IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **vs.** **JOSEPH KEKOA MANIBUSAN,** Defendant and Appellant.	**Case No. S094890** Monterey County Superior Court No. SM 980798 **CAPITAL CASE**

Appeal from the Judgment of the Superior Court
of the State of California, County of Monterey

The Honorable Jonathan R. Price, Judge Presiding

APPELLANT'S OPENING BRIEF

Volume 1 of 2

DAVID S. ADAMS, SBN 078707
Attorney at Law
P.O. Box 1670
Hood River, Oregon 97031
(541) 386-5716

Attorney for Appellant
Joseph Kekoa Manibusan

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **vs.** **JOSEPH KEKOA MANIBUSAN,** Defendant and Appellant.	**Case No. S094890** Monterey County Superior Court No. SM 980798 **CAPITAL CASE**

Appeal from the Judgment of the Superior Court
of the State of California, County of Monterey

The Honorable Jonathan R. Price, Judge Presiding

APPELLANT'S OPENING BRIEF

Volume 1 of 2

DAVID S. ADAMS, SBN 078707
Attorney at Law
P.O. Box 1670
Hood River, Oregon 97031
(541) 386-5716

Attorney for Appellant
Joseph Kekoa Manibusan

TABLE OF CONTENTS

///
///
///
///
///

///
///
///
///

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

CALIFORNIA CASES

OTHER STATE CASES

CONSTITUTIONS AND STATUTES AND RULES

UNITED STATES CONSTITUTION

CALIFORNIA CONSTITUTION

CALIFORNIA STATUTES

PENAL CODE

EVIDENCE CODE

CALIFORNIA RULES OF COURT

OTHER AUTHORITIES

CALJIC INSTRUCTIONS

TREATIES

International Covenant of Civil and Political Rights

LAW REVIEWS, GENERAL REFERENCE, WEBSITES

Brienza, *Stun Belts Zapped by Civil Liberties Groups* (1999) 35 Trial 99.....174, 177

Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use is Permissible Under the United States and Texas Constitutions* (1998) 30 St. Mary's L.J. 239, 242-243, 246-247.....174, 177

Merriam-Webster's Collegiate Dictionary (10th ed. 2001)....53, 309

http://www.cdcr.ca.gov/Facilities_Locator/SVS.....75

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. **JOSEPH KEKOA MANIBUSAN,** Defendant-Appellant.	**No. S094890** Monterey County Superior Court No. SM 980198 **CAPITAL CASE** **APPELLANT'S OPENING BRIEF**

STATEMENT OF APPEALABILITY

This matter comes before the Court as the result of an automatic appeal by appellant Joseph Kekoa Manibusan (Kekoa), following a judgment of death entered against him in the Monterey County Superior Court on January 24, 2001. (Pen. Code § 1239 (b); 7 CT 1821-1927.)

STATEMENT OF THE CASE

In a four count complaint filed on March 18, 1998, appellant Joseph Kekoa Manibusan was charged with the special circumstance murders of Priya Mathews and Frances Anne Olivo, and with the attempted murder of Jennifer Aninger as well as aggravated mayhem on Ms. Aninger. Specifically, Count 1 charged premeditated murder of Ms. Mathews (Pen.

Code §187(a)[1]) occurring January 31, 1998; an allegation that the crime was a serious felony (§1192.7(c)(1); a multiple murder special circumstance (§ 190.2(a)(3)); a felony-murder special circumstance (attempted robbery of Priya Mathews, §§ 190.2(a)(17) and 211); a second felony-murder special circumstance (attempted robbery of Jennifer Aninger, §§ 190.2(a)(17) and 211); a drive-by murder special circumstance (§190.2(a)(21); and an enhancement for discharge of a firearm from a vehicle causing death or great bodily injury (§ 12022.55) so as to cause the murder to be both a serious felony and a violent felony (§§ 1192.7(c)(8), 12022.5, 667.5(c)(8)). Count 2 charged attempted premeditated murder of Ms. Aninger (§§ 664/187(a), 664(1)); this crime was alleged to be serious (§ 1192.7(c)) and was also subject to the same enhancements as count 1 (§§ 1192.7(c)(8), 12022.5, 667.5(c)(8)). Count 3 charged aggravated mayhem on Ms. Aninger (§ 205). Count 4 charged premeditated murder of Ms. Olivo (§ Pen. Code §187(a)) occurring February 1, 1998; an allegation that the crime was a serious felony (§1192.7(c)(1); a multiple murder special circumstance (§ 190.2(a)(3)); a drive-by murder special circumstance (§190.2(a)(21); an enhancement for personal use of a firearm (§12022.53(d)); an enhancement for discharge of a firearm from a vehicle causing death or great bodily injury (§ 12022.55) so as

[1] All further statutory references will be to the California Penal Code unless otherwise noted.

to cause the murder to be both a serious felony and a violent felony (§§ 1192.7(c)(8), 12022.5, 667.5(c)(8)). In addition, a prior juvenile conviction (§ 245(a)(1) occurring February 22, 1985) was alleged as a "strike" pursuant to § 1170.12(c)(1). (1 CT 01-06.[2])

On March 20, 1998, after counsel had initially been appointed, an amended complaint was filed, adding a co-defendant Norman Willover. The amended complaint contained the same allegations against appellant as those in the original complaint and added six counts applying only to the co-defendant. Four of those counts directly mirrored the charges lodged against appellant with the exception that Mr. Willover was charged with personal firearm use against Ms. Mathews and Ms. Aninger, and the personal use allegation was not included in the count regarding Ms. Olivo. Specifically, Count 5 charged Mr. Willover with the premeditated murder of Ms. Mathews (Pen. Code §187(a)) occurring January 31, 1998, an allegation that the crime was a serious felony (§1192.7(c)(1), a multiple murder special circumstance (§ 190.2(a)(3)), a felony-murder special circumstance (attempted robbery of Priya Mathews, §§ 190.2(a)(17) and 211), a second

---

[2] The designations CT and RT used in this brief refer to the Clerk's Transcript on Appeal and the Reporter's Transcript on Appeal respectively. The format used here (1 CT 01-06) lists the volume, the type of transcript and the page number/s as contained in the certified record on appeal.

felony-murder special circumstance (attempted robbery of Jennifer Aninger, §§ 190.2(a)(17) and 211), a drive-by murder special circumstance (§190.2(a)(21), an enhancement for personal use of a firearm causing great bodily injury (§12022.53(d), and an enhancement for discharge of a firearm from a vehicle causing death or great bodily injury (§ 12022.55) so as to cause the murder to be both a serious felony and a violent felony (§§ 1192.7(c)(8), 12022.5, 667.5(c)(8)); Count 6 charged the attempted premeditated murder of Ms. Aninger (§§ 664/187(a), 664(1)), this crime was alleged to be serious (§ 1192.7(c)) and was also subject to the same enhancements as count 5 (§§ 1192.7(c)(8), 12022.5, 667.5(c)(8)); Count 7 charged aggravated mayhem on Ms. Aninger (§ 205) and added an enhancement for personal use of a firearm causing great bodily injury (§12022.53(d); Count 8 charged the premeditated murder of Ms. Olivo (§187(a)) occurring February 1, 1998, an allegation that the crime was a serious felony (§1192.7(c)(1), a multiple murder special circumstance (§ 190.2(A)(3)), and a drive-by murder special circumstance (§190.2(A)(21). The two new counts were both alleged against Mr. Willover only for events occurring February 4, 1998: Count 9 was an allegation that he unlawfully possessed a billy club (§ 12020(a)) and count 10 was an allegation that he had given false information to a police officer (§ 148.9). (1 CT 20-31.)

A second amended complaint was filed on April 27, 1998.

Otherwise identical to the first amended complaint, this version added count 11, which charged appellant with the October 14, 1997 attempted robbery (§§ 664/211) from Sandra Caudle, and was alleged to be a serious felony (§ 1192(c)(19).) (1 CT 56-68.)

Appellant's initial counsel declared a conflict on April 29, 1998. (1 CT 69-71.) On May 11, 1998, appellant's original counsel was relieved and two new attorneys were appointed. (1 CT 84-88.)

The preliminary hearing was held on June 22 and June 23, 1998. (1 CT 103-104, 2 CT 429-431.) Appellant was held to answer as charged. (2 CT 430.)

The information was filed on June 25, 1998, and was identical to the second amended complaint, with the exception that the charge of attempted robbery was now listed as count 5, thus grouping all counts relating to appellant as counts 1-5 and those regarding co-defendant Willover as counts 6-11. (2 CT 517-529.) Appellant was arraigned on the information on July 10, 1998, and his current counsel were reappointed for the proceedings in Superior Court. (2 CT 532-533.) Also at the arraignment, the prosecutor announced his intention to seek the death penalty. (2 CT 532-533.) At the next hearing, August 19, 1998, the case was assigned to the Honorable Jonathan Price, for all purposes. (2 CT 534.)

The case was continued from time to time thereafter, during which

time appellant filed, withdrew then re-filed a *Marsden*[3] motion against his appointed counsel. (2 CT pp. 566-572; 573-574; 575-582.) Although the motion was denied on February 3, 1999, one of appellant's attorneys, James Newhouse, went on to declare a conflict of interest on March 1, 1999. (2 CT 584, 588.) Richard West was then appointed co-counsel on March 18, 1999. (2 CT 592.)

Following the trial and conviction of co-defendant Norman Willover, the information was amended on July 8, 1999 to remove those counts referring to him, otherwise leaving the five counts charged against appellant unchanged. (3 CT 669-673.)

On October 13, 1999, Appellant's lead counsel, James Dozier, filed a declaration of conflict of interest. (3 CT 702.) On the same day, appellant filed a new *Marsden* motion. (3 CT705.) Mr. Dozier was relieved on October 15, 1999 (3 CT 711-712), and on October 26, 1999 Eugene Martinez was appointed in his stead. (3 CT 717, 719.) After a lengthy search, Lawrence Biegel was appointed as *Keenan*[4] counsel on March 23, 2000. (3 CT 786-788.)

Jury selection began on September 7, 2000 and continued through September 18. (5 CT 1468-1470; 6 CT 1504-1508.) A motion to quash the

---

[3] *People v. Marsden* (1970) 2 Cal.3d 118.

[4] *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430

jury panel made during the course of jury selection was denied. (6 CT 1504-1520.) Testimony in the guilt phase of the trial began on September 19, 2000 and continued into September 28. (6 CT 1530- 1618.) Following arguments of counsel, the case was submitted to the jury for guilt determination on September 29, 2000. On October 2, 2000, after slightly more than a day of deliberations, the jury returned verdicts finding appellant guilty of all counts, and finding all special circumstance allegations and enhancements to be true[5]. (6 CT 1615-1635.)

The following day, the trial court determined that the alleged prior "strike" conviction was true. (6 CT 1635-1637.) On October 4, 2000, the penalty phase began and continued until October 13. (6 CT 1640-1667.) Following argument, jury deliberation began on October 16, 2000 and continued into October 19 at which time the jury returned a verdict for the death penalty. (6 CT 1668-1678.)

On January 24, 2001 the trial court denied appellant's motions for a new trial and to modify the penalty, and pronounced sentence. The trial court imposed a sentence of death for both counts 1 and 4; imposed the midterm sentence of seven years for count 2, then doubled the sentence

---

[5] Although finding appellant guilty of count 2 (attempted murder), the jury did not find the allegation that the crime was premeditated to be true.

pursuant to Penal Code §1170.12(c)(1) and ordered that the determinate sentence run consecutive to the sentence for counts 1 and 4; imposed a sentence of life plus a consecutive sentence of 25 to life for count 3, all to run consecutive to counts 1 and 4; and, imposed a sentence of three years for count 5. (6 CT 1815-1820.) The commitment and judgment of death was filed on January 24, 2001 and the Abstract of Judgment was filed the following day. (7 CT 1821-1833.)

-o0o-

STATEMENT OF FACTS

Introduction

When the life of Joseph Kekoa Manibusan (Kekoa) is viewed as a whole, his present residence on death row seems predestined. Although he was born to a seemingly middle class Guamanian/American family with military roots, under the surface lay an upbringing that created a directionless young man, indoctrinated from birth into the drug culture, who craved attention and approval. His father, a career enlisted soldier in the army, sold drugs to support his own addiction and used his children's urine to avoid being discovered in drug testing. He admitted being disappointed when Kekoa and his twin sister Yolina were born, and remained a disinterested parent whose contributions to Kekoa's upbringing were consistently negative. His father was particularly harsh with Kekoa, frequently abusing him verbally by questioning his intelligence, his appearance and his masculinity and comparing him unfavorably to his twin sister. His father also indulged in physical abuse, beating Kekoa with a belt or an electrical cord.

The military's discovery of his father's addiction led to his discharge and a precipitous drop in the family's living situation. They moved from military housing to a low rent apartment in a drug area, to living in a car. Eventually, Kekoa and his sister were brought to Seaside, California when

their father returned to live with his own father. There, Kekoa became a participant in his father's life of hustling and drug dealing. Although he resisted for a surprising period of time, Kekoa eventually began using drugs himself, and began running with a group of people that included Adam Tegerdal (a primary prosecution witness) who was also his father's "driver" for drug dealing.

The progression continued when Norman Willover, Kekoa's codefendant in the charged crimes, arrived in Seaside. Despite being a year or so younger, Willover was more hardened. He carried a gun and was the driving force behind the shootings that wounded Jennifer Aninger and killed both Priya Mathews and Frances Olivo.

Four people were named as being present in those shootings. Two, Adam Tegerdal and Melissa Contreras, became witnesses for the prosecution in exchange for freedom from prosecution for the shootings and other benefits. The other two, Kekoa and Norman Willover, were prosecuted. Notwithstanding Willover's leadership role in these events and his subsequent convictions for the special circumstances murders of Ms. Mathews and Ms. Olivo, Willover was not subject to the death penalty due to his age. At age nineteen, however, Kekoa was statutorily eligible for the capital sentence he ultimately received.

A. Evidence Presented at The Guilt Phase

The structure and tone of the prosecution's case against Kekoa Manibusan (and also against Norman Willover in an earlier separate trial) came from the testimony of two people, Melissa Contreras and Adam Tegerdal, who said they were with Kekoa and Willover during the evening of January 31, 1998 and the early morning of February 1, 1998. Neither of these people were subjected to custodial arrest for any crimes arising from these events, and both received benefits for their testimony.

Contreras, a gang member and methamphetamine user (61 RT 12048; 12033-12034; 12092-12094; 12218-12219), received cash payments from the witness protection program in 1998 and 1999. (61 RT 12022-12023.) She initially agreed to talk with the police because she was afraid that she would be prevented from seeing her children or her boyfriend if she were arrested for these charges. (61 RT 12037-12040.)

Tegerdal, a methamphetamine user who provided the automobiles used during all of the crimes charged against Kekoa testified after making a plea deal. He was allowed to plead guilty to being an accessory after the fact to murder, and to the attempted robbery that was the basis for Count 5 of the information filed against Kekoa. He faced a maximum sentence of three years, eight months but hoped that after his testimony he would be able to

avoid prison time altogether. (67 RT 13277-13280.)

A third compensated witness, Tim Frymire, was not arrested or charged. His statement to the police first drew their attention to Kekoa, Willover, Contreras and Tegerdal regarding the events of January 31, 1998 and February 1, 1998, but he did not claim to have been present during the events. (68 RT 13460-13466; 13488-13491.)

According to the evidence presented at Kekoa's trial, the events leading to the charged crimes began towards the end of January, 1998, when Kekoa Manibusan was living in Seaside, California with Frymire, a methamphetamine seller. (68 RT 13449-13450, 13485-13486.) Also living there at the time were Frymire's five daughters and prosecution witness Melissa Contreras. (60 RT 11860-11863, 68 RT 13449-13450.)

Kekoa, Tegerdal, and Tegerdal's friend and former gang-mate Norman Willover[6] got together at a party on January 30, 1998. They used methamphetamine and did not sleep.[7] (66 RT 13066-13075.) They remained together, and on the afternoon of January 31, 1998, they were

---

[6] 66 RT 13058-13060. Willover, a juvenile, was tried separately as an adult. He was convicted of all counts and sentenced to life imprisonment without possibility of parole.

[7] Tegerdal admitted that he had not slept since January 28, 1998, his wakefulness fueled by methamphetamine which would cause him to hallucinate from time to time. (66 RT 13066-13075.)

driving in Tegerdal's 1994 Cougar. At one point, Willover retrieved a backpack from a house in the town of Marina, which Tegerdal learned contained a gun. (66 RT 13016-13018.)

That afternoon, Contreras got a call from Kekoa. Some time afterward, Kekoa, Tegerdal and Willover arrived at Frymire's house, where Contreras met them and left with them in Tegerdal's car. (63 RT 12403-12405.) She already knew Willover and had met Tegerdal although she had not talked with him before. (60 RT 11863-11865; 66 RT 13018-13020.) All the other people in the car had been taking methamphetamine before Contreras joined them. (66 RT 13066-13075; 70 RT 13885-13890.) Contreras also saw Tegerdal and Willover using the drug later. (61 RT 12018-12020.)

The four drove away, with Kekoa at the wheel of Tegerdal's car. (60 RT 11867.) During the drive, they talked about robbing people. (66 RT 13020-13022, 13083-13088.) Contreras learned that Willover had a gun in his backpack and heard that they would use the gun in any robberies. (60 RT 11869-11872; 63 RT 12403-12405.)

At a gas station, Kekoa asked Contreras to drive, and she agreed without hesitation, despite knowing about the gun and the plan to commit robbery. (60 RT 11867-11868; 61 RT 12052-12058.) At Kekoa's direction, she drove "all over" the area until she stopped by a park in

Monterey. (60 RT 11873-11875; 66 RT 13022-13028.) Kekoa and Willover got out, apparently to attempt a robbery, while Contreras and Tegerdal remained in the car.[8] Kekoa and Willover returned, not having committed a robbery, ten to fifteen minutes later. (60 RT 11874-11875; 66 RT 13020-13028.) Contreras drove away but turned over the wheel to Kekoa a short time later when she got into the back seat with Tegerdal. (60 RT 11876-11877.)

While driving near the wharf, Tegerdal pointed out two women and asked if they had a purse. (61 RT 12066-12069; 66 RT 13106-13119.) Kekoa drove out to the end of the wharf, then drove back to where the women were standing. Willover, in the front seat, had put a leather glove on one hand and a bandana over his face. As they came near the women, Willover told them to give him their money, but they apparently did not hear him. Willover became angry at the lack of response and started shooting, firing several bullets. (60 RT 11878-11882, 61 RT 12070-12075; 66 RT 13028-13033.) Contreras said she was surprised by the shooting because she did not believe that the prospect of robbing people would escalate to shooting and had heard no one encourage Willover to use the gun. (61 RT

---

[8] Contreras believed that either Kekoa or Willover had the gun at this point, but could not remember which. (61 RT 12090-12092.)

12073-12075.)

This shooting occurred between 11:00 p.m. and midnight. (60 RT 11831, 11837; 63 RT 12441-12447.) When the emergency personnel arrived, they found Priya Mathews dead and Jennifer Aninger wounded in the head. (63 RT 12453-12470.) Ms. Mathews' body showed four separate bullet wounds. (68 RT 13414-13422.) Ms. Aninger had been wounded in the head and arm. (63 RT 12453-12456.) Her head wound was severe, causing damage to her brain. As a result, she lost motor function in her left hand, lost her sense of smell, and suffered memory loss and impairment to her ability to concentrate. (66 RT 13001-13012; 69 RT 13672-13689.)

