6 (CST 1464 - 1491)
Gayle Cornell	White p. 1495	Vol. 6 (CST 1492 - 1519)
Vernon Herbers	White p. 1579	Vol. 6 (CST 1576 - 1603)

Paul Hughes	White p. 1607	Vol. 6 (CST 1604 - 1631)
Ramona Bebout	White p. 1719	Vol. 7 (CST 1716 - 1743)
Stacey Taylor	White p. 2393	Vol. 9 (CST 2390 - 2417)
James Anderson	White p. 3092	Vol. 12 (CST 3089 - 3116)
Vicki Hill	White p. 3120	Vol. 12 (CST 3117 - 3144)
Albert Edwards	White p. 3148	Vol. 12 (CST 3145 - 3172)
Isabelle Jensen	White p. 3176	Vol. 12 (CST 3173 - 3200)
Robert Meis	White p. 4159	Vol. 15 (CST 4155 - 4182)
Mary Sydnor	**Black p. 2981**	**Vol. 11 (CST 2978 - 3005)**
Alex Stewart	Hispanic p. 483	Vol. 2 (CST 480 - 507)
Eusebia Hernandez	Hispanic p. 708	Vol. 3 (CST 705 - 732)
John Salazar	Hispanic p. 1411	Vol. 6 (CST 1408 - 1435)
Arturo Ruvacaba	Hispanic p. 3037	Vol. 11 (CST 3034 - 3060)
Antonio Cruz	Asian p. 1299	Vol. 5 (CST 1296 - 1323)
Mary Rivera	Not Stated. P. 961	Vol. 4 (CST 958 - 985)
Ricahrd Gaughan	Not Stated p. 1747	Vol. 7 (CST 1744 - 1771)
James Hopp	Not Stated p. 1775	Vol. 7 (CST 1772 - 1799)

Prospective Jurors Remaining After Jury Selection Completed

Leticia Barragan	Hispanic p. 511	Vol. 2 (CST 508 - 535)
Sylvia Alcaraz	Hispanic p. 539	Vol. 2 (CST 536 - 563)
Christina Gomez	Hispanic p. 567	Vol. 3 (CST 564 - 592)
Loreto Garcia	Asian p. 596	Vol. 3 (CST 593 - 620)
Jose Gonzales	Hispanic p. 624	Vol. 3 (CST 621 - 648)
Edgar Ferrer	Asian p. 1130	Vol. 5 (CST 1127 - 1154)
James Taylor	White p. 1271	Vol. 5 (CST 1268 - 1295)
Harvey Flake	**Black p. 1355**	**Vol. 5 (CST 1352 - 1379)**
Maria Frulla	White p. 1523	Vol. 6 (CST 1520 - 1547)
Vicki Whipple	White p. 2085	Vol. 8 (CST 2082 - 2109)
Theresa Fontes	Hispanic p. 2281	Vol. 9 (CST 2278 - 2305)
Joseph Murphy	White p. 2729	Vol. 10 (CST 2726 - 2753)
Shelly Hughes	White p. 2757	Vol. 10 (CST 2754 - 2781)
Joseph Barrett	White p. 2785	Vol. 10 (CST 2782 - 2809)
William Schicora	White p. 3064	Vol. 11 (CST 3061 - 3088)
Rubert Owens	**Black p. 3204**	**Vol. 12 (CST 3201 - 3228)**
Debbie Abbott	White p. 3598	Vol. 13 (CST 3595 - 3622)

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Albert Jones***
Case Number: **Superior Court No. CR-53009**
Supreme Court No. S056364

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing them in an envelope and
/ / depositing the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ X / placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on **June 20, 2008,** as follows:

Albert Jones
Post Office Box K-23800
San Quentin State Prison
San Quentin, CA 94974

Hon. Gordon R. Burkhart
Superior Court Judge
Hall of Justice
4100 Main Street
Riverside, CA

Scott C. Taylor
Deputy Attorney General
300 South Spring Street,
110 W. A Street, Suite 1100
San Diego, CA 92101

James Bender
Attorned at Law
29995 Technology Drive #305
Murrieta, CA 92563

Grover Porter
Attorney at Law
355 N. Sierra Way
San Bernardino, CA 92410

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **June 20, 2008**, at Sacramento, California.

Saundra Alvarez

Saundra Alvarez