Following the shooting, Kekoa drove quickly away. (60 RT 11883.) In the car, Willover said something about not leaving any witnesses. (66 RT 13031-13033.) At first, Willover appeared to be scared and nervous (61 RT 12079-12081), but then became excited and happy, while Kekoa seemed to be in a hurry to leave the scene. Kekoa also expressed some admiration for Willover's actions, giving him "props." (60 RT 11883-11887; 61 RT 12006-12008.).)

As they drove towards Salinas, Kekoa, Willover and Tegerdal talked about the need to change cars to avoid being caught. At Tegerdal's house in Salinas, they left the Cougar and got into Tegerdal's Monte Carlo and

continued on. (60 RT 11887-11890; 66 RT 13033-13038,) Tegerdal drove at first and Willover and Kekoa again talked about finding someone to rob. At some point, Kekoa began to drive, and continued to talk with Willover about committing a robbery. (60 RT 11890-11891; 66 RT 13033-13038.)

After 1:00 a.m., they returned to Seaside and drove around for a bit until they saw a woman standing on the corner with no one else around. (60 RT 11891; 61 RT 12009-12011, 12106-12111.) Willover asked Kekoa if he was going to do something to the woman.[9] Kekoa nodded, then drove around the block and stopped near where she was standing. (61 RT 12009-12011.) Kekoa motioned to the woman who started to walk towards the car. When she got to about eight feet away, Kekoa put his hand out the window and started shooting. (61 RT 12012-12014; 66 RT 130389-13041.)

Frances Olivo was shot three times. One of the bullets entered her chest and passed through her heart. (68 RT 13422-13426.)

Kekoa drove away after the shooting. (61 RT 12014.) According to Tegerdal, both Kekoa and Willover were laughing. (66 RT 13041-13044.) As they drove away, Contreras thought that Kekoa appeared "hyper" and seemed upset that he hadn't used all the bullets in the gun. As they passed a

---

[9] Contreras had varying recollections of what was said in this regard, testifying at one point that Willover asked about robbing her, at another about "doing it to her" and another whether Kekoa would "get" her. (61 RT 12108-12111.)

car double parked in the roadway, Kekoa reached across Willover and fired shots out of the passenger side window at the car. The people in the car began to chase them, but Kekoa eventually eluded them. (61 RT 12015-12017; 66 RT 13044-13046.) He then drove to the place his father was staying at Fort Ord, where more methamphetamine was used. (61 RT 12017-12018; 12274-12276.)

Early in the morning of February 1, 1998, Anthony McGuiness awoke to find Kekoa, Tegerdal, Contreras and Willover in his house. Both Tegerdal and Willover were sleeping but Kekoa was awake, sitting with Contreras in his lap. McGuiness was particularly surprised to see Tegerdal, whom he had forbidden to come to the house. (70 RT 13854-13858.) None of the people were loud or boisterous, nor did they appear to be celebrating. (70 RT 13859-13861.)

McGuiness' wife Linda thought that something might be wrong and talked with Kekoa for about 10 minutes, but was not able to find out what it was. (70 RT 13864-13868.) Another person present, Brian Boyton, also thought Kekoa seemed to be bothered by something and was more quiet than ususal. (70 RT 13884-13885.) Anthony McGuiness said that he drove Kekoa to a house in Seaside and before he left he saw Kekoa with another man standing by an open car trunk. (70 RT 13858-13859.)

Meanwhile, Tegerdal and Willover went outside to Tegerdal's car.

Searching the car, they found two shell casings which they threw into the street. Tegerdal then left and started to drive away, but ran out of gas after just a few blocks. (67 RT 13240-13243.)

Tim Frymire said that Kekoa arrived at his house in the early morning hours of February 1, 1998.[10] He appeared to want to talk to Frymire, but was agitated, looking out the windows and talking gibberish. (68 RT 13450-13452.) Kekoa asked Frymire for some .22 caliber cartridges he had left there several months before, and Frymire replied that if he had a gun he should take it outside. Frymire agreed that Kekoa could put a gun in the trunk of his car and watched as he did so. (68 RT 13452-13456.) Kekoa left with two other people in Frymire's car at about 5:30 a.m. When he returned that evening, the gun was no longer in the trunk.[11] (68 RT 13456-13458.)

That evening, while watching television with Kekoa, Frymire saw a broadcast about three women being shot the previous day. Kekoa pointed to the television and to his own chest. (68 RT 13458-13460.) Later, Frymire went to the Seaside Police Department and reported his suspicions that

---

[10] Frymire admitted to being under the influence of methamphetamine at this time. (68 RT 13485-13488.)

[11] Willover regained possession of the gun at some point. On February 4, 1998, Willover gave the backpack containing the gun to Joshua Riley and told him that it was involved in some sort of trouble. Police found the gun at Riley's house later that day. (64 RT 12608-12612.)

Kekoa and the others had been involved in the shootings. (68 RT 13460-13466.) Ultimately, Frymire received payments from the witness protection program. (68 RT 13476-13478.)

Kekoa was arrested at Frymire's house on February 4, 1998. (68 RT 13491-13494.) Later that day, officers returned to the house and spoke with Contreras. She was not arrested but went to the police station with them. (61 RT 12035-12036.) There, she said that was afraid that she would be arrested and separated from her son, even though she was told that she was not under arrest. As a result of her concerns, Contreras agreed to cooperate with the investigators. (61 RT 12037-12040.) She gave a videotaped statement at the time and later testified at the preliminary hearing of this case and at Willover's trial. (61 RT 12040-12043.) Within a month or two of the shootings, Contreras began receiving monthly payments of $700 from the witness protection program. (61 RT 12027-12033.) The payments continued into 1999. (61 RT 12022-12023.)

Contreras said that Kekoa had called her after he had been arrested. During the conversation he asked if she was "being true" and also described feeling bad about what had happened. (61 RT 12026-12027.) Frymire reported a similar call from Kekoa. (68 RT 13460-13466.)

In addition to the events stemming from January 31, 1998 and February 1, 1998, the prosecution also presented evidence of an attempted

robbery that took place on October 14, 1997. Adam Tegerdal said that he and Kekoa were driving around the area and talking about having no money. At a shopping center, Kekoa told Tegerdal to stop, got out of the car and ran up to a woman. Kekoa grabbed her purse and the woman fell to the ground, but Kekoa was unable to take the purse away from her. Kekoa ran back to the car and Tegerdal drove away. (66 RT 12012-12016.) Sandra Caudle confirmed that Kekoa tried to take her purse at a shopping center, that she fell down without losing the purse and that Kekoa ran to a car and got away. (68 RT 13506-13515.)

B. Evidence Presented at the Penalty Phase

1. Evidence Offered to Justify Death

The prosecution's penalty phase evidence contained evidence of other violent conduct attributed to Kekoa, most of which concerned an assault on his sister and the aftermath. The prosecution also offered evidence of weapons possession, jailhouse conduct and victim impact evidence.

a. Domestic violence

Leslie Pieankul is the mother of Kekoa's son. They met in the 9th grade and fell in love. Their son was born in early 1995. (79 RT 15666-15673.) About six months after the birth of their son, Kekoa beat her up and the police were called. He had also hit her on other occasions. (79 RT 15673-15675.)

In January of 1995, Kekoa and his twin sister Yolina argued. Kekoa became enraged, knocked Yolina to the floor and kicked her, causing her to loose consciousness. (81 RT 16030-16051; 83 RT 16412-16424.) Their uncle took her to the hospital, but he had poor recollection of the incident due to his methamphetamine use. (83 RT 16412-16424.) Kekoa came to the hospital later and asked a security guard about his sister. When the police came, the guard pointed Kekoa out. The officers contacted him and in the course of a pat down discovered a sawed-off .22 rifle. Kekoa was arrested but returned to the hospital later and told the guard "snitches don't last." (79 RT 15685-15693; 80 RT 15807-15810, 15812-15817.)

b. Weapons possession

On January 14, 1997 Kekoa was in the rear seat of a car that was stopped by police, In the course of the stop, two handguns were found under the driver's seat. Kekoa had a single round of ammunition in one of his pockets that was the same caliber as one of the guns. (79 RT 15678-15682.)

On July 25, 1997 Kekoa was a passenger in a car along with Adam Tegerdal, Kekoa was arrested on a warrant and a search of the car revealed a knife in a sheath near his leg. (80 RT 15825-15828.)

On October 20, 1997 Kekoa and his father were passengers in a car driven by Tegerdal. A search of that car revealed two knives, one near

Kekoa. (80 RT 15831-15839, 15840-15845.)

c. Jailhouse incidents

On June 10, 1998, Norman Willover was placed into a holding cell where Kekoa had previously been placed. Kekoa ran over to Willover and began to hit him. Willover had a bloody nose as a result. (80 RT 15846-15855.)

On August 21, 2000 Kekoa was in his jail cell when custodial officers began to do cell extractions in response to an inmate fight and resulting rowdiness. Officers came to extract Kekoa from his cell and he did not cooperate. In response the officer used pepper spray to induce compliance. Kekoa ran at the officer, hitting his shield and cracking it. The officer took Kekoa to the ground. (80 RT 15856-15865; 82 RT 16201-16212.)

d. Victim impact

The prosecutor called Frances Olivo's husband, two sons and sister-in-law who testified that her loss has been hard on her four teenage children, particularly on her 17 year old daughter who is mentally challenged. (81 RT 16015-16029.) The prosecutor then called Priya Mathews' sister, who testified that their parents and their nephew have felt her loss particularly severely. (83 RT 16401-16412.)

2. Evidence Offered in Support of Imprisonment for Life Without Parole

The defense presented testimony showing how the drug methamphetamine works to profoundly damage the mind and body. The defense also detailed Kekoa's chaotic upbringing in an abusive and drug addicted family and produced psychological testimony that showed how such an upbringing creates a damaged individual.

a. Impact of Methamphetamine

Dr. Clark Smith, director of a drug and alcohol treatment hospital, described the effects of methamphetamine. In addition to the expected stimulation and hyper alertness, Dr. Smith also described the longer term changes to the brain caused by the drug. He said that the brain's natural chemicals, adrenalin and dopamine, are depleted and replaced by the drug. To compound the problem, the body's natural release mechanism does not function with the new chemical so that the stimulation lasts hours rather than minutes, a process which can result in psychosis. The drug does not leave the body completely for about 72 hours, and even then the natural chemicals will not have been replenished. Dr. Smith added that addiction develops as the user tries to recapture the initial pleasurable sensations caused by the drug and to avoid the extremely unpleasant sensations that arise as the intoxication begins to recede. (89 RT 17684-17704.)

Dr. Smith testified that methamphetamine abuse creates a higher risk for violent behavior due to judgment deficits, poor impulse control and physical exhaustion. Although aggressive or violent conduct can occur at any point in the intoxication cycle, it is in the latter phase (particularly if the subject had been using heavily) that it is most likely since the subject would still have a large amount of the chemical in his system, but the pleasurable sensations have worn off and the person's mood is at a low point. (89 RT 17704-17815.)

The Prosecutor presented Dr. Alex Stalcup in rebuttal. Dr. Stalcup explained that he had examined various reports and transcripts from witnesses and found no evidence that Kekoa was in the dangerous "tweaking" stage of methamphetamine intoxication at the time of the shootings, nor any evidence that he was under the influence at the time. (90 RT 17873-17893.)

b. Kekoa's Family and Upbringing

Juan Manibusan, Kekoa's grandfather, was born in pre-war Guam. Subject to Japanese control during his youth, he left Guam and then joined the United States Army in 1950. He underwent basic training at Fort Ord, near Monterey, then went on to serve in the Korean conflict. While in the military, he was transferred from time to time and was stationed in Germany and Korea as well as in various bases in the United States. He also fathered

five children: Pete (born in Germany and Kekoa's father), John, Martha (Arlene), Geneive, and Alma (Candy). His children also spent time in Guam while Juan was stationed in post-conflict Korea. (83 RT 16426-16449.) Juan decided to retire and return to the United States when he learned that Pete's wife Beulah was pregnant with twins. (84 RT 16695-16698.)

Pete Manibusan was a smart and musically talented kid. He found alcohol early, drinking before he was thirteen and moving on to hard liquor by the time he was 14 or 15. (83 RT 16479-16486.) He kept his alcohol abuse secret from his parents and managed to graduate high school with honors. Pete rejected several college admission letters and chose the military instead, enlisting in 1974. (83 RT 16484-16486.)

Once in the military, his drinking increased and he began to use other drugs. He was transferred to Hawaii where met Kekoa's mother Beulah. She shared his passion for alcohol but did not use drugs, so he hid his use from her. She became pregnant and they married. She also continued to drink during her pregnancy. Pete was transferred to Fort Ord, where Beulah gave birth to twins, Kekoa and his sister Yolina. Pete was not happy with this development, and his alcohol and drug use increased. (83 RT 16487-16498.)

Pete's parenting style reflected his lack of interest and lack of skill. He tried to create competition between Kekoa and his sister, and would let

them fight. At an early age, Yolina usually won these fights and Pete ridiculed Kekoa, including telling him that he would become homosexual, to get him to fight harder. Pete was also informed at one point that Kekoa was hyperactive and should be tested for developmental problems, but Pete did not follow through.[12] (83 RT 16514-16518.)

Shortly after the birth of the twins, Pete was transferred to Germany. There, Pete began selling drugs in order to finance his own continued use. He also learned to use his children's urine to avoid the military's drug testing. (83 RT 16497-16502.) After three years, Pete was transferred to Colorado, where his drug activities intensified and he became involved with the Colombian cocaine trade. He was nearly caught during this time when he was forced to use some of his own urine for a drug test, but evaded consequences by bribing the soldier who recorded the drug results. (83 RT 16502-16511.) Shortly thereafter, Pete had a run-in with the Colombians who wanted him to work more directly with them. Frightened, he re-enlisted and transferred to Hawaii. (83 RT 16518-16521.)

In 1986, while in Hawaii, Pete was forced to leave the military after turning in a positive drug test. (83 RT 16601-16604.) He had become

---

[12] Pete's abusive behavior towards his children was also noticed by his family who tried to talk to him about it, but he would not listen and did not stop. (85 RT 16854-16884, 16885-16921.)

addicted to methamphetamine and wound up smoking most of his profits from drug dealing. As a result of his subsequent discharge from the service, he lost his military housing and was forced to move to an apartment in a drug-infested neighborhood. Pete's customers would often stay in the apartment. Pete told his children that these people were "uncles". (84 RT 16601-16612; 86 RT 17037-17040.) In one incident while they lived there, Kekoa was beaten up by another boy. Pete came to get him and yelled at him for the whole 15 to 20 minute drive home, then made him wear his sister's panties on his head to shame him. (84 RT 16612-16614.)

Pete eventually convinced Beulah to try methamphetamine, and she too became addicted. They were eventually evicted from the apartment and in 1989, the family lived in their car for awhile. They sometimes slept at the houses of their drug connections and left Kekoa and his sister in the car while there. Pete also continued to abuse both children, calling them dumb and beating them with his belt or an electric cord. (84 RT 16614-16622.) On one occasion, 13 year old Kekoa came home with a new skateboard. Pete learned that he had taken some money that had spilled and used that to buy the skateboard. Pete yelled at him for not getting more money, then returned the skateboard to the store and kept the refund for drug money. (84 RT 16623-16627.)

For a period of time while in Hawaii, Pete sent Kekoa to live with his

grandparents, his uncle John, and his cousin Vince, even though Pete knew that his brother was an active drug addict at the time. When Kekoa returned, Pete was living on the street. (84 RT 16630-16633.)

In 1992, the whole family returned to California to live with Pete's parents, brother and nephew and other family members, bringing the total number of people living in the house to between nine and eleven. Pete learned that his nephew Vince had also become a drug dealer. Pete saw that Vince was not skilled nor careful and taught him how to be more discreet. (84 RT 16633-16638.) Eventually, Pete, his brother John, and Vince were all both dealing drugs and manufacturing methamphetamine at the house. (86 RT 17009-17010.)

The situation at Pete's parent's house became more chaotic over time. There was frequent in and out traffic because various people in the house were selling drugs. Pete often left for days at a time, and returned to find that Beulah had remained locked in her bedroom the whole time leaving Kekoa and Yolina to fend for themselves. (84 RT 16639-16646.) Things became so bad that Kekoa's sister became fed up and began proceedings to become emancipated. (84 RT 16647-16649.) Pete learned that Kekoa had started using methamphetamine when Kekoa called him from jail (after being arrested for the assault on his sister) and asked that Pete bring him some drugs. (84 RT 16661-16662.)

Notwithstanding the number of people and the ongoing drug activity, Pete's parents remained unaware of the dysfunction around them, even though it was obvious to others who tried to talk to them about it. (84 RT 16812-16825, 16829-16836.) Ultimately though, things became so bad at the house that his parents left Seaside at the urging of their daughters in Texas. (84 RT 16829-16836.) Pete's mother had undergone a mastectomy, was aware that things were disappearing from the house, and was upset by the constant chaos. (84 RT 16723-16729.)

When his parents left, Pete and the remaining family moved to Marina. (86 RT 17011-17014.) Afterwards, Pete's marriage to Beulah broke up and he rented an apartment, where he had Kekoa and Yolina stay while he lived elsewhere with his girlfriend, Bonnie. (84 RT 16656-16661; 86 RT 17053-17054.) During this time, Kekoa's girlfriend Leslie became pregnant and gave birth to their child. (84 RT 16656-16661.)

Pete's girlfriend, Bonnie Roman, was a methamphetamine addict. Pete set her up in an apartment separate from his parent's house. They had three children together. (84 RT 16649-16655.) Bonnie went to prison several times and two of their children were removed from the house as a result. (88 RT 17450-17464.) While she was in prison the last time, Pete rented a room at the McGuinness house. There, he continued to use and to supply Kekoa with drugs. (84 RT 16666-16673.) He left that residence on

the morning of January 31, 1998 and moved to Texas. At the time of his move, Bonnie was in a residential treatment program. (84 RT 16673-16679.)

c. Impact of Kekoa's Upbringing

Dr. Thomas Reidy, a psychologist, explained that Kekoa's history, which included a significant amount of developmental trauma, produced a damaged individual. He also explained that similar traumas do not affect every individual the same way and that some people are more damaged than others. Dr. Reidy identified several factors that increase the risk for this sort of damage and noted that Kekoa had suffered nearly all of them. Specifically, he explained that Kekoa's addict father and absent mother began the pattern, which was exacerbated by physical and emotional abuse. The poor parenting, poor family management, parental non-involvement and poor family bonding all contributed to a toxic family environment in which the only way that Kekoa could hope to bond with his family was to do drugs with them. As Kekoa grew into a teenager, these patterns were further developed by additional corrupting influences, including his cousin Vince. He ultimately wound up with no moral compass and no self-control. (87 RT 17240-17297.)

-o0o-

SECTION 1

ISSUES AFFECTING THE TRIAL AS A WHOLE

I

A JUROR WHO FELT PERSONALLY THREATENED BY AN INCIDENT AT TRIAL AND LATER REFUSED TO SIGN THE VERDICT FORM WAS NOT IMPARTIAL, REGARDLESS OF HER ASSURANCES TO THE CONTRARY

During the guilt phase deliberations Juror 58, the foreperson of the jury, gave a note to judge. A hearing was held, at which the jury was questioned. She explained that someone she knew, a friend of a friend, had come into the courtroom, and they had spoken. Then, over the weekend she found out from the friend through whom she knows this person that the person also knew Kekoa's family well and that they were talking about her. The juror said her husband was worried over their safety and had asked her to request discharge. She personally did not want to be dismissed and said she felt she could be fair. Defense counsel argued that she should be dismissed, citing her apparent fear. The judge refused, saying he felt she could be fair. They questioned the juror further and established that she didn't learn any personal information about Kekoa or his family. (77 RT 15201-15218; CT 1622-1625: letter from Juror #58, marked Court exhibit 3). After that discussion, in a sealed, ex parte hearing, defense counsel revealed to the judge that Kekoa knew the person who came into the courtroom and that she

was a gang associate. The judge declined to change his ruling. (77 RT 15219-15232; CT 1632-1638, 1642.)

Soon afterward, Juror 58 sent another note to the judge, asking to be relieved as foreperson because she did not want to sign the verdict forms. Defense counsel moved for a mistrial; the judge denied the motion.

A. Facts

The jury retired for deliberations on Friday, September 29, 2000 and after submitting a request for additional instruction packets, left for the weekend. (6 CT 1620; 7 CT 2010.) When they returned on October 2, 2000, Juror No. 58[13] provided a letter to the trial court, dated the previous day, in which she asked to be allowed to resign from the jury because her anonymity had been compromised and because she feared for her safety. The text of the letter is as follows:

> Please be aware it has been brought to my attention that my anonymity as a juror for the case People versus Manibusan has been compromised.
>
> On Thursday, September 28th, a person whom I know personally walked into the courtroom to observe the trial. As you may expect, this came as a shock to me. However, I dismissed the incident as a coincidence. However, this weekend I became aware of this person as a close friend of both the defendant and his family. Additionally, I became aware of the fact that my name has already been revealed to the members of his family.

---

[13] This juror was the foreperson of the jury at the time. (6 CT 1701.)

> As you may understand, this does not make me feel comfortable to continue as a juror in this case. My safety and the safety of my family may be in jeopardy because of this incident.
>
> Please accept my request to step down as a juror in this case.
>
> Thank you very much for your consideration.
>
> (7 CT 2012; 77 RT 15202.)

The trial court then conducted a hearing outside the presence of other jurors. There he interviewed the juror, who confirmed the facts related in the letter, and explained further that the courtroom spectator was the girlfriend of her personal friend's brother, and that she and the spectator knew each other. She went on to say that she had talked with her friend on Saturday and learned that the spectator had been talking about the juror with a member of Kekoa's family. Juror 58 then discussed this with her husband, and concluded that it would be best to ask to be excused from the jury. (77 RT 15205-15206.)

To the trial court, however, the juror stated that regardless of what she had written, she did not now wish to be discharged. She explained that her husband was particularly concerned for their mutual safety; and while she was not sure that she disagreed with him and was uncomfortable, she did not wish to step down. In response to questions from the judge and the prosecutor, she said that the incident would have no effect on how she felt about what she had heard in the courtroom and that it would not affect her

actions as a juror. (77 RT 15207-15208.) She reassured the judge that she did not feel concerned about retribution for any actions she might take, and became less concerned the more she thought about it. (77 RT 15209.) She had determined that she should divulge what had happened but did not feel compromised in her ability to render a fair verdict, and was sure that the incident would not affect her verdict. (77 RT 15209-15211.) She also said that she had received no information about Kekoa or his family, and had told her friend that she could not talk about the case. (77 RT 15213.)

When the juror was excused from the hearing, defense counsel moved to have the juror removed and replaced by an alternate, based on her concern that her identity had been disclosed to Kekoa's friends and family. Counsel also expressed doubts that the juror would be unaffected, despite her claims to the contrary, and argued that there was now a substantial doubt as to her ability to be fair. (77 RT 15214-15216.) The trial court denied the motion and responded that Juror 58's answers to the contrary were clear, and added that he had observed her demeanor and determined "there is no demonstrable reality that she is unable to perform her duties as a juror." (77 RT 15217-15218.)

Later that afternoon, the trial court summoned counsel regarding a note from the jury. (77 RT 15233.) That note read "Can we switch from the original foreperson to the co foreperson for purposes of reading (and

signing) the verdict(s)." It was signed by Juror 58. (7 CT 2015.)

When informed of the note, defense counsel reminded the trial court about the morning's discussions and moved for a mistrial on the grounds that Kekoa's right to a fair trial before an unbiased jury had been violated. The motion was based on the presence of Juror 58 and the likelihood that she disclosed her unrest to the other jurors as a reason to step down as foreperson. Counsel explained that the juror had not been instructed to withhold any mention of her acquaintance with the spectator from the rest of the jury, and not to discuss her attendant reactions with them. Counsel also pointed out the discrepancy between the juror's responses asserting the incident would have no effect on her given at the morning hearing, and her current desire to step down as foreperson. (77 RT 15234-15236.)

The prosecutor responded that he did not know who the foreperson was, and that the defense interpretation of the note was unsupported either by the juror's previous statements or the contents of the note itself. (77 RT 15236.)

The trial court dismissed the defense claims regarding jury discussions as "pure speculation", and echoed the prosecutor's obstinate refusal to recognize that Juror 58 was the foreperson.[14] The court denied the

[14] Juror 58 was the foreperson. (6 CT 1701.) The trial court's refusal to recognize this from the circumstances known at the

motion, citing *People v. Perez* (1989) 212 Cal.App.3d 395, 402 as support for the proposition that requests to change foreperson "come up all the time"[15] and reiterated his belief that the defense interpretation was merely speculation. (77 RT 15236-15237.)

Defense counsel responded that the parties knew that Juror 58 was the foreperson because the signature on the current jury note, a previous jury

---

time, however, is puzzling. Her recognition that she would sign the verdict forms shows that she was the foreperson. Further, the original notes were signed and none of the parties dispute that Juror 58 had signed the jury notes, thus signifying that she was the foreperson. More to the point, if the trial court considered this an important question of fact in his analysis of the issue, a few brief questions to the juror would have resolved the issue and made a record of the facts. Regardless of whether or not the trial court believed that Juror 58 was the foreperson, the trial court's failure to conduct an additional hearing shows that the trial court did not consider the information regarding juror bias to be important. As shown in the argument, the trial court erred in failing to conduct an inquiry when additional information suggesting misconduct came to light.

[15] Neither the holding of *Perez* in this regard, nor the facts of that case support the trial court's statement. In that case, after 4 days of deliberations, the jury sent a note (signed by the foreperson) indicating deadlock. The jury was questioned and four jurors did not agree that they had deadlocked. When the trial court denied the request to declare the jury deadlocked and suggested that the jurors take a break, one juror asked whether it was possible to change the foreperson. The trial court responded that it was their decision and there was no rule against changing, concluding "So if there is a palace coup, that can happen I suppose. Just make it, as they say, bloodless." The Court of Appeal recognized that the only statutory task for the foreperson (per section 1149) is to advise the court or clerk when the jury has reached a verdict. (*People v. Perez* (1989) 212 Cal.App.3d 395, 402.)

note, and the morning's letter was the same. Counsel argued that it was a reasonable inference that the reason the juror did not wish to sign the verdict forms was the same concern that prompted the request to be discharged. Counsel also argued that it was a reasonable inference that the juror had discussed the reason for her reluctance to sign the verdict form with the other jurors. (77 RT 15237-15239.)

The trial court ignored this new information and dismissed counsel's arguments. Rather than conduct a further inquiry to resolve the discrepancy between the juror's earlier statements and her request to have someone else sign the verdict, the court simply informed the jury that they were free to change foreperson if they so chose. (77 RT 15240.) Shortly thereafter, the jury returned with the verdicts. (6 CT 1624.)

Prior to the start of the penalty phase, defense counsel renewed the motion to disqualify Juror 58, asking that she be removed for the penalty phase. (6 CT 1638-1639.) This motion briefly reiterated the facts known at the time of the motion for mistrial, adding only that the jury note inquiring about the ability to switch foreperson came at approximately 4:30 p.m., and that the verdict was returned approximately 15 minutes after this question was answered. (6 CT 1639.) The trial court ruled: "There is nothing new in here that the Court hasn't already ruled upon. The motion is denied." (79 RT 15601.)

The trial court was given yet another opportunity to correct its refusal to investigate the possibility of juror misconduct through the defense motion for a new trial, heard on the day of sentencing. (6 CT 1685-1744.) In their motion, counsel sought a new trial for allegations of jury misconduct. One section related to Juror 58 and reiterated the arguments previously made concerning the juror's fears concerning the breach of anonymity, the trial court's failure to admonish the juror not to discuss her fears or the underlying facts with her fellow jurors, her request not to sign the verdict forms, and the motion to disqualify her from penalty deliberations. In an offer of proof, counsel then noted that Juror 58 had spoken to a defense investigator and provided additional information relevant to her qualifications to serve on the jury[16]. (6 CT 1691-1693.) Counsel stated that Juror 58 had related the following information to Mr. Lepore:

> She confirmed that she was indeed elected foreperson of the jury. She told Mr. Lepore that on Thursday before the verdict she noticed someone in the courtroom she recognized as "Christy." She knew that Christy shared a child with the brother of [her] close friend. She personally knew Christy and had spoken with her prior to trial. [Her] girlfriend's brother is currently in state prison. ¶ [Juror 58] told Mr. Lepore that when she first saw Christy at the trial she [Christy] was sitting next to a woman [Juror 58] assumed was the defendant's mother. At one point she saw Christy and this

---

[16] The investigator, Mr. Lepore, was present in court when the motion was argued and counsel was prepared to call him as a witness to verify the information. (96 RT 19004.)

> woman hugging. ¶ [Juror 58] further informed Mr. Lepore that over the weekend preceding the verdict she spoke to her close friend by telephone and asked why Christy was at the trial. Her friend advised her that Christy's boyfriend knows either the defendant or his mother. Her fried further told her that Christy and the defendant's mother had been talking about [Juror 58]. [She] asked her friend to contact Christy and ask her if [Juror 58's] name was known to the defendant's mother. ¶ [Juror 58] also told Mr. Lepore that during deliberations on the morning of the day that the guilty verdicts were rendered she told the other jurors that she did not want to sign the verdict and she probably mentioned that she was concerned for her personal safety.
> (6 CT 1692-1693.)

In addition, a declaration from trial juror A.G. was attached to the motion. A.G. stated that on the day of the verdict, Juror 58 "told us that she did not want to read the verdict because she knew someone who had a connection with the Manibusan family and she feared for her safety. This juror understood this to mean "she feared that she might be in danger later on if she read the verdict." (6 CT 1701.)

Further information was provided in an addendum to the motion filed January 23, 2001. (7 CT 1798-1809 This addendum contained declarations concerning the issues of juror misconduct. As pertinent here, Christy Page described a contact with "Jessica", Juror 58's "best friend." Christy confirmed that her boyfriend is Jessica's brother Andre and that she met Kekoa through Andre when both he and Kekoa were in the county jail. She also confirmed that she had come to the trial and recognized Juror 58.

She averred that she had talked with Jessica some two to four weeks after being in court. At that time Jessica told her that Juror 58 had told Jessica that she had been contacted by a deputy sheriff at a youth baseball game and that he had told Juror 58 "he had spoken with Joseph Manibusan and that Manibusan had told the deputy that he (Manibusan) had killed that woman and that if he was out of jail he would do it again . . . Manibusan had no remorse and did not care and that he would not change a thing." (7 CT 1803.)

Also attached to the addendum was a declaration by defense investigator Gregory Lepore describing an additional contact with Juror 58. (7 CT 1806-1807.) The juror told him she had been at a youth soccer game in October, 2000 and her husband told another parent that she was a juror on the Manibusan trial. She said this parent was a deputy sheriff and told the juror and her husband that he knew Manibusan, but she could not recall whether the conversation took place while the trial was in progress or not[17]. (7 CT 1807.) During the hearing on the motion for a new trial, counsel clarified that he did not intend to rest the motion on the declarations and statements, but rather that he believed the allegations, when considered as a whole, were sufficient to compel the court to conduct further inquiry. (96

[17] The death verdict was rendered October 19, 2000. (6 CT 1678.)

RT 19006, 19011, 19014.) The trial court rejected the defense contentions and denied the motion. (96 RT 19045-19050.)

The right to a trial before unbiased jurors who have no personal stake in the outcome of a trial is a fundamental pillar of our justice system. "The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence 'based on the evidence presented in court.' " (*Skilling v. United States* (2010) __ U.S. __ [130 S. Ct. 2896, 2948]; see also *Irvin v. Dowd* (1961) 366 U.S. 717, 723; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362.) An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence before it. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) When this right is violated by the presence of a juror whose impartiality has been eroded, prejudice must be presumed. (*People v. Foster* (2010) 50 Cal. 4th 1301, 1342.)

The test for determining whether juror misconduct likely resulted in actual bias[18] is "different from, and indeed less tolerant than," normal

---

[18] Bias in this sense not require a showing that a juror bears prejudice or animosity towards the defendant. Instead, juror bias exists if there is a substantial likelihood that a juror's verdict was based on an improper outside influence, rather than on the evidence

harmless error analysis. (*People v. Marshall* (1990) 50 Cal.3d 907, 951; see *In re Carpenter* (1995) 9 Cal.4th 634, 654.) If the record shows a substantial likelihood that even one juror "was impermissibly influenced to the defendant's detriment," reversal is required regardless of whether the court is convinced an unbiased jury would have reached the same result. (*People v. Marshall*, supra, at p. 951; see *In re Carpenter*, *supra*, at pp. 651, 654; *In re Malone* (1996) 12 Cal.4th 935, 964.) In *Carpenter*, the Supreme Court clarified that the strength of the prosecution's evidence may be examined to determine the likelihood of juror bias, but once actual bias has been found the judgment must be reversed regardless of the strength of the evidence. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 655.)

Where the trial court has been informed of facts which raise a reasonable likelihood of juror misconduct or bias, the court must inquire into those facts to determine whether misconduct has occurred. (*People v. Burgener* (1986) 41 Cal.3d 505, 519-520 [overruled on other grounds, *People v. Reyes* (1998) 19 Cal.4th 743, 753].) The failure of a court to investigate misconduct under these circumstances is an abuse of discretion, and prejudice is presumed. (*People v. Pinholster* (1992) 1 Cal. 4th 865,

---

and instructions presented at trial, and the nature of the influence was detrimental to the defendant. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 294; *People v. Honeycutt* (1977) 20 Cal.3d 150, 157-158; *People v. Barton* (1995) 37 Cal.App.4th 709, 719.)

926)

During the course of the trial, Juror No. 58 asked to resign as a juror and informed the judge that a person known to her had attended the trial as a spectator, that she had talked with her husband about the matter, and that it caused both of them significant concern for their safety. The trial court interviewed the juror, who withdrew her request to be discharged. The judge decided that she could remain neutral and allowed her to continue on the jury despite counsel's motion to have her replaced by an alternate.

Later in the guilt phase deliberations, Juror 58 sent a note to the court asking to be allowed to step down as foreperson so as not to have to sign the verdict. Defense counsel moved for a mistrial. Despite this clear evidence that the juror was still affected by her concerns notwithstanding her claims of neutrality, the trial court denied the motion..

The trial court was given two more opportunities to address the issues of jury misconduct, once when the defense moved to disqualify the juror from sitting on the penalty phase and again in a motion for a new trial. The new trial motion was supported by new facts showing that the juror had talked about her reactions to the incident with other jurors and about requesting not to sign the verdict because of her fear of reprisal. In addition, the new facts showed that the juror admitted talking about the case with people outside of the courtroom. The court dismissed these new facts and

chose not to inquire further.

The trial judge thus failed to re-evaluate his assessment of the juror's state of mind in the face of facts that, if true, would show that the juror engaged in misconduct. In this, the court erred and allowed a juror who was affected by facts outside the evidence to participate in both guilt and penalty decisions, appellant's convictions. This error violated Kekoa's constitutional rights to a neutral and impartial jury and his convictions and sentence must be reversed.

B. A Trial Judge's Need to Avoid Disrupting the Jury Must Give Way to the Need to Investigate When Facts Show That a Juror's Decisions are Influenced by Events Outside the Trial Proceedings

1. When Presented With Information Suggesting a Reasonable Possibility that A Juror Had Become Unqualified, a Trial Court Must Investigate, and Must Do So Again If New Information Arises After an Initial Inquiry Has Been Made

> The right to a trial by jury is guaranteed by the state and federal Constitutions and is a cornerstone of our legal system. We entrust to 12 jurors the solemn task of judging the credibility of witnesses, evaluating the significance of the evidence, and ultimately determining whether a defendant in a criminal trial is guilty. ¶ To maintain the integrity of the process, potential jurors are screened for bias through the voir dire process. Those selected take an oath to follow court instructions designed to protect the deliberative process, eliminate outside influences, and generate a decision based solely on the evidence presented at trial. Jurors are told that to ensure both sides receive a fair trial, they are not to discuss the case with anyone and that deliberations must occur only in the

jury room.
(*People v. Cissna* (2010) 182 Cal. App. 4th 1105, 1110-1111.)

The trial judge is tasked with enforcing the procedures that guarantee a fair trial. In a capital trial, the judge's responsibilities are magnified by the need to take special care that the proceedings are undertaken in a manner to meet the Eighth Amendment need for enhanced reliability. (*Zant v. Stephens* (1983) 462 U.S. 862, 874–879; *Beck v. Alabama* (1980) 447 U.S. 625, 637–638.)

A trial judge must take great care not to interfere with the flow of jury deliberations. (*People v. Alexander* (2010) 49 Cal.4th 846, 927; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; *People v. Cleveland* (2001) 25 Cal.4th 466, 485; *United States v. Thomas* (1997) 116 F.3d 606, 620.) However, when a trial court becomes aware of allegations which would, if true, constitute good cause to doubt the juror's ability to perform the required duties, the judge must conduct a hearing to determine whether the juror has become disqualified. (*People v. Lomax* (2010) 49 Cal.4th 530, 588; *People v. Barnwell, supra*, 41 Cal.4th at p. 1051; *People v. Cleveland, supra*, 25 Cal.4th at p. 478; *People v. Ray* (1996) 13 Cal. 4th 313, 343; *People v. Burgener, supra*, 41 Cal.3d at pp. 519-520.)

Good cause for removal of a juror exists when facts in the record show " 'an inability to perform the functions of a juror . . . as a demonstrable

reality.' " (*People v. Gates* (1987) 43 Cal. 3d 1168, 1199; *People v. Johnson* (1993) 6 Cal. 4th 1, 21.) In the event that the trial judge determines there is good cause to believe that the juror cannot perform his or her duties, the judge should discharge the juror and substitute an alternate to that seat. (§ 1089; *People v. Espinoza* (1992) 3 Cal. 4th 806, 821.)

The decision whether to investigate the possibility of juror bias, incompetence, or misconduct and the ultimate decision to retain or discharge a juror - rests within the discretion of the trial court. (*People v. Beeler* (1995) 9 Cal. 4th 953, 989.) As a guide to the exercise of this discretion, this Court has held that a hearing is required when the court receives information which, if proven to be true, would constitute good cause to doubt a juror's ability to perform his duties and would justify his removal from the case. (See, e.g., *People v. Burgener*, *supra*, 41 Cal. 3d at pp. 516-521[hearing required where foreman informed court that another juror was intoxicated more than once during trial]; *People v. Pinholster*, *supra*, 1 Cal. 4th at p. 927 [hearing held when trial court informed of article glamorizing the prosecutor and mentioning current case appearing in major local paper] [overruled on other grounds, *People v. Williams* (2010) 49 Cal. 4th 405, 459.)

Even when a trial court has inquired into possible bias or misconduct and concluded that the jury was unaffected, new facts suggesting that

problems persist or that new misconduct has occurred trigger a new duty to investigate. The fact that the trial court had previously investigated the possibility that a juror was subject to outside influence in no way renders the court immune from this duty when new facts shed a different light on the issue. So long as the new facts demonstrate that misconduct may have occurred, the duty to investigate arises. (*People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067 (hereafter *Castorena*).)

Castorena shows that, regardless of whether the trial court had previously investigated an instance of alleged misconduct, the receipt of new information throwing additional light on the same allegation raises a new duty to investigate. In *Castorena*, the trial court had conducted two investigations of the same alleged misconduct, the failure of a juror to deliberate. Several jurors were interviewed during two separate hearings concerning allegations that the juror was making decisions based on feelings rather than facts, and was not discussing the evidentiary basis for her feelings. A hearing was held when the allegations were first made and resulted in an instruction to the jurors to continue to deliberate and to share their views of the facts. A second hearing was held when the allegations were repeated. In both hearings, several jurors agreed, to some deviation in detail, that the suspect juror was relying solely on feelings to make her decision and further that she would not explain the evidentiary basis for her

opinions. (*People v. Castorena, supra*, 47 Cal.App.4th at pp. 1057-1062.)

The new evidence in *Castorena* was a letter from the suspect juror that explained her point of view, alleged that she ***was*** deliberating, provided a different point of view of the deliberation process and suggested that the other jurors were motivated by frustration. The trial court not only ignored this letter, the judge also determined that the letter itself was further misconduct because it touched on the juror's thought processes. (*Id* at p. 1054.) While lengthy and detailed, the letter was, in essence, simply a refutation of the factual allegations of misconduct made by several other jurors. Despite the two previous investigations providing substantial evidence corroborating the likelihood of misconduct, the Court of Appeal held that this letter contained new information regarding the existence of misconduct and thus created a new duty to investigate. Because the trial court failed to obey this duty, the court of appeal found an abuse of discretion and further found that the prejudice presumed from that abuse required reversal. (*People v. Castorena, supra*, 47 Cal.App.4th at pp. 1066-1067.) *Castorena*'s analysis applies equally here.

///

///

///

2. New Information Raising a Reasonable Possibility that Juror 58 Had Become Unqualified Required Investigation Even Though The Juror Had Previously Assured The Court that Outside Events Would Not Affect Her Decision

In this case, the trial court proceeded properly at first, conducting a hearing after learning of the facts that could lead to the discharge of Juror 58. At the hearing, the judge interrogated the juror in a non-coercive way about the facts, going so far as to bring the juror back into chambers to resolve a factual question left unresolved after the first series of questions. At that point, the court's determination that the juror remained qualified was primarily a factual determination that depended upon an evaluation of the juror's credibility when she stated that she would not allow the fear arising from the breach of her anonymity to affect her duties as a juror.

Later, though, new facts arose casting doubt on the trial court's conclusions. Just a few hours after receiving Juror 58's assurance that the breach of her anonymity would not affect her deliberations, the court received the note requesting that Juror 58 be relieved of her duty to sign the verdict. This was new information and an obvious indication that the juror had overestimated her ability to put the incident aside. Her request to resign as the jury foreperson in order to avoid having to sign the verdict and to

read the verdict in court[19] was more than an allegation of her inability to compartmentalize the fear of reprisal that she had articulated; it was an overt demonstration that the fear was still active in her thought process and affecting her actions as a juror.

Despite this new information, the trial court failed to recognize that the duty to investigate possible misconduct had been reinvigorated, and improperly relied upon his previous (but now suspect) evaluation of the juror to deny the motion for mistrial without conducting further inquiry. As previously noted, information reasonably raising a reason to doubt a juror's impartiality triggers the trial court's duty to investigate, regardless of whether a previous investigation has been conducted. (*Castorena, supra.*) When such facts exist, the court's failure to investigate is itself an abuse of discretion. (*People v. Pinholster, supra,* 1 Cal.4th at p. 928.)

Like the trial court in *Castorena, supra,* the trial court here received new information that cast a different light on the issue of misconduct. Unlike the *Castorena* court, the court here did not conduct a second inquiry when new allegations came to light. Instead, having made one inquiry, the

---

[19] The fact that she would not actually have to read the verdict is not relevant to this issue. Whether or not her belief that the foreperson would announce the verdict was true, it is the fear that prompted her request that is important rather than her understanding of the manner of returning a verdict.

judge appeared to be unwilling to reevaluate his conclusion despite new information that should have led him to doubt the reliability of that conclusion.

In *Castorena* the new information that led to the second inquiry was a note saying that the problems in the jury room persisted despite the court's instructions. While this confirmed the court's earlier assessment that a juror was not deliberating, the judge found it necessary to inquire further before taking action against the juror. Here, the new information did not confirm the court's first impression, it cast doubt upon that initial assessment by showing that the juror's performance in the jury room was indeed affected by the presence of Ms. Page at the trial. Even so, the judge did not take action to inquire further.

In this failure, the trial court's action mirrors that of the *Castorena* court's ultimate failure to respond to new information by holding a new hearing. The fact that the *Castorena* judge had twice before inquired into the possibility of misconduct did not relieve her of the duty to do so yet again when new information was presented. In this case, the trial court fell into the same error, albeit more quickly than the judge in *Castorena*, refusing to conduct a second inquiry even though pertinent new information had come to his attention.

The new information here was amply sufficient to trigger the trial

court's duty to inquire. Before sending Juror 58 back to deliberate after reviewing her letter, counsel expressed his concern that her fear would not easily be dispelled and that she might bring that fear into the jury room in a way that would affect her deliberations. (77 RT 15214-15216.) The juror's request to be relieved of the duty to sign the verdict revitalized that concern and added the likelihood that she had brought her fear to the attention of the other jurors. Although counsel brought this to the trial court's attention by way of his motion for a mistrial, the court refused to investigate. Instead of responding reasonably to the information and taking steps to determine whether the outside situation had been brought into the jury room, the trial court evaded its responsibility, calling counsel's concern "pure speculation" with "nothing in the record to support it", and even questioning whether it was Juror 58 who was making the request. (77 RT 15236-15237.)

The vehemence of the trial court's response is surprising, particularly given the ease with which the trial court could have investigated. Counsel's concerns transcended speculation and sprang directly from the facts on the record concerning the nature of the juror's fear. The juror's letter had already informed the court of the reason for her fear, and the new note from

the jury showed that it was likely affecting her actions as a juror.[20]

Because the judge was aware of new facts that raised a reasonable inference that a juror had become unqualified and that jury misconduct had occurred, the court's duty to investigate was triggered. The failure to investigate was thus an abuse of discretion. As shown below, this abuse of discretion created a presumption of prejudice and requires reversal.

C. When Given A Chance to Correct Its Error The Trial Court Again Failed to Conduct A Hearing to Investigate Juror Misconduct

Not only did the trial court fail to properly investigate the objective indicia of misconduct when it occurred, the court disregarded a subsequent opportunity to correct its error. Following the guilt verdicts, the defense

---

[20] The reasonable inferences made by counsel were not, as the trial court charged, mere speculation. Speculation, as used in this sense refers to the process of forming a conclusion without sufficient evidence. (See e.g. *Merriam Webster's Collegiate Dictionary* (10 ed., 1993.) Merriam-Webster, Inc., p. 1129 [speculate . . . "*vt* 1: to take to be true on the basis of insufficient evidence"; speculation - "an act or instance of speculating".) An inference, on the other hand, refers to the process of drawing a conclusion from known facts. (*Id* at pp. 597-598 [infer - "1: to derive as a conclusion from facts or premises (we see smoke and ~ fire . . .)"; inference - "the act or process of inferring."].) Further, counsel's reasonable interpretation of the note was shown to be prescient by later events. Juror 58 did seek to be relieved because of her fear of reprisal. Further, she had expressed that fear to the other jurors when she explained why she was asking not to sign the verdict. Because these facts were not known at the time of the motion for mistrial, they will be discussed in , *post.*

again moved to disqualify Juror 58, basing that motion on the juror's letter and request to have someone else sign the verdict forms. In addition, counsel pointed out that the verdicts were returned within 15 minutes of the receipt of the judge's message allowing the jury to select a new foreperson to sign the verdicts, indicating that deliberations had concluded before the sending of the note

The defense motion allowed the trial court a chance to recognize that the juror's actions required additional investigation. The totality of the circumstances known to the judge at this point should have raised enough concern about the juror's ability to remain uninfluenced to trigger an inquiry before allowing her to take part in the penalty phase. The trial court failed to take advantage of the opportunity and clung to his previous assessment again without weighing the juror's reluctance to sign the verdict as a fact showing that his initial assessment was wrong. (79 RT 15601.) His determination of Juror 58's ability to be unaffected by the outside events in the performance of her duties as a juror thus continued to ignore the new doubt raised by her request to be removed. As shown above, that fact triggered the duty to investigate anew. (*People v. Castorena, supra*, 47 Cal.App.4th at p. 1066.)

Rarely is a trial court afforded the opportunity to review and correct its actions in the manner offered here. Granted, first impressions are lasting

and create an inertia of their own. But first impressions must give way when new information casts doubt on the correctness of the impression, particularly when the primary object is an impartial assessment of the facts. The trial judge failed to grasp this opportunity, however, and again retreated to his previous impression of the juror without regard to the information that was not known when he made that assessment.

By failing to seize this second opportunity to conduct a further hearing, the trial court compounded its error and allowed the trial to continue while an unqualified juror remained in her seat.

D. When Presented With New and Additional Facts Showing that Juror 58's Performance as a Juror Was Influenced by Outside Pressures, the Trial Court Again Erred by Failing to Conduct A Hearing

The saying "the third time's the charm" reminds us that as humans we are often mistaken or unsuccessful in our initial approaches to a task. Sometimes, after an unsuccessful attempt, we have the good fortune to have additional chances to repeat a task and, if we learn from our mistakes, we can change the outcome and proceed correctly. The trial court here had additional chances to review its decision about Juror 58's fitness to serve. As shown in Section C above, after the judge had initially failed to inquire even though new facts had come to light, the judge had a second chance to review his actions, but repeated his error. With the motion for a new trial,

the trial court was presented with additional evidence of Juror 58's disqualification and misconduct and yet a third opportunity to take appropriate action. Unfortunately, the court was not charmed, and instead compounded its error.

In the motion for a new trial, counsel reminded the trial court of the previous challenges to Juror 58, and provided new information to show that her ability to perform her duties as a juror were compromised by outside influences. To briefly summarize the facts (related fully in section A above), counsel first stated that in an interview Juror 58 had admitted discussing events occurring at the trial with a friend while the trial was still in progress.[21] Counsel also provided information that the spectator (Christy Page) who had been the subject of the juror's fear had confirmed her relationship to Juror 58, and added that she had learned that the juror had told their mutual friend about a conversation the juror had with a sheriff's deputy who knew Kekoa. That conversation may have occurred while the trial was still in progress.[22] Counsel then provided information that Juror 58

21

Counsel stated that the juror told his investigator that she had talked with a close friend about seeing a person they both knew at the trial and had discussed that person's relationship with appellant and her safety concerns arising from the incident. (6 CT 1693.)

22

Christy Page related that she had learned from their mutual friend that a

discussed with the other jurors her fear arising from seeing Ms. Page as a spectator with the rest of the jury, and told them that she was afraid to sign the verdict forms for that reason. (6 CT 1701.) Finally, the information provided concerning Juror 58 also informed the court that during the trial she discussed events with her husband as well as with her friend.[23]

All this information was new to the trial court. Although the subject of Juror 58's reactions to Ms. Page's presence at the trial was at the heart of

---

sheriff's deputy had told Juror 58 that Kekoa had confessed the crime to him, had expressed no remorse, and had even said that he would do it again. (7 CT 1803.) Juror 58 confirmed that she had talked to a deputy about the case, but said she could not recall the details. (7 CT 1807.) Neither person could provide a specific time for this conversation, but both said that it could have occurred while the trial was in progress. The declaration from Christy Page diverged in some details from the events recounted by Juror 58, but corresponded sufficiently to raise serious questions about the juror's receipt of outside information during the trial. Thus Ms. Page's identification of the event where the conversation took place as a little league baseball and the juror's description of a youth soccer game correspond in that both are youth sport activities. Importantly, both women agree that during that event the juror discussed aspects of the case with a sheriff's deputy. Particularly given the juror's statement that this conversation could have occurred during the trial, the mutually corroborating details support the need for further investigation.

23

Juror 58 specifically described discussing her fear about seeing Ms. Page with her husband in her letter to the trial court, and during her in camera interview. (7 CT 2012, 77 RT 15205-15206.) She also told Mr. Lepore that her husband had initiated the conversation with the deputy, telling him that she was a juror in the Manibusan case, thus indicating his familiarity with what she was doing as a juror. (7 CT 1807.) Further, counsel informed the trial court that the juror told Mr. Lepore she had discussed the incident involving Ms. Page with her friend (6 CT 1692-1693.)

the previous rulings and was the subject of the trial court's initial inquiry, the new information all tended to show that the juror was not, in fact, able to keep the events out of her deliberative process, nor keep her concerns to herself. Thus the effect of the events was not just actively on the juror's own state of mind during deliberations (an outcome directly at odds with her assurances to the court), but led the juror to discuss the events occurring during the trial with people outside of the jury room and also to explain her fear and the reason for it to the jury as a whole, both entirely new areas of misconduct. [24] (See *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1413–1414 [verdict must be uninfluenced by extrajudicial evidence or communications or by improper association with the witnesses, parties, counsel or other persons]; *People v. Cissna, supra,* 182 Cal.App.4th at p. 1115 [outside conversations about case]; *People v. Gamache* (2010) 48 Cal. 4th 347, 398 [inadvertent exposure to out-of-court information gives rise to presumption of prejudice because jurors may be influenced by material the defendant cannot confront, cross-examine, or rebut].)

The trial court did not find the new information particularly

---

24

The new information also included facts showing a third new area of misconduct by Juror 58, discussion of Kekoa's failure to testify. This discussion did not appear to have been originated by this juror, however, and will therefore be discussed in Argument III, *post.*

important. Concerning the declaration of juror A.G., the court found it incompetent pursuant to Evidence Code, section 1150. "This juror does not say they would change their vote. The juror impermissibly speculates as to what may, and I emphasize the word may, have been a reason or reasons that other jurors rendered the verdict they rendered. There is no tangible basis for such speculation. It's incompetent evidence and it's improper for any court to consider it."[25] (96 RT 19047.) In the other portion of A.G.'s declaration, the trial court found "There is no evidence of juror misconduct. There is no indication that juror number 58 influenced negatively any juror or their vote." (96 RT 19047.) The trial court also noted, in response to the argument that the juror had not been instructed to keep her fears and concerns away from the jury, "This juror was to be admonished not to discuss the matters of inquiry with other jurors. Well, there is no indication that the juror did so." (96 RT 19047.)

Addressing the addendum to the motion (containing the declaration of Christy Page, and declarations regarding investigator Lepore's interviews with jurors 58 and D.S.), the trial court noted that Ms. Page's declaration was

---

[25] This portion of the declaration actually referred to the receipt of extra-judicial information provided by a different juror. Counsel had asked the court to strike the portion relating to the jury's thought processes when considering the declaration. (6 CT 1688, #9 and 10; 96 RT 19041.) This is discussed more fully in Argument II, *post*.

primarily inadmissible hearsay that was uncorroborated and otherwise incompetent evidence under Evidence Code section 1150. The court also reviewed Mr. Lepore's interview with Juror 58 and found that it contained no evidence of "misconduct or prejudice to the defendant on any issue cited by the defense in their motion for a new trial." (96 RT 19049-19050.)

In the argument of the motion, counsel explained that the jurors were mainly uncooperative when attempts were made to interview them. Most were simply unwilling to talk; a few would talk but would not sign declarations; apparently only juror A.G. ultimately signed a declaration. Counsel noted, however, that seven or eight of the jurors (none of whom had signed a declaration) were present in court. (96 RT 19002.) Throughout the argument, defense counsel pointed out the paucity of their information and requested the trial court to conduct a hearing to obtain the facts necessary to resolve the question of juror misconduct. (See, e.g. 96 RT 19004, 19006, 19011, 19014, 19041, 19045.) The trial court never responded directly to counsel's request for further inquiry, except to say that "implicit in that ruling [denial of the motion for new trial] is the defense request for further inquiry of juror 58 which is denied." (96 RT 19050.)

The trial court's view of the new information was simply wrong. With the new facts showing that Juror 58 did inform the jury that she was afraid of retaliation and why, and also that she discussed the case outside the

jury room, with her husband, her friend, and possibly even with a sheriff's deputy, the totality of the circumstances showed that the possibility of misconduct was based on more than mere speculation and thus demanded further investigation. (*Castorena, supra*, at p. 1066.) The trial court, however, continued to turn a blind eye to the new information, discounting it and refusing to recognize that there was more than sufficient information contained in the motion and declarations to support counsel's request that the court conduct a further inquiry.

A trial judge cannot be an ostrich, blithely ignoring current information in order to maintain an illusion of an unchanging world. When presented with new information, a judge must release the all too human tendency to hold on to old conclusions and reassess his position. The same is true with jurors, who are frequently asked on voir dire whether they would be willing to change a position they have taken in deliberations if they are shown facts that they have overlooked could lead to a different conclusion. A failure of a juror to examine the underpinnings of his or her conclusions when faced with facts suggesting they are wrong is misconduct. (See *People v. Alexander, supra*, 49 Cal. 4th at p. 926.) A failure of a judge to do the same is a miscarriage of justice, and that is what occurred here.

E. The Misconduct Was Prejudicial

When the denial of a new trial motion based on juror misconduct is

appealed, this Court conducts an independent review the of the trial court's actions. (*People v. Gamache* (2010) 48 Cal. 4th 347, 396; *People v. Ault* (2004) 33 Cal.4th 1250, 1261–1262.) "We accept the trial court's credibility determinations and findings on questions of historical fact ***if supported by substantial evidence***. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]" (*People v. Ault*, *supra*, 33 Cal. 4th at p. 1263; *People v. Nessler* (1977) 16 Cal.4th 561, 582, fn. 5[emphasis added].)

Here, there was no witness testimony for the court to weigh and determine credibility except for the initial hearing with Juror 58 (discussed above). The only additional facts are contained in declarations subject to this Court's independent review. Otherwise, the trial court's failure to investigate the multiple allegations of misconduct prevented the determination of historical fact. The only credibility determination here (that Juror 58 could keep any impact of the breach of her anonymity out of her deliberative thought pattern) was shown to be highly suspect shortly after it was made. As shown above, the trial court's continued adherence to this determination in the face of new information was not supported by substantial evidence, and the court made no further determinations concerning the credibility of the juror as the result of her request to be

relieved of her duty to sign the verdict or regarding any of the other factually supported allegations of misconduct.

In reviewing the trial court's actions, this Court must first independently determine whether the allegations of juror irregularities and misconduct triggered the trial court's duty to investigate. (See *People v. Castorena, supra*, 47 Cal.App.4th at pp 1065-1067.) As shown above, this duty was activated when the trial court learned of Juror 58's request to avoid signing the verdict, again at the time of the motion to disqualify Juror 58, and finally at the time of the motion for a new trial. At each of these times, the trial court had information that had not been considered at the time it first determined that the juror could proceed despite her admitted fear, and the new information was sufficient to cast substantial doubt on her ability to remain unbiased. Further, as time passed more information became available to the court, all pointing more directly to the likelihood of misconduct affecting Juror 58 and also the jury as a whole. The trial court's failure to properly investigate the claimed misconduct was thus an abuse of discretion.

Juror misconduct is not structural error and thus not reversible per se. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 256.) Even so, the test for prejudice is rigorous.

The measure of prejudice begins with a presumption that misconduct

is prejudicial. (*People v. Foster*, *supra*, 50 Cal. 4th 1301, 1342.)

> " 'In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial ... . The presumption is not conclusive, but the burden rests heavily upon the Government to establish ... that such contact with the juror was harmless to the defendant. [Citations.]' (*Remmer v. United States* (1954) 347 U.S. 227, 229 [98 L. Ed. 654, 74 S. Ct. 450].)" (*Lewis*, *supra*, 46 Cal.4th at p. 1309; see *In re Hamilton* (1999) 20 Cal.4th 273, 294-295 ["A sitting juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require similar examination for probable prejudice."].) "The presumption of prejudice ' "may be rebutted ... by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm." [Citations.]' [Citations.]" (*Lewis*, at p. 1309.) (*People v. Foster*, *supra*, 50 Cal. 4th at p. 1342.)

In the absence of evidence to rebut the presumption, reversal is required. (*People v. Pierce* (1979) 24 Cal.3d 199, 208.) Applying this standard, the Court of Appeal in *People v. Harper* (1986) 186 Cal.App.3d 1420, 1427, stated that both the *Chapman*, *supra*, and *Watson*, *supra*, tests were "inapplicable." The Court of Appeal discounted the use of any strength of the evidence based test, noting " 'Convincing evidence of guilt does not deprive a defendant of the right to a fair trial [citation] since a fair trial includes among other things the right to an unbiased jury. . .' [Citations omitted]' [Citations.]" (*People v. Harper*, *supra*, 186 Cal.App.3d at p. 1427.)

Further, the presumption of prejudice is more difficult for the

prosecution to overcome if the issue arises after the verdict has been rendered. (*People v. Barton*, *supra,* 37 Cal.App.4th at pp. 714-715; *People v. Cooper* (1991) 53 Cal.3d 771, 838, *People v. Holloway* (1990) 50 Cal.3d 1098, 1111-1112, disapproved on other grounds in *People v. Stanbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Because the trial court erred by not making further inquiry here, obviously it did not take any corrective measures with the jury before it reached its verdict. Thus, the prosecution's burden necessarily becomes more difficult.

Here, there were ample facts before the trial court to corroborate the likelihood of misconduct, with even Juror 58 confirming that she was affected by events outside the trial evidence, that she discussed those events and her reactions with other jurors, and that she discussed matters relating to the trial with outsiders. Had the trial court conducted the appropriate inquiry, the court may have discovered sufficient evidence to explain the juror's conduct in a way sufficiently neutral to rebut the presumed prejudice. The court did not do so however, and "we cannot speculate about what facts might have been adduced if the inquiry had been conducted." (*People v. Castorena*, *supra*, 47 Cal.App.4th at p. 1066.) Because the alleged misconduct was serious and the known facts show that the juror exposed the rest of the jury to highly inflammatory and prejudicial information, there is nothing in the record to rebut the presumption of prejudice. As a result

appellant's convictions must be reversed and a new trial ordered.

F. The Trial Court Compounded Its Error by Applying an Improper Test for Prejudice

The trial court's struggle to apply the law did not end with its failure to investigate the new showings of misconduct. The Court also erred by applying an incorrect test. By applying an improper legal standard, the trial court further abused its discretion. (*In re Marriage of La Musga* (2004) 32 Cal.4th 1072, 1105.)

When ruling on the defense motion for mistrial, the trial court noted in regard to Juror A.G.'s declaration "There is no evidence of juror misconduct. There is no indication that juror number 58 influenced negatively any juror or their vote." (96 RT 19047.) It is difficult to determine from this statement whether the trial court was thinking about the test for misconduct itself, or the test for prejudice. Regardless of which test the court was attempting to articulate, no legal standard applicable to an evaluation of juror misconduct incorporates such a standard. In fact, a standard that purports to measure the actual impact of an act of misconduct on a particular juror's thought process would violate Evidence Code, Section 1150.[26]

---

[26] Earlier in the ruling, the judge commented: "There is nothing stated that is open to sight, hearing or other senses subject to corroboration. ***This juror does not say they would change their vote.*** The juror impermissibly speculates as to what may, and I emphasize the word may, have been a reason or reasons that other

Because the trial court's attempt to articulate a reason for his determination that no misconduct occurred incorporated an improper legal standard, the court further abused its discretion. Because this abuse of discretion had the effect of sanctioning substantial juror misconduct, the error should be presumed prejudicial and, as discusses above, such prejudice cannot be rebutted.

-o0o-

---

jurors rendered the verdict they rendered. There is no tangible basis for such speculation." (96 RT 19047, emphasis added.) The two passages together suggest that the judge believed that under Evidence Code, section 1150, a juror could describe the effect of misconduct on their own thought process, but not upon other jurors. The section makes no such distinction.

II

A JUROR COMMITTED MISCONDUCT BY INJECTING FACTS AND OPINIONS ABOUT CONDITIONS OF IMPRISONMENT INTO THE PENALTY DELIBERATIONS AFTER THE TRIAL COURT HAD EXCLUDED SUCH EVIDENCE

Introduction

The problems involving Juror 58 were not the only allegations of jury misconduct raised in the motion for a new trial. (See Argument I above.) At the motion for a new trial, counsel submitted a declaration from juror A.G. who alleged that another juror (R.M.) had interjected information concerning prison conditions into the penalty phase deliberations. The trial court had specifically excluded such evidence from the trial.[27] The addition of these facts into the deliberations violated the instructions given to the jury and constituted grave misconduct. (*People v. Wilson* (2008) 44 Cal.4th 758, 829; CALJIC 1.03, 7 CT 1841; 75 RT 14830; § 1120.)

A. Evidence Presented in the Motion for a New Trial Revealed that Juror 112, a Prison Employee, Provided Information During Penalty Deliberations About the Conditions in Prison for Inmates

In a Motion for a New Trial filed December 20, 2000, counsel raised

---

[27] Prior to the presentation of evidence, the defense had moved to allow expert testimony to address the myths and misconceptions commonly held by the public regarding life in prison without possibility of parole. (3 CT 842-865.) The motion was denied. (5 CT 1219.) See Argument XVI, *post.*

several grounds including jury misconduct based upon the jurors' extra-judicial receipt of information, specifically charging juror R.M.'s actions in providing evidence of prison conditions in violation of the court's instructions. (6 CT 1688-1691.) In support of this portion of the motion, counsel offered the declaration of Juror A.G. who stated that another juror, R.M., worked at a prison and provided "a lot of information about what life in prison was like for inmates. The information from [R.M.] showed me that while life in prison isn't much of a life, it is still a life." (6 CT 1701.[28])

In an addendum to the motion, counsel provided declarations from the investigator, Mr. Lapore, that he had interviewed other jurors and that they had also mentioned juror R.M.'s information. Juror D.S. told investigator Lapore that R.M. was asked questions about prison life because it became known that he worked in a state prison. (7 CT 1809.) Juror 58 also recalled R.M.'s statements about prison life. Even though she claimed not to have listened to much of what he had to say, she recalled that R.M. said that prison was hard for some inmates, but not for others. She noted that he did not volunteer the information but was asked questions by several jurors once it became known that he worked in a prison. She did specifically recall

---

[28] Juror A.G. also said that R.M.'s statements were "One of the most compelling arguments that may have convinced the jury to vote for death." (96 RT 19014-19015, 19041. Evid. Code §1150.)

R.M. saying that inmates received cable television, and a juror responding that even the juror did not have cable. (CT 1806.)

In arguing the motion, the prosecutor first made a general challenge to juror A.G.'s declaration as "incompetent and inadmissible", apparently arguing that the declaration should be discarded because some of his statements regarding the impact of R.M.'s information on the jury's thought processes ran afoul of the thought process prohibition of Evidence Code section 1150. (96 RT 19032, 19036.) Other than that threshold challenge, the prosecutor's argument, in its entirety, was:

> Going a little further on this issue of prison conditions, there was no suggestion in here that this juror, who everyone knew worked in a prison, no suggestion that he was talking about prison conditions for a person sentenced to life without the possibility of parole. That is not hinted at here. What it is is irrelevant information that the jurors when thinking about this man's occupation asked him about. That does not rise to the level of misconduct. The short of it is there is no basis for hauling any jurors in here and having them testify.
> (96 RT 19037.)

The trial court agreed with the prosecutor that the declaration was incompetent, containing matter that was improper under Evidence Code section 1150. Further the court determined that "There is nothing stated that is open to sight, hearing or other senses subject to corroboration. This juror does not say they would change their vote. The juror impermissibly speculates as to what may, and I emphasize the word may, have been a

reason or reasons that other jurors rendered the verdict they rendered. There is no tangible basis for such speculation. It's incompetent evidence and it's improper for any court to consider it." (96 RT 19047.) The judge went on, however, to rule that even if the declaration were deemed competent "There is no evidence of juror misconduct. There is no indication that juror number 58 influenced negatively any juror or their vote." (96 RT 19047.[29])

Specifically discussing the portion of A.G.'s declaration concerning "one of the arguments that may have convinced" the jury, the trial court properly recognized that the "mental machinations" of the juror could not properly be considered. The court went on, however, to state "There is not one scintilla of evidence presented to the senses by any of these speculatory statements that demonstrate Mr. Manibusan was deprived of a fair trial or a just verdict." (96 RT 19048.) Although the judge then considered the remaining declarations, he did not do so in the context of R.M.'s introduction

---

[29] See discussion *post*. Since juror A.G. was the only juror to sign a declaration, the trial court appears to have been referring to that declaration in this portion of the ruling. However, because this analysis is contained in a portion of the ruling that related to the misconduct of Juror 58, it is not clear that the court considered the entire declaration incompetent, although the court did note that the analysis applied equally to both allegations of misconduct. (96 RT 19048.) Regardless of what was contemplated, the court's reaction of deeming the entire declaration incompetent was error. The majority of the declaration contained descriptions of events, which are expressly made admissible by section 1150, and any incompetent portions should simply have been excised.

of extraneous information into the jury process. After concluding the discussion of the declarations, the trial court denied the motion for a new trial on all grounds. The judge also denied the defense request for further judicial inquiry into misconduct.[30] (96 RT 19050.)

B. Knowing That A Juror Had Brought Outside Evidence Into the Jury's Deliberations, The Trial Court Erred By Refusing to Consider the Evidence of Misconduct and By Denying The Motion For A New Trial

The trial court received information that three jurors all agreed that juror R.M. had provided a significant amount of information to the jury about life behind the walls of a prison. Since no testimony of this nature had been allowed in evidence, any consideration of the information by the jury was improper. A jury's verdict must be based on the evidence presented at trial, not on extrinsic matters, and it is misconduct for a juror to bring outside evidence or matters of the juror's expertise into deliberations. (*People v. Wilson*, *supra*,44 Cal.4th at p. 829.)

The receipt of extrajudicial evidence like that considered here is plainly misconduct. While some cases can present the fine line between a juror's permissible use of his or her own life experience in deliberations and misconduct arising from injecting evidence and opinion based on specialized information obtained from outside sources, (see *People v. Loker* (2008) 44

---

[30] Specifically referring to additional inquiry of Juror 58.

Cal. 4th 691, 753; *People v. Steele* (2002) 27 Cal.4th 1230, 1266), this is not a case of that nature because R.M.'s conduct was clearly on the wrong side of any such line. His statements were not the application of his life's lessons to the deliberative process. Instead, he provided extrajudicial evidence that was then considered by the jury as if it were on the same footing as evidence they received in court, and likely of better quality because they knew the source was one of their own as opposed to an expert paid by one side or the other.

Like cases that have decried a juror's consultation of outside legal experts, R.M.'s conduct brought outside expert testimony into the jury room. (*In re Stankewitz* (1985) 40 Cal.3d 391, 399; *People v. Honeycutt*, *supra*, 20 Cal.3d at p. 157[receipt by a juror of legal advice on questions presented by case "egregious misconduct" even though advice was largely correct and not shared with other jurors].) In *Stankewitz*, a police officer who was a member of the jury expressed as fact based on his 20 years as an officer, his own opinion about the law of robbery, which obviated the element of an intent to permanently deprive the owner of property. (*In re Stankewitz*, *supra*, 40 Cal.3d at p. 396.) This Court determined that he had " 'consulted' his own outside experience as a police officer on a question of law." (*Id* at p. 399.)

Here, the juror consulted his own outside experience as well. Unlike

the officer in *Stankewitz*, he did not opine on the law and contradict the judge's instructions. Instead, his conduct was as harmful or worse because he brought observations and opinions into the jury room that had been specifically excluded as evidence. Compounding the misconduct was the fact that R.M.'s statements were not merely isolated remarks, but were the subject of extended discussion and some particular interest among the other jurors. All of the jurors who spoke to the investigator[31] recalled that R.M. had given them information about life in prison.

Not only were the juror's observations and opinions about prison life improper, they were also likely misleading. As conceded by the prosecutor, there was no indication that the juror had discussed the specifics of prison conditions for a prisoner under a sentence of life without the possibility of parole.[32] (96 RT 19037.) The likely failure of the juror to distinguish between LWOP conditions and conditions generally does not mean that the

---

[31] While arguing the motion for a new trial, counsel noted that most jurors would not speak to the investigator. Even though seven or eight jurors were present in court at the time of the argument, none of them had been willing to sign a declaration. (96 RT 19002.)

[32] The prosecutor used this theory to argue that the information is irrelevant to the discussion of misconduct because the jurors were simply talking about R.M.'s occupation. (96 RT 10937.) The prosecutor's speculation cannot be taken seriously since it contradicts A.G.'s direct statement that the information was "about what life in prison was like for inmates." (6 RT 1701.)

jurors paid no attention to his information, and to the contrary many appeared quite interested since he was drawn into the discussion by their questions. Salinas Valley State Prison houses both level I and level IV prisoners. Whether R.M., a vocational instructor, even worked with level IV inmates is not known and there is nothing to suggest that his information was not confined solely to level I inmates. (See the description of the prison at http://www.cdcr.ca.gov/Facilities_Locator/SVSP.html.)

The trial court could only avoid serious discussion of R.M.'s misconduct by declaring that no evidence of misconduct existed. As shown above, the court appeared to reject juror A.G.'s declaration as a whole, citing Evidence Code section 1150. That section provides in pertinent part:

> Upon inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.
> (Evid. Code § 1150(a).)

Nothing in this section compels a court to disregard legitimate descriptions of "statements made, or conduct, conditions, or events" if contained in a declaration that also includes mention of "the effect [of any of these things] upon a juror." This Court has found jurors' declarations to be

admissible and sufficient proof for a trial court to grant a motion for a new trial. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 80; *People v. Hutchinson* (1969) 71 Cal.2d 342, 350.) While statements of the effect of misconduct on any juror's thought process are statutorily irrelevant, and must not be considered, the presence of such irrelevant information does not render the whole declaration incompetent any more than the expression of an impermissible opinion during testimony render the entirety of the witness's testimony incompetent. The remedy is simply to excise the irrelevant portion and consider only the relevant. This is exactly what counsel requested. (96 RT 19041.)

Had the trial court considered the factual material contained in A.G.'s declaration, the existence of misconduct was unmistakable. A.G. clearly stated that R.M. had "provided the jury with a lot of information about what life in prison was like for inmates." (6 CT 1701.) This information was corroborated by statements from Juror 58 and juror D.S. obtained by investigator Lapore but the court did not consider the statements of Juror 58 or juror D.S. for any purpose. The trial court failed to recognize that these statements, while hearsay, could be seen as corroboration of A.G.'s description of misconduct, even if they would not support the allegation standing alone.

The trial court's error prevented it from evaluating the claim of

misconduct based on the juror's receipt of outside information. Had the court properly considered the information, the court would have no choice but to recognize that the jurors' actions in receiving and discussing this information was misconduct, and also that the misconduct would be presumed to be prejudicial. Because the misconduct was substantial and directly implicated the sentencing choice, the prejudice could not be rebutted.

The prosecutor appeared to recognize the difficulty of rebutting the prejudice caused by the misconduct, and instead argued that the juror's comments were inconsequential discussions of his employment and thus not the sort of information that would raise a presumption of prejudice. (See 96 RT 19037.) The prosecutor's argument is not only weak (96 RT 19041), it is factually wrong. The discussions described in the declaration and statements were about a prisoner's life, not the juror's. These were the very conditions deemed legally irrelevant by the trial court and inadmissible.

The fact that this Court and others have determined that prison condition evidence is not relevant to a sentencing decision does not mean that jurors do not find a logical connection between their task of deciding which sentence is appropriate and evidence of what the reality of a life sentence is like for an inmate. As shown by the actions of the jury here, they are curious about the subject and have a desire to factor the information into

their decision. The risk of keeping the evidence out of the trial is that the jurors are free to speculate or consider evidence that is not filtered by the judicial process - exactly what happened here. Instead of a qualified expert who could describe the conditions of confinement for prisoners sentenced to life without possibility of parole, this jury received what amounted to expert testimony from an unqualified witness who enjoyed an enhanced credibility because he was one of their own, and not a partisan witness. Because this outside evidence was a subject of interest in the penalty trial and was discussed extensively, the presumption of prejudice cannot be overcome.

On appeal, this Court independently reviews the record, accepting only the trial court's evaluation of witness credibility and determination of disputed facts so long as those actions are supported by substantial evidence. (*People v. Ault, supra*, 33 Cal. 4th at p. 1263.) Since the trial court held that the declaration of A.G. and the investigator's statements were not admissible, there are no determinations subject to deference. As shown above, the undisputed facts show the presence of grievous misconduct and that the presumption of prejudice arising therefrom cannot be rebutted. As a result, the Court must order a new penalty trial.

C. Having Received Specific Factual Allegations of Misconduct, The Trial Court Erred by Refusing To Conduct Additional Inquiry

In addition to the previously identified errors arising from the

presentation of outside evidence to the jury, the trial court also failed to abide by its statutory duty to hold a hearing to determine whether there was good cause to discharge juror R. M..

Penal Code section 1120 provides in pertinent part:

> If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. . . . [T]he juror making the statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his discharge as a juror.

The duty to investigate misconduct arises when facts suggesting that misconduct has occurred come to the attention of the trial court. (*People v. Burgener*, *supra*, 41 Cal.3d at pp 519-520.) As shown above, the declaration of A.G. and the statements of Juror 58 and juror D.S. provided with the motion for a new trial were sufficient by themselves to require a new trial. In light of those facts, the refusal of the trial court to merely investigate is inexplicable.

Both statutory and decisional law require an investigation when there is a reasonable allegation that the jurors had considered outside evidence. Here, the trial court was made aware of three statements by jurors that substantiated the misconduct and showed that it consisted of far more than mere remarks made in passing. Further, counsel noted that his investigator and seven or eight of the trial jurors were present in court and would have

been instantly available for the court to interview. By refusing to do so, the trial court not only committed serious error, it also prevented the creation of a much broader record.

The failure to investigate fact based allegations of misconduct is an abuse of discretion and presumptively prejudicial. (*People v. Foster*, *supra*, 50 Cal.4th at p. 1342.) As shown above, in this instance of serious misconduct that presumption cannot be rebutted. As a result, a new penalty trial must be ordered.

-o0o-

III

THE JURY COMMITTED ADDITIONAL MISCONDUCT BY DISCUSSING APPELLANT'S FAILURE TO TESTIFY

A third type of juror misconduct was identified in appellant's motion for a new trial. Based on the declaration of juror A.G. and on statements from Juror 58 and juror D.S. obtained by defense investigator Lapore, there was evidence that Kekoa's failure to testify was discussed by the jurors.

Juror A.G. noted "It was the general consensus of the jury that if the defendant testified he would subject himself to damage by the prosecutor's questions." (6 CT 1701.) According to investigator Lapore's declaration, Juror 58 "told me that jurors talked about the fact that the defendant did not testify." and Juror D.S. "stated that jurors discussed the fact that defendant Joseph Manibusan did not testify. Smith stated that he does not remember hearing any instructions from the judge about how to account for the defendant not testifying." (7 CT 1806, 1809.)

Discussion of a defendant's failure to testify violates the Fifth Amendment privilege against self incrimination. (*Griffin v. California* (1965) 380 U.S. 609, 615; *People v. Leonard* (2007) 40 Cal. 4th 1370, 1424-1425.) It also implicates the Sixth Amendment right to an impartial jury and the right to a fair capital sentencing determination guaranteed by the Eighth Amendment. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1070.)

It is misconduct for a jury to consider the defendant's failure to testify for two additional and practical reasons: it is not evidence that was presented to them and it is a direct violation of the instructions they received. (See *People v. Leonard, supra*, 40 Cal.4th at pp. 1424-1425.)

When the trial judge learns of facts showing that jurors have, in fact, discussed the defendant's failure to testify as part of their deliberations, the judge must either grant a new trial or inquire further into the matter to dispel the presumption of prejudice. (*People v. Burgener, supra*, 41 Cal.3d at pp 519-520.)

The prosecutor's response to the charge of misconduct was to cast the misconduct as fleeting and trivial, citing *People v. Hord* (1993) 15 Cal.App.4th 711, 726-728.[33] *Hord* involved a post-trial hearing regarding an allegation of misconduct triggered by the foreperson's declaration that: ". . . During the deliberations, the comment was made as to why the defendant did not take the stand." ". . . I, being foreman of the jury, interrupted and informed the jury that whether the defendant testified or not had no bearing on his guilt or innocence. This was not to be used in our

---

[33] *Hord* specifically held that declarations such as A.G.'s here were admissible as evidence of misconduct, a holding directly contrary to the prosecutor's contention that the declaration violated Evidence Code section 1150. (*People v. Hord, supra*, 15 Cal.App.4th at pp. 724-726.)

decision making process. Any further discussion or talk whatsoever regarding testimony of the defendant was stopped." (*Id* at p. 722.) At the hearing, the trial court reviewed other jurors declarations and determined

> Of the remaining jurors, five did not recall any comments during deliberations regarding defendant's not testifying. Of those five jurors, two did not recall any talk regarding defendant's possible sentence. The other three jurors did not mention the sentencing aspect in their declarations. [¶] The final four jurors all recalled that a comment was made during deliberations on the fact defendant did not testify. Of those four jurors, three recalled that the foreperson advised them they could not use the information. Of those four jurors, one specifically stated he did not recall a comment on defendant's possible sentence, the other three jurors did not mention the sentencing comment in their discussions" (*Ibid.*)

While the court did find that the declarations showed misconduct and raised the presumption of prejudice, the court found the misconduct was minor because the discussions did not go beyond a brief reference to something that the jurors clearly knew. The court concluded that the brief discussion was not prejudicial because it did not go beyond "natural curiosity", but acknowledged that if it had the possibility of prejudice would increase. (*Id* at p. 726.)

The misconduct here is neither fleeting nor trivial. As shown in Arguments I and II above, this jury was exceptionally prone to consider as evidence material that was not provided through the trial process. In this instance, despite a specific instruction that they not take into account the

defendant's failure to testify, they did so and also speculated about why he did not testify. Neither of these facts, presented to the trial court in the motion for a new trial, delves into the thought process that led to the verdict. Both are facts showing that the jury discussed a matter that came from outside the evidence.

The misconduct must also be viewed with an eye on the prosecutor's flirtation with *Griffin* error[34] during his closing argument in the guilt phase. (*Griffin v. California, supra*, 380 U.S. 609, 615.) The prosecutor began his rebuttal by noting there was "no defense in the case" and asking the jurors to "Think of what might have been a defense in this case. This defendant was in Los Angeles or Peoria, Illinois. He wasn't anywhere near here when

---

34

Griffin held that a criminal defendant's rights against self-incrimination forbids "comment by the prosecution on the accused's silence." (*Griffin v. California, supra*, 380 U.S. at p. 615). Thus, the prohibits a prosecutor from commenting on a defendant's decision not to testify. (*Ibid.*). However, "a prosecutor's indirect comment violates *Griffin* only 'if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.' " (*Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 912 (quoting) Prosecutorial comments pertaining to the defendant's failure to present exculpatory evidence that do not call attention to the defendant's failure to testify, and comments on the defense's, and not defendant's, failure to counter or explain the testimony presented are permissible. (See *United States v. Mares* (9th Cir. 1991) 940 F.2d 455, 461.)

these offences [sic] took place." (74 RT 14672.) The incipient trend toward commentary on the failure of the defense to present an alibi or to have Kekoa explain his actions was halted by an objection (74 RT 14672), and the trial court told the jury that the defense had no burden of proof in the case. (74 RT 14688.)

Given the factual averments concerning the jury's discussion of Kekoa's failure to testify and the prosecutor's earlier invitation for the jury to consider what was not presented, the trial court had a duty to investigate the nature of the misconduct. (*People v. Foster*, *supra*, 50 Cal.4th at p. 1342.) The trial court's failure to undertake this duty is an abuse of discretion. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 926.)

As shown in Arguments I and II, the trial court's abuse of discretion for failing to investigate jury misconduct creates a presumption of prejudice. As with the other forms of misconduct discussed previously, the presumption cannot be overcome in this case and as a result this Court must vacate the convictions and order a new trial.

-o0o-

IV

THE CUMULATIVE IMPACT OF THE MULTIPLE INSTANCES OF JURY MISCONDUCT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY

While each incident of misconduct raised above must be independently evaluated, the cumulative impact of the misconduct must also be considered. When three different types of jury misconduct are identified and facts exist showing that the allegations are not based on conjecture or speculation, the idea that something untoward is going on is inescapable. At the very least, the facts on record here should have spurred the judge to take action that would allow him to either confirm or quiet the allegations of misconduct. As shown above, none of the three types of misconduct were trivial. One involved a juror's personal knowledge of facts that caused her to fear for her safety, and her communication of those facts to the jury. The facts supporting this allegation were initially inferred from her actions, then confirmed by another juror. (Argument I.) The second form of misconduct involved a juror's use of facts gained from his employment as a prison guard and extensively shared with the other jurors as evidence of the conditions faced by a prisoner. This was supported by facts contained in a juror's declaration and supported by statements obtained by the defense investigator from two other jurors. (Argument II.) The third form of

misconduct involved the discussion in deliberations of the fact that Kekoa did not testify. This misconduct was also supported by facts contained in a juror's declaration and supported by statements obtained by the defense investigator from two other jurors. (Argument III.)

Thus even if the trial court was unconvinced to conduct further inquiry by any one area of misconduct, the combination of facts showing that three different types of misconduct occurred should have done so. The judge's failure to investigate based on the totality of the circumstances presented is in itself an abuse of discretion, related to but separate from those discussed previously. And as shown previously, the presumed prejudice arising from each of the failures to investigate cannot be rebutted. The combined prejudice is stronger still.

As a result of the trial court's refusal to investigate in the face of multiple showings of juror misconduct, Kekoa's convictions must be reversed and a new trial ordered.

-o0o-

V

THE TRIAL COURT'S EXCLUSION FOR CAUSE OF JURORS WHO COULD NOT FORESEE APPLYING THE DEATH PENALTY IN THIS CASE BUT WOULD FOLLOW THE COURT'S SENTENCING INSTRUCTIONS VIOLATED THE CONSTITUTIONAL GUARANTEE TO A FAIR AND IMPARTIAL JURY

A. The *Witherspoon/Witt* Rule

The Sixth and Fourteenth Amendments "guarantee[ ] a defendant on trial for his life the right to an impartial jury." (*Morgan v. Illinois* (1992) 504 U.S. 719, 728; *Yeatts v. Angelone* (4th Cir.1999) 166 F.3d 255, 265.) Whether a prospective capital juror is impartial within the meaning of the Sixth and Fourteenth Amendments is determined in significant part on the basis of his or her opinions regarding the death penalty. A prospective capital juror is not impartial and "may be excluded for cause because of his or her views on capital punishment [if] the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [hereafter *Witt*]; citing *Adams v. Texas* (1980) 448 U.S. 38, 40.) A prospective juror who will automatically vote either for or against the death penalty regardless of the court's instructions will fail to consider in good faith evidence of aggravating and mitigating circumstances. Such a juror is not impartial and cannot constitutionally remain on a capital jury.

(*Witherspoon v. Illinois* (1968) 391 U.S. 510 [hereafter *Witherspoon*];

Morgan v. Illinois, *supra*, 504 U.S. at pp. 728, 733-734.)

The United States Supreme Court has recently summarized this well established body of law as follows:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon*, 391 U.S., at 521, 88 S. Ct. 1770, 20 L. Ed. 2d 776. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt*, 469 U.S., at 416, 105 S. Ct. 844, 83 L. Ed. 2d 841. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, at 424, 105 S. Ct. 844, 83 L. Ed. 2d 841. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.*, at 424-434, 105 S. Ct. 844, 83 L. Ed. 2d 841.
> *Uttecht v. Brown* (2007) 551 U.S. 1, 9 (127 S. Ct. 2218, 2223; 167 L. Ed. 2d 1014, 1021.)

A juror who merely expresses doubts about imposing the death penalty, yet expresses ongoing willingness to follow the trial court's instructions is not a proper subject of a challenge for cause within this rule. A trial judge who sustains a *Witherspoon/Witt* challenge to such a juror commits reversible error.

> A trial judge may not exclude a prospective juror "simply because he expresses some reservations about imposing the

> death penalty in any case." *United States v. Tipton,* 90 F.3d 861, 879-80 (4th Cir.1996) (citing *Witherspoon v. Illinois,* 391 U.S. 510, 520-23, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). Exclusion of jurors who simply express qualms or hesitation results in a jury which is not impartial, but rather one "uncommonly willing to condemn a man to die." *Witherspoon,* 391 U.S. at 521, 88 S.Ct. 1770. The determination as to whether a potential juror's reservations would "substantially impair the performance of his duties" or whether they are mere qualms is a matter of discretion for the trial judge and is reviewed with deference. *Tipton,* 90 F.3d at 880.
> (*Orbe v. True* (E.D. Va, 2002) 233 F.Supp.2d 749, 768.)

In this case, potential jurors 24, 199 and 232 expressed some degree of support for the death penalty in general. Although they were willing to follow the trial court's instructions, each had some qualms or hesitations about personally participating on a jury that could be involved in imposing the death penalty. Although none expressed an absolute refusal to vote for death in an appropriate case, they were reluctant to do so. They were all excused for cause, one on the trial court's own motion without a challenge from the prosecutor.

As demonstrated below, these jurors were qualified to serve on appellant's jury. Exclusion for cause of a prospective juror from serving on a capital jury when that juror is in fact qualified to serve is per se reversible error — even though the prosecutor did not exhaust all available peremptory challenges. (*People v. Heard* (2003) 31 Cal.4th. 946, 965-966; *Gray v. Mississippi* (1987) 481 U.S. 648.) By dismissing these qualified jurors, the

trial court committed reversible error.

B. The Jurors

1. Juror 24

Juror 24 first tried to explain her reluctance to say whether she could vote for death when examined by the trial court. She said that she had thought about the question thoroughly, and was not sure that she had the right to vote for death although she had no doubt about her ability to render a guilt verdict. She concluded that she was unsure of her ability to vote for death for anyone. (52 RT 10259-10269.) She also expressed doubt about being able to return a verdict of death when questioned by the prosecutor. (RT 53 10446.) In response to questions from defense counsel about this uncertainty, the juror replied: "It's can I even if he is found guilty, and all of that, can I pass that judgment that he should be sentenced to death. That is what I am unsure about in my own mind. Point blank." (53 RT 10473.) She went on to explain: "I'm not saying that I would close my mind to that. I'm just saying as a moral issue something within me, do I have the right or the ability to say that that person would die." (53 RT 10474.)

Neither the defense nor the prosecutor challenged Juror 24 for cause. The trial court, however, disqualified the juror on his own motion:

> Well, I have still have some concerns about juror number 24. And it's my feeling that juror number 24 has given us sufficient equivocal answers talking about, I don't think I could,

> I don't believe I could, I don't feel I could, let's see, wrote down on here, and all referring to the death penalty. "I don't think I can." "I'm unsure if I'm able to sentence anybody to death." "I don't believe I could." "I don't know." "It's a moral issue." "Do I have the right." This is clearly *People vs. Clark*, 5 Cal. 4th 950[35], after having these responses on how she would vote to the death penalty. . . . The juror is excused for cause.
> (53 RT 10495, quotation marks added for clarity.)

Defense counsel objected to this exclusion, and argued that the juror had merely expressed a moral quandary concerning her ability to impose the death penalty, and had in fact stated that she could do so under certain circumstances.[36] The trial court maintained that he believed her to be equivocal, and overruled the objection. (53 RT 10496.)

---

[35] In *Clark*, this Court reiterated the rule that in the face of equivocal answers by a juror in death qualification, the trial court's evaluation of the juror's state of mind is binding. "On appeal, we determine whether the trial court's decision [to excuse a potential juror for cause] is supported by substantial evidence. (Citations omitted.) '[I]f the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding.' " (Citations omitted.) (*People v. Clark* (1993) 5 Cal.4th 950, 1025 (overruled on other grounds by *People v. Doolin* (2009) 45 Cal. 4th 390, 421 fn. 22.)

[36] See 52 RT 10266, where juror 24 explained her desire to see the prosecutor provide more convincing proof than the minimum required for conviction as support for a death verdict. ("it might be easier for me to help -- since I would have a hard time passing judgment on somebody's life for the death penalty, I would think that, if they were able to prove it even more, then I might be able to, if that makes any sense.")

2. Juror 199

Juror 199 initially noted that she had a religious conflict concerning the death penalty, and wondered what judgment God would render upon her if she voted for death. She noted that her concern was mainly based on the possibility of sentencing an innocent person to die and affirmed that she would be able to consider voting for death. (56 RT 11027-11028.) That afternoon, however, the prospective juror told the prosecutor that she would be unable to return a death verdict in a case of this nature. (57 RT 11245-11246.) She clarified that answer when questioned by the defense, explaining that she would consider death but was likely leaning towards a life sentence. (57 RT 11252.) Finally, the trial court asked the prospective juror about the seeming contradiction, and noted that she was crying at the time. She acknowledged that her answers appeared contradictory and said that she was overcome trying to imagine Kekoa's life on the streets. The trial court then pressed her to resolve the contradiction:

> THE COURT: What's at issue here is your state of mind based on the question of whether or not you could consider death and whether or not you don't think you could vote for death. Those are inconsistent.
> JUROR NUMBER 199: I know they are.
> THE COURT: Can you please explain that inconsistency, so that we know what your state of mind is?
> JUROR NUMBER 199: If the prosecution presented a case and with a really heinous crime, if it was really a terrible crime, and -- I don't know, sir. I don't know.
> THE COURT: Does that mean you don't know if you could

impose the death penalty?
JUROR NUMBER 199: That's correct. I don't know if I could do it.
(57 RT 11264.)

The prosecutor challenged this prospective juror for cause alleging that her answers showed unequivocally her inability to vote for the death penalty. Defense counsel referred to her questionnaire responses that she supported the death penalty and law enforcement[37] and argued that her emotional response in court likely reflected exhaustion and the stress caused by the process. He noted that she did express an ability to consider death, particularly in response to the trial court's questions. The trial court, however, referred to her statements of internal conflict, called her answers inconsistent and determined that "I'm absolutely positive in this case that it's proper that she be excused for cause." (57 RT 11268-11269.)

3. Juror 232

Prospective juror 232 believed that life was sacred and should not be

---

[37] The prospective juror's questionnaire is located at 14 CT 4014-4035. She was a forest ranger and peace officer (4017), she considered herself biased towards law enforcement and recognized that an arrest is based upon evidence (4027), she expressed "some religious conflicts" concerning the death penalty but it was needed and she felt more strongly for the death penalty now than previously in her life (4029), she thought she might impose a higher standard of proof knowing that the death penalty was possible and she declared that she would not automatically vote for either possible penalty (4030.)

taken, but did not preclude application of the death penalty to more serious types of murders. The juror thought that it would be difficult, but not impossible, to consider the death penalty in a case like this. She did not, however, believe it to be a reasonable possibility that she could impose death. The prospective juror explained that she knew about the case, had discussed it extensively, knew some of the background information, and knew some of the witnesses. With the combination of her religious beliefs and her knowledge of the case and the witnesses, she doubted her ability to be able to base any decision solely upon what she heard from the witness stand. That same information led her to conclude "I don't think I could vote for the death penalty." (57 RT 11207-11210.)

The prosecutor challenged prospective juror 232, after asking simply "Do you believe you are able to vote for the death of this defendant?" and obtaining her negative response. (57 RT 11248.) Defense counsel submitted the issue after observing that the trial court had failed to ask any clarifying questions as had been the case with other challenged jurors. (57 RT 11271-11271.) The trial court responded:

> I believe that this juror could not conscientiously or would be a reasonable possibility that this juror would vote for death. As apparently, one of the reasons I didn't ask her a lot of questions was because of her statement I'm not sure she could be impartial. I tried to talk to her a little bit about that, and she kept talking about all this other evidence that she had received and I didn't think it was appropriate to let her go on and talk

about things that she had written in her questionnaire about professions and everything else. So motion for cause 232 is granted.
(57 RT 11272.)

C. A Prospective Juror In A Capital Case May Not Be Excused For Cause Based On Unwillingness to Apply The Death Penalty Unless The Voir Dire Affirmatively Establishes The Juror Will Not Follow The Law Or Consider Death As An Option

In *Witherspoon*, the United States Supreme Court held that prospective jurors in a capital case may not be excused for cause on the basis of moral or ethical opposition to the death penalty. A capital defendant's Sixth and Fourteenth Amendment right to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon* at p. 522.) Instead, the state could properly excuse only those jurors "who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (*Witherspoon* at pp. 522-523, n. 21, emphasis omitted.)

The Court modified the *Witherspoon* standard in *Adams v. Texas* (1980) 448 U.S. 38, a capital case involving the murder of a police officer. The Court explained that *Witherspoon* and its progeny "establish[] the

general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) The high court determined that states had a legitimate interest only in challenges that insure "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid.*) Prospective jurors thus could **not** be excluded from service simply because their views on the death penalty would impact "what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." (*Id.* at p. 50.) Instead, a prospective juror who was reluctant to consider capital punishment could be discharged for cause only where the record showed him unable to follow the law as set forth by the court. (*Id.* at p. 48.) Moreover, as the Court later made plain in specifically re-affirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Witt* at p. 423.)

The same standards apply to jury selection in a capital case under both the federal and state constitutions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1246, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146, and *People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Heard, supra*, 31 Cal.4th at p.

958.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114; *Rodrigues* [8 Cal.4th] at p. 1146.)" (*People v. Jones, supra,* 29 Cal.4th at p. 1246, parallel citations omitted.)

In this context the United States Supreme Court has emphasized that, "[i]t is important to remember that *not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases* so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176, emphasis added.) This Court has emphasized this aspect of *Lockhart*, observing that "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled--indeed, duty-bound--to sit on a capital jury, unless his or her personal views *actually* would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart* (2004) 33 Cal.4th 425, 446, emphasis added.)

This Court, however, has frequently found *Lockhart* inapplicable if the record shows a prospective juror has made conflicting, equivocal or ambiguous statements about his or her ability to vote for death. Faced with a potential juror deemed equivocal, this Court has held that a trial court may

decide to discharge the juror and the decision is binding on the reviewing court. (See, e.g., *People v. Harris* (2005) 37 Cal.4th 310, 331; *People v Cleveland* (2004) 32 Cal.4th 704, 734-735; *People v. Mayfield* (1997) 14 Cal.4th 668, 727; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Breaux* (1991) 1 Cal.4th 281, 309-310; *People v. Frierson* (1991) 53 Cal.3d 730, 742; *People v. Cox* (1991) 53 Cal.3d 618, 646.)

In light of *People v. Schmeck*, counsel will not reiterate the arguments that the Court has frequently found unpersuasive, but invites the Court to reexamine it's previous holdings regarding equivocal or ambiguous responses in the death-qualification process. (*People v. Schmeck* (2005) 37 Cal.4th 240, 263.)

The jurors here all could consider the death penalty as an option, although they did not think that it would be a likely choice for them. Only when pressed to say that they would consider it in a case like this one, when they had not yet heard all of the facts and circumstances that would factor into the decision, did they waiver from their original statements. This sort of questioning unfairly calls upon the juror to make a snap judgment, without benefit of all the facts, while under pressure. Those who do not firmly believe in the rightness of the death penalty are much more likely to succumb to such pressure and say that they would likely not vote for death, even though they would conscientiously follow the court's instructions. Such

jurors are not properly excluded.

In *Gall v. Parker*, the 6th Circuit found the exclusion of a potential juror improper when the juror was uncertain of his views but nonetheless stated he could possibly believe the death penalty to be appropriate in certain situations and that he would follow the law as instructed. (*Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 330-31 [overruled on other grounds, see *Matthews v. Simpson* (W.D. Ky. 2008) 603 F. Supp. 2d 960, 1038 fn. 65].) There, the Court of Appeal examined the situation of a juror whose responses were not unlike those given here:

> Notwithstanding the deference owed to the trial judge, we find that the factual record does not fairly support Correll's exclusion under the standards of *Adams* and *Witt*. Correll's discomfort with the death penalty did not appear to " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424 [quoting *Adams*, 448 U.S. at 44]. Correll rejected the proposition that his mind was "closed" to imposing the death penalty–"No, I would say it isn't closed, but it - I am just undecided." J.A. at 507; "it is just one of those things you would have to cross when you got to it." J.A. at 506-07. Moreover, on several occasions, he informed counsel and the judge that he would possibly or "very possibly" feel the death penalty was appropriate in certain factual scenarios. J.A. at 507. He also told the judge that he believed he could and would follow the law as instructed. J.A. at 508. These statements showed that he was not "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its" death penalty scheme, the standard that *Witt* requires for exclusion. *Adams*, 448 U.S. at 51. Correll's statements that his decision would likely depend on the facts he was faced with also suggested that his selection would comport with a trial court's "quest" to find jurors who

> "conscientiously apply the law and find the facts." *Witt*, 469 U.S. at 423. Similarly, Correll's uncertainty as to how the option of a death sentence would affect his decision should not have led to his exclusion. In *Adams*, the Court reversed a conviction on a scheme that precluded prospective jurors "whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." 448 U.S. at 50-51. Finally, unlike the juror who was properly struck in *Witt* because she repeatedly "affirmed that her beliefs would interfere with her sitting as a juror," 469 U.S. at 434, Correll not once stated that his beliefs would deter him from serving as an impartial juror. Correll's exclusion was thus error.
> (*Gall v. Parker, supra,* 231 F.3d at pp. 331-332.)

By removing jurors who did not say that they were unalterably opposed to the death penalty or that they would follow their beliefs instead of the law, the trial court committed constitutional error. The jurors merely replied honestly when asked, under pressure, whether they could consider death in an artificial set of circumstances and without full benefit of the facts and the court's instructions. While this Court has deemed such responses unforgivably equivocal, they do not present jurors who would fail to "conscientiously apply the law and find the facts." The jurors should not have been excluded. Appellant respectfully asks this Court to reconsider it's prior rulings in this regard.

Further, this Court's rule making the trial court's decision binding whenever a juror makes conflicting or equivocal statements violates the Sixth Amendment requirement as stated by *Witt* and *Adams*, by essentially

abdicating its responsibility to review trial court rulings excluding prospective jurors on death qualification voir dire. Many, if not most, prospective jurors who are thoughtful and concerned about their ability to impose death as a juror will, at some point in their questioning, make a statement that could be interpreted as equivocal or give conflicting statements as their views evolve. Such statements, in a cold record, appear equivocal but may be merely the sound made by a mind struggling to reconcile personal belief and legal duty. As a reviewing court, this Court has a responsibility to do more than seize upon such statements out of context, couple them with assumptions about the trial court's superior reading of a juror's demeanor and rely upon them as reasons to be bound by the trial court's ruling. The Court, as a matter of due process, should make some independent review of the voir dire to determine whether the trial court's determination that the juror held views on the death penalty that would prevent or substantially impair his ability to impose death was, in fact, fairly supported by the record within the context of the questioning. For all of these reasons, appellant respectfully asks this Court to reconsider it's prior rulings in this regard.

VI

THE TRIAL COURT IMPROPERLY RETAINED JURORS WHO DID NOT RELENT FROM AUTOMATIC DEATH PENALTY VIEWS AND DID NOT EVENHANDEDLY APPLY THE *WITT* PRINCIPLES

A. Introduction

A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729)

During the voir dire process, several prospective jurors who had expressed automatic death penalty sentiments (hereafter ADP) were excused for cause. Others, however, were retained in the jury pool despite appellant's challenges that they be excused on account of their views. An examination of the responses given by these jurors, particularly when

contrasted with the voir dire responses of the cause-excluded death penalty opponents, discussed above, shows that the trial court was not even-handed in its applications of the *Witherspoon/Witt* principles.

B. The Jurors

In the motion to quash the venire, the defense compared the trial court's treatment of two jurors, one a death penalty supporter (Juror 50), the other an opponent (Juror 36), and charged that they were treated unequally. (6 CT 1511-1519.)

1. Juror 50

Juror 50's answers in her questionnaire showed her to be a strong supporter of the death penalty. This was reflected not only in her answers to penalty questions but in a comment to question 25 in the general section where she wrote "I believe in Capitol [sic] Punishment."[38] (9 CT 2597.) She also wrote that she had read about the case in the newspapers and that "he sounded to me to be guilty." (9 CT 2603.) Finally, she wrote that she was Baptist, and as such "We believe in Capitol Punishment." (9 CT 2605.)

During voir dire she told the trial court that she could vote for life

---

[38] This question asked "Do you have any religious or personal beliefs or opinions that would prevent you from sitting in judgment of another person? The question had spaces to check yes or no and asked the responder to explain a yes answer. Juror 50 checked the yes box and explained that answer by writing "I believe in Capitol Punishment" (9 CT 2597.)

without the possibility of parole in some circumstances, but she qualified her response as to this case due to what she had read about the case, which gave rise to strong feelings and led her to declare herself biased against Kekoa. The trial court pursued her claim of bias and she eventually agreed that she could set aside her bias and make her decision based only on evidence presented in court. Asked if she could see a reasonable possibility that she could ever vote for LWOP, she replied "I think so." (53 RT 10418-10422.)

Defense counsel asked Juror 50 if it was true that if she sat as a juror and had found guilt and the special circumstances to be proved beyond a reasonable doubt she would then automatically vote for the death penalty. She replied "I believe so." The trial court then interjected "Juror 50, you mean to tell me you would, after the guilt phase is over, before you heard anything else, you would vote for the death penalty, is that what you are saying?" The juror responded "No. I'm saying that I would choose death if I have the right information." Thereafter, the juror maintained that she would not vote for death without evidence, although she did admit that before hearing any evidence she was "leaning more towards the prosecution than . . . to the defense" (53 RT 10479-10482.)

2. Juror 36

Juror 36 wrote in his questionnaire that he strongly opposed the death penalty. Like Juror 50, he also checked the yes answer to question 25 and

wrote "I am opposed to the Death Penalty" as an explanation. He noted that his mother is a Quaker and taught him to oppose the death penalty, and that his own Catholic faith has the same position. He also concluded that he would always choose life without the possibility of parole if given the choice. (9 CT 2443-2453.)

On voir dire, the trial court made no attempt to rehabilitate Juror 36. The entirety of the voir dire follows:

> THE COURT: You indicated that you have some very strong convictions against the death penalty because of religious affiliation and that there was no way you could ever vote for the death penalty. Do you still feel that way?
>
> JUROR NUMBER 36: Yes, I do.
>
> THE COURT: Is there in your mind any reasonable possibility that you could ever vote for a death penalty, put someone to death?
>
> JUROR NUMBER 36: I don't think so. My beliefs are that I'm opposed to the death penalty.
>
> THE COURT: Well, I just want to make sure that we are both talking about the same thing. Some people are opposed to the death penalty but would find it to be an appropriate sentence in certain circumstances. Could you find that to ever be an appropriate circumstance given your belief?
>
> JUROR NUMBER 36: No. No, I could not.
>
> THE COURT: Thank you. You are excused.
> (53 RT 10404.)

In this example, the trial court treated similarly situated jurors quite

differently, accepting Juror 36's disqualifying remarks swiftly and discharging him before an objection had been made, while leading Juror 50 away from her disqualifying remarks. The contrast between the simple dialogue with Juror 36 compared to the drawn out process of rehabilitation with Juror 50, taken to the point of interjecting his rehabilitating efforts into defense counsel's questioning, shows an unequal hand, rehabilitating a juror who would otherwise be disqualified as ADP, while doing nothing of the sort for a juror who opposed capital punishment. For other jurors, the process presented fewer blatant instances of disparate treatment, but the trial court's response to challenges to anti-death penalty jurors differed from that afforded to death penalty supporters.

Compare the treatment of prospective jurors 24, 199, and 232, discussed in the argument V with the following jurors:

3. Juror 6

This juror wrote in her questionnaire that she supported the death penalty and explained that position with two reasons: first that a greater consequence might make some people think twice before committing a crime, and second that "prisons aren't much punishment", adding that prisoners have "quite a few" luxuries. Although she checked that she would not automatically choose either penalty, she discounted the use of background evidence in mitigation, noting "Everyone has hardships in their

past. Everything is a choice. There are no excuses for such behavior." (7 CT 2055-2057.)

In voir dire, the trial court asked about her responses concerning background evidence, and she confirmed what she had written, stating "I would be sympathetic to and feel bad for his upbringing, but I think what he did is a separate thing and he needs to be accountable for his actions regardless of that." When the trial court asked if she would reject an instruction that she was required to consider background evidence, she said that she would follow the law. (52 RT 10220-1021.)[39]

Responding to defense counsel, she admitted that if she were to sit in the penalty phase, she would probably "lean more towards the death penalty" (53 RT 10453-10457.)

Juror 6 was challenged by the defense based on her response that she would lean towards death in the penalty phase. The prosecution objected, noting that she had agreed to consider both sides. The trial court denied the challenge. (53 RT 10489-10490.)

---

[39] In a sidelight casting some light on her credibility, she responded in her questionnaire that she her neighbor "who is a close friend" was a Salinas Police officer. (7 CT 2049.) In voir dire, she admitted knowing the officer as a neighbor, but now claimed "I'm not very close to him at all." (52 RT 10221.)

4. Juror 139

Juror 139's questionnaire was unremarkable. She wrote that she would consider the death penalty, and wrote that she believed it was appropriate for certain crimes, "including murder" and believed it to be biblically based. She belonged to a religious denomination that had an opinion on the death penalty, but wished to discuss that in private. Otherwise, she indicated that she could choose either penalty. (12 CT 3500-3503.)

On voir dire, she indicated that she had asked to discuss her religious opinion on the death penalty because it was difficult for her to write about it. She explained that the death penalty was sanctioned in Leviticus, and that she believes that provides authority for its use. She agreed, however, that she would not impose the death penalty at all times. (55 RT 10828-10831.)

When defense counsel questioned Juror 139, she agreed that the Bible commanded that "if a man's life is taken, it should be redeemed with another man's life." Counsel then asked if she had found a person guilty of murder and special circumstances, she would feel that she was required to vote for death. Juror 139 responded "I believe I would have to do that. Yes." (55 RT 10908-10909.)

Following counsels questions to other jurors, the trial court again questioned Juror 139.

THE COURT: All right. Number 139, I need to clarify something. You had indicated to Mr. Martinez to his question that if you got to the penalty phase, that I believe you said your Biblical something would kick in and you would vote for the death penalty, did I understand that, what you said?

JUROR NUMBER 139: Yes, I would vote for the death penalty and he also said with -- was it with extenuating circumstances was that the --

THE COURT: Special circumstances.

JUROR NUMBER 139: Special circumstances, beyond a shadow of a doubt, if he was found guilty, with special circumstances, I believe I would stand for the death penalty.

THE COURT: Okay. I want to make sure I understand this clearly. Number one, the standard isn't beyond a shadow of a doubt. The standard to be applied is the law that I will give you and that is beyond a reasonable doubt.

JUROR NUMBER 139: Okay.

THE COURT: And we would tell you what a reasonable doubt is at a later time. What I need to know, however, what we all need to know, is whether or not your views indicate a bias for the death penalty.

JUROR NUMBER 139: Not at all.

THE COURT: So can you explain to me what you meant when you said that your Biblical views would kick in? That's what I am not understanding.

JUROR NUMBER 139: Well, if we went through the trial and the defendant was found guilty, according to your instructions, and then we went into the penalty phase --

THE COURT: And there would be further instructions there also.

JUROR NUMBER 139: Right. Which I would of course listen to because I feel it's my duty to be fair as humanly possible. I would have to know as other people in this courtroom would, without a doubt there was a reason to take a life but I believe I could do that. I mean I believe I could vote for the death penalty, if there were no doubt.

THE COURT: And if I were --

JUROR NUMBER 139: No reasonable doubt and the instructions led me to the point where I had to make that decision.

THE COURT: Well, you would follow the law that I give to you; is that correct?

JUROR NUMBER 139: That's absolutely correct.

THE COURT: Would your view of the law be clouded, however, in your vote in determining penalty by your Biblical views?

JUROR NUMBER 139: No.
(55 RT 10918-10921.)

5. Juror 230

Juror 230 had read about the case and wrote that it would be difficult for her to erase that from her mind. She said that she believed that Kekoa was guilty and that it would be hard for her to be impartial. She also wrote that she supported the death penalty and believed that certain crimes called for its use to remove the offender from society. Although she checked that she would not automatically vote for death, she also wrote that she would not consider any background evidence since "People cannot be allowed to use

them as excuses for their behaviors." (15 C T 4380-4383.)

In voir dire, Juror 230 began to contradict some of what she wrote in her questionnaire. She told the judge that while she still remembered what she had read about the case, she could put that out of her head and decide the case from what she heard in court. Asked about her answer that she had already formed an opinion that Kekoa was guilty, she explained that once a person had been arrested, she believed that "they have to be proven not guilty more than guilty. The trial judge explained that the law required a presumption of innocence and asked if she understood that. She replied "I understand" She also said that her views had changed and that she didn't feel partial to one side or the other. (RT 56 11105-11110.)

When the trial court asked Juror 230 to explain the type of unforgivable crime that would merit the death penalty, she responded "taking an innocent person's life. somebody who is probably age, young ages." Asked if she could, in those circumstances, foresee imposing LWOP, she replied that it depended on the circumstances, but that the defendant's background wouldn't enter into her calculations. She maintained her view that background information would merely be offered as an excuse and that the nature of the crime should determine the punishment. The trial court told her that the law did not allow for that approach, but had to weigh additional evidence "under the law of aggravation, mitigation" to make the

decision. Juror 230 replied that she could do that. (56 RT 11110-11112.)

She was not questioned by the prosecutor beyond a single question asked of all the potential jurors, but told defense counsel that once guilt had be proved beyond a reasonable doubt, she would lean toward death and that the defense would have to convince her to vote otherwise. (57 RT 11260-11261.)

The defense challenged Juror 230 based on her answers exposing her reluctance to consider background evidence as mitigating. The prosecutor responded that she had been unequivocal in her agreement to consider all of the facts before deciding. The trial court held that she was not substantially impaired from voting for either penalty. (57 RT 11275-11277.)

6. Juror 234

Juror 234 had both read about and seen television coverage regarding this case. From that he had formed an opinion that Kekoa was one of the people "that did the crimes." He also wrote that he strongly supported the death penalty, explaining "If the person did the crime he or she should pay for it." He checked that he would not automatically choose either penalty. (15 CT 4466-4471.)

On voir dire, Juror 234 stated that he had changed his mind about his feeling that Kekoa was guilty, and now understands that he is presumed

innocent until proven guilty. His feelings about retribution remained intact. Asked about his support for the death penalty, Juror 234 replied "Well, if they did it, they need to pay for it. And sir, I will tell you, if they shoot somebody that's how they die. If they hang somebody, that's how they should die. How they commit the murder is how they should go." He also explained that he knew that the law didn't allow for those responses, and explained that was just how he felt. (57 RT 11218-11220.)

Asked about the two choices of penalty that could arise, Juror 234 explained: "Well, if he proven to have done it without no doubt, the death penalty. If there is a waiver, could be, may not, the it's imprisonment for life." Asked to explain his answer, Juror 234 said "If the jury votes on life imprisonment, then I will go along with it." He also said that he did not mean that he would just make the choice that others made. He also explained that he would consider the person's background to see how they treated other people. (57 RT 11220-11223.)

Questioned by defense counsel, Juror 234 said that if the charges had been proved beyond a reasonable doubt, there was still a chance he would not vote for death, but it would be up to the defense to prove that to be the acceptable punishment. (57 RT 11261-11262.)

The defense challenged Juror 234 for cause, arguing that his responses, particularly regarding his attachment to the idea that the crime

determines the punishment and his apparent inability to realistically consider a LWOP verdict, disqualified him. The prosecutor responded that he had specifically said that he would not automatically vote for either penalty. (57 RT 11281.)

The trial court found the juror's statement that he would consider both penalties to be genuine and honest, and denied the challenge. (57 RT 11281-11282.)

C. The Trial Court Erred by Rejecting Appellant's Challenge that These Jurors were Impermissibly Biased Towards Imposing a Death Sentence

1. Applicable Law

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. Const., Amend. VI.) The Fourteenth Amendment extended the right to an impartial jury to criminal defendants in all state criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) In addition, the Due Process Clause of the Fourteenth Amendment independently requires the impartiality of any jury empaneled to try a cause. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 726.)

Whether a prospective capital juror is impartial within the meaning of the Sixth and Fourteenth Amendments is determined in part on the basis of

their opinions regarding the death penalty. A prospective capital juror is not impartial and "may be excluded for cause because of his or her views on capital punishment [if] the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Witt*, 469 U.S. at p. 424; citing *Adams v. Texas*, *supra*, 448 U.S. at p. 40.) A prospective juror who will automatically vote either for or against the death penalty regardless of the court's instructions will fail to consider in good faith evidence of aggravating and mitigating circumstances. Such a juror is not impartial and cannot constitutionally remain on a capital jury. (*Witherspoon*, *supra*; *Morgan v. Illinois*, *supra*, 504 U.S., at pp. 728, 733-734.)

As previously noted, in *Witherspoon,* the United States Supreme Court held that capital-case prospective jurors may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless those jurors' views would prevent them from judging guilt or innocence, or would cause them to reject the death penalty regardless of the evidence. Disqualification is permissible only if such a prospective juror makes this position "unmistakably clear." (391 U.S. at p. 522, fn. 21.)

That standard was amplified in *Witt*, where the court, adopting the standard previously enunciated in *Adams v. Texas*, *supra*, 448 U.S. at p. 45, held that a prospective juror may be excused if the juror's voir dire responses

convey a "definite impression" (*Witt, supra*, 469 U.S. at p. 426) that the juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (Id. at p. 424.) The *Witt* standard applies here. (*People v. Avena* (1996) 13 Cal.4th 394, 412.)

Witt requires a trial court to determine whether a potential juror would be impaired. (*Witt, supra*, 469 U.S. at p. 424.) This Court's duty is to

> [E]xamine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties . . ." was fairly supported by the record.
> (*People v. Miranda* (1987) 44 Cal.3d 57, 94, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 176.)

2. This Issue Was Not Waived For Failure to Exhaust Peremptory Challenges

To preserve the right to assert on appeal that the trial court wrongly denied a challenge for cause, a defendant must (1) exercise a peremptory challenge to remove the juror in question, (2) use all of his or her peremptory challenges, and (3) communicate to the court dissatisfaction with the jury selected. (*People v. Crittenden* (1994) 9 Cal. 4th 83, 121, *People v. Seaton* (2001) 26 Cal. 4th 598, 637.) Here, counsel both objected and expressed his disapproval with the jury. Counsel did not, however, exhaust all peremptory challenges but used 19 of his 20. Counsel recognized the requirement to use all of his peremptory challenges and explained this failure

as the result of a cruel Hobson's choice, to use the final challenge and face a jury even more likely to vote death due to the answers given by the next jurors to be called into the box, or to prevent this by accepting the jury as constituted. Counsel thus chose what appeared to be the lesser of two evils and accepted (but did not approve of) the jury as constituted. (See 59 RT 11696-11699.)

The Court's procedural hurdle requiring exhaustion of peremptories as a prerequisite for retaining the *Witt* issue on appeal presents an "intolerable" dilemma that cannot be imposed in this circumstance. (See *Simmons v. United States* (1968) 390 U.S. 377, 394 ["However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."].)

This Court has, in another context, recognized that jury selection is a

unique process in which counsel's evaluation of the best composition of jurors is undergoing constant change:

> . . . Moreover, the selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empaneled. As we noted in People v. Johnson (1989) 47 Cal.3d 1194, 255 Cal.Rptr. 569, 767 P.2d 1047: "[T]he particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors." (Id. at p. 1220, 255 Cal.Rptr. 569, 767 P.2d 1047.)
>
> Ultimately, an advocate picking a jury is selecting a committee to decide the case. In addition to each panelist's individual characteristics, the group must be able to work together with courtesy and dispassion to reach a complex result with substantial consequences. An advocate is entitled to consider a panelist's willingness to consider competing views, openness to different opinions and experiences, and acceptance of responsibility for making weighty decisions. Once empaneled, the jury wields tremendous power over the outcome of the case. Even the opportunity to question each panelist individually for the few minutes allotted provides only a glimpse into the panelist's thoughts, decision making ability, experiences, and willingness to discharge the panelist's important duty. Each juror becomes, to a certain degree, a risk

> taken. Voir dire is a process of risk assessment. As the Supreme Court observed, "potential jurors are not products of a set of cookie cutters." (*Miller-El II*, *supra*, 545 U.S. at p. 247, fn. 6, 125 S.Ct. 2317.)
> (*People v. Lenix* (2008) 44 Cal.4th 602, 623-624)

The imposition of a rigid requirement of exhaustion of peremptory challenges puts counsel to the unconscionable choice between engaging effectively in the vital process of choosing a jury, so aptly described in the preceding passage, or preserving a constitutional violation for appeal. This mirrors the "intolerable" choice condemned in *Simmons* and should be abandoned.

Error in failing to excuse a juror for cause when the juror has stated that he or she would automatically vote to impose the death penalty, where sequestered questioning took place, is harmless unless a defendant exhausts all peremptory challenges in selecting the jury, and a juror to whom the defendant objects remains on the panel. (*People v. Coleman* (1988) 46 Cal.3d 749, 769-771; *Ross v. Oklahoma* (1988) 487 U.S. 81, 89.)

Here, counsel should be excused for failure to exercise all 20 peremptory challenges due to the circumstances described above, and to counsel's continued objection to the jury composition. Similarly, as shown below, the error is not harmless even though none of the jurors who were challenged was sworn as a trial juror or alternate.

3. The Trial Court's Unequal Application of the *Witt* Standard Resulted in the Improper Denial of Cause Challenges to Jurors Who Would Not Realistically Consider Life Without Possibility of Parole as a Sentencing Choice

All of the jurors identified above delivered similar responses regarding their willingness to apply the law as did the jurors who showed reluctance to impose the death penalty. None went through the questionnaire/voir dire process without altering their positions. The trial court's treatment of them, however, was different. Jurors who were reluctant to impose the death penalty were considered equivocal, while jurors who had difficulty seeing how background factors could be mitigating and who believed that justice should be on an eye for an eye footing were accepted when they simply agreed to "consider" all of the penalty evidence they would receive.

This disparate treatment can be traced, some extent, to the trial court's understanding of the process revealed in a passing statement that the purpose of the voir dire is to "do a death qualification, not a LWOP qualification." (56 RT 11007.) Although the trial court on more than one occasion correctly iterated the *Witt* standard, this comment showed that his concern was much more toward making sure that jurors were able to consider death, than making sure that they would be unimpaired in their ability to apply the law and have equal capacity to reach either verdict.

In determining whether a juror is biased, "deference must be paid to the trial judge who sees and hears the juror." (*Witt*, 469 U.S. at 426.) The question is not whether the trial judge was wrong or right in his determination of impartiality, but merely whether his decision was "fairly supported by the record." (See *Witt*, 469 U.S. at 433 [internal quotations omitted].) Under the applicable *Witt* standard, the record here does not support the trial court's conclusion that the jurors could follow all of the court's instructions, particularly those regarding the consideration of background mitigation evidence.

Instead, as shown above and in the previous argument, the record shows that the trial court applied different standards in the application of the *Witherspoon/Witt* rules that resulted in the improper inclusion of ADP jurors in the venire, despite the disqualification of anti-death penalty jurors who expressed a greater willingness to consider applying the death penalty than the ADP jurors did towards applying LWOP. Thus, numerous persons were allowed to remain on the venire despite having expressed strong pro-death views that substantially impaired their ability to follow the court's instructions and their oath.

Although none of the identified jurors were sworn as trial jurors or alternates, the result of the trial court's unbalanced application of the *Witt* standard was that the pool of available jurors from which counsel could

select was improperly inclined to death's side of the scale. As shown in Argument V, the defense was forced to accept the least biased jury possible rather than face the prospect of exhausting all peremptory challenges only to allow the prosecution to further skew the jury. Even as it was, the trial court's uneven application of the *Witt* standard produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521) and violated appellant's rights to a fair and impartial jury, to due process of law, and to a reliable penalty determination. Consequently, the death sentence must be reversed.

-o0o-

VII

THE PROSECUTOR'S USE OF RACE-BASED PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS WAS REVERSIBLE ERROR

An objection to group bias underlying the exercise of peremptory challenges falls under the *Batson/Wheeler* rule that discrimination in the jury selection process violates the state and federal constitutions. (*Batson v. Kentucky* (1986) 476 U.S. 79 [hereinafter *Batson*]; *People v. Wheeler* (1978) 22 Cal.3d 258 [hereinafter *Wheeler*].) Here, the prosecutor used peremptory challenges to remove eighteen potential jurors. The defense objected to six of these, three of whom where African-American women, two more women were also ethnic minorities (one Asian and one Hispanic) and one to an Hispanic man. Each of these objections charged that the prosecutor appeared to be targeting racial minorities, and as the pattern developed, the objections included a demonstrated bias against minority women. Ultimately, the prosecutor excused half of the African American women who were in the venire.

The prosecutor's use of race and gender based criteria to exclude some jurors tainted the jury selection process, and created a structural defect requiring that Kekoa's convictions be reversed. (*Batson*; *Wheeler*; *Ford v. Norris* (8th Cir. 1995) 67 F.3d 162; *People v Battle* (8th Cir. 1987) 836 F.2d 1084, 1086 ["the striking of even 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 the striking of some black jurors."].)

A. The *Batson/Wheeler* Rule

The use of peremptory challenges to excuse prospective jurors on the basis of race violates the federal Equal Protection Clause (U.S. Const., 14th Amend.; *Batson*; *Powers v. Ohio* (1991) 499 U.S. 400, 409; *J.E.B. v. Alabama* (1994) 511 U.S. 127, 130-131; *United States v. DeGross* (9th Cir. 1992) 960 F.2d 1433, 1438-1439), and the California constitutional right to trial by a jury drawn from a representative cross-section of the community. (Cal. Const., art. I, § 16; *Wheeler*; *People v. Alverez* (1997) 14 Cal.4th 155, 192; *People v. Howard* (1992) 1 Cal.4th 1132, 1158.) Although springing from somewhat different constitutional roots, the *Batson* and *Wheeler* rules have been recognized to encompass the same principles, standards and procedures. (See *People v. Johnson* (2002) 30 Cal.4th 1302, 1313-1318; *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7; *People v. Turner* (1986) 42 Cal.3d 711, 717; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 811, fn. 1 (overruled on other grounds, *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677).)

The *Batson* decision described a three-step procedure for a trial judge faced with an objection that a peremptory challenge was the product

of bias. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162, 168; *People v. Thomas* (2011) 51 Cal.4th 449, 473-474.)

The defendant has the initial burden of making a prima facie showing that the state is using peremptory challenges for discriminatory reasons. (*Batson* at pp. 93-97; *Wheeler* at pp. 280-281.) To meet the first step burden, the defendant should make as complete a record as possible of the reasons for his/her suspicion of bias, show that the challenged juror is a member of a cognizable group, and raise "an inference of discriminatory purpose." (*Johnson v. California* (2005) 545 U.S. 162, 168; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1104.)

In the first-step evaluation, the trial court is obligated to make a clear statement of whether the objector has met the initial burden. If the trial court fails in this regard, and requests an explanation for the prosecutor's

challenge without first explicitly finding the defendant has made a prima facie showing of intentional discrimination, the prima facie showing requirement will be considered either moot or implicit in the request. (*Hernandez v. New York* (1991) 500 U.S. 352, 359; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1106; *People v. Welch* (1999) 20 Cal.4th 701, 745-746; *People v. Arias* (1996) 13 Cal.4th 92, 135-136; *People v. Sims* (1993) 5 Cal.4th 405, 428 ["in general, when the trial court inquires as to the prosecutor's justifications, the court has made 'at least an implied finding' of a prima facie showing"]; *Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327, 1329, fn. 2; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 839-840; *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 824; *Rankins v. Carey* (C.D. Cal. 2001) 141 F. Supp.2d 1231, 1239.)

When a trial court finds that a prima facie showing has been made that a member of a cognizable group was challenged because of group association, the burden of production shifts to the prosecution. (*Batson, supra,* at p. 96; *Purkett v. Elem* (1995) 514 U.S. 765, 769; *Wheeler, supra,* at p. 280; *People v. Ayala* (2000) 24 Cal.4th 253, 260; *People v. Box*, *supra*, 23 Cal.4th at pp. 1187-1188; *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047; *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1192-1194.) To satisfy this second step burden, the prosecution must offer a nondiscriminatory reason for *each* questioned challenge.

(*Batson, supra*, at pp. 97-98; *Wheeler, supra*, at pp. 280-281 *People v. Hayes* (1999) 21 Cal.4th 1211, 1284; *People v. Fuentes* (1991) 54 Cal.3d 707, 714-715.)

Upon the proffer of a facially race-neutral explanation, the third step of the analysis requires the trial court to evaluate both the appearance of discrimination and the justification for the challenge to determine whether purposeful discrimination has been shown. (*Purkett v. Elem, supra*, 514 U.S. at p. 767; *Batson, supra*, 476 U.S. at pp. 96-98; *People v. Ayala, supra,* 24 Cal.4th at p. 260; *Wheeler, supra*, 22 Cal.3d at pp. 282-283.) To do this properly, the trial court must make a sincere and reasoned evaluation of whether the prosecutor's given explanation is genuine or a sham. (*People v. Fuentes, supra*, 54 Cal.3d at pp. 718, 720-721; *People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

On appeal, a reviewing court analyzes the trial court's response to a *Batson/Wheeler* objection at the same three steps. The review of a first step finding that the defendant did not make a sufficient showing, the reviewing court will review the entire record of voir dire to determine whether the record suggests grounds upon which the prosecutor might reasonably have challenged the juror in question, and if it does so defer to the trial court's judgment. (*People v. Yeoman* (2003) 31 Cal.4th 93; *People v. Davenport*, (1995) 11 Cal.4th 1171, 1200.) Where, however, a

trial court applies an improper standard or makes a peremptory and unreasoned ruling without sincerely and objectively evaluating the merits of the objection, no such deference is warranted and the reviewing court should review the record de novo. (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077; see also *People v. Arias*, *supra*, 13 Cal.4th at p. 136 [no deference warranted when the trial court does not make a "sincere and reasoned" effort to evaluate the prosecutor's step three showing].)

Second, when the trial court has made an express or implied determination of a prima facie showing of group bias, a reviewing court must analyze the trial court's determination of whether the prosecutor has provided a facially race-neutral explanation for the challenge. Since the stage-two process does not require the trial court to probe the reason given other than to make sure that the justification does not inherently involve group bias, a reviewing court will afford deference to the trial court's decision, and reverse only upon a showing of clear error/abuse of discretion. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768.)

In step three, the appellate court reviews a decision that involved a factual determination as well as an application of the law. Because the trial court's stage three evaluation of the prosecutor's justification properly includes the trial court's observations of the juror in question and determinations of credibility, the appellate court will normally exercise

great restraint in reviewing the trial court's factual conclusions, and presume those findings to be correct. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 769; *People v. Arias*, *supra*, 13 Cal.4th at p. 136.) This deferential review is possible only so long as the trial court has made a "sincere and reasoned effort" to evaluate the justifications offered by the prosecutor. If it has, the appellate court will not reassess the prosecutor's good faith by conducting a comparative juror analysis. (*People v. Arias*, *supra*, 13 Cal.4th at p. 136.) In those cases where the trial court has failed in its duty to make the "sincere and reasoned effort" to evaluate the claimed *Batson/Wheeler* violation, however, the reviewing court has nothing to which to defer and must undertake its own juror analysis.

A failure of a trial court to properly respond to a *Batson/Wheeler* objection is a structural constitutional error. (*People v. Silva* (2001) 25 Cal.4th 345, 386 ["The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal. (Citations.)"].) Consequently, on appeal, a finding that exclusion of a even a single juror violated the *Batson/Wheeler* rule requires per se reversal of a criminal judgment. (*Batson* at p. 100; *Dawson v. Delaware* (1992) 503 U.S. 159, 169 (conc. opn. of Blackman, J.); *People v. Silva*, *supra*, 25 Cal.4th at p. 386; *Wheeler* at p. 283; *United States v. Bishop*, *supra*, 959 F.2d at p. 827.)

Here, the trial court erred in performing both first and third stage analyses.

B. Jury Composition and Selection, Generally

The jury selection began by culling panels of jurors for hardships that would prevent their service. (47 RT 9206- 49 RT 9678.) Jurors who did not request a hardship excuse and those whose hardships were rejected were given questionnaires to complete and a date to return for voir dire. (See 48 RT 9403-9444 [hardship procedure]; 7 CT 2018-2039 [questionnaire of Juror 001].) The jurors were then questioned in groups of 18. The trial court questioned the prospective jurors first, after which the prosecutor and the defense were allowed limited time to question the jurors and develop potential cause challenges. (See 52 RT 10213-53 RT 10500 [first day voir dire and cause challenges].) Once a sufficient number of potential jurors had been accepted, the parties began the process of exercising peremptory challenges. (59 RT 11668-11669.)

Ultimately, the prosecutor challenged 18 potential jurors, and two potential alternate jurors. (59 RT 11669-11696.) The defense made *Wheeler* objections to six of these challenges, none of which concerned potential alternates. All six objections were overruled. (59 RT 11669-11671; 11671-11675, 11675-11676, 11677-11682, 11685-11686, 11689-11690.)

C. The Challenged Jurors, the Challenges and the Rulings

1. Juror 20

Juror 20's questionnaire revealed that she was a 44 year old mother of three. daughters, two of whom were still teenagers in school. She worked as a manager for Pacific Bell, and had been employed there for 23 years. Her husband worked as an Engineer for PG & E. She had lived in Seaside for 23 years and had served on one previous jury (which did not return a verdict). She had no unpleasant memories of her prior service and agreed to follow the law as instructed without hesitation. She had friends and relatives who worked in law enforcement, and had considered training as a legal secretary. She also had a nephew who had been prosecuted for and convicted of theft and drug charges, and thought that he had been treated fairly in the system. (8 CT 2196-2208.)

In the death penalty section of the questionnaire, Juror 20 checked the box indicating that she opposed the death penalty.[40] She explained her choice by writing "I oppose the death penalty because I believe that many innocent people have been put to death wrongfully." (8 CT 2209.) She wrote that she believed that life without parole was a more severe

---

[40] There were five options available: Strongly support, support, will consider, oppose, strongly oppose. It appears that Juror 20 had initially checked "will consider", blotted that out and then checked "oppose". (8 CT 2209.)

punishment than death, and checked a box indicating that she would not automatically vote for either penalty, but vote according to the evidence presented. (8 CT 2209-2212.)

During the trial court's voir dire, Juror 20 explained her previous jury service, recalling vaguely that the circumstances had involved a killing in a labor camp. She also recalled that the jury was unable to complete deliberations because several jurors became sick or injured. (52 RT 10250-10251.)

When questioned about her death penalty responses, Juror 20 replied that she had thought about them over the weekend. She said that she still opposed the death penalty, but clarified that "if the specifics are there, I would be able to judge fairly on which way to go." Ask if this meant that there was a reasonable possibility that she could vote for the death penalty, she replied "That's correct." (52 RT 10253.) She also explained that despite her answer that information about Kekoa's background and upbringing would not be of any help in deciding the penalty, she would listen to and consider such evidence. She concluded ". . . there are things that possibly could be said that would change my mind. But I mean I'm not a close-minded person. I try to be fair about everything I do." (52 RT 10254.) Neither the prosecutor nor defense counsel asked Juror 20 any questions.

The prosecutor exercised his first peremptory challenge to remove prospective juror 20. (59 RT 11669.) Before she left the courtroom, defense counsel asked her to stay and to approach the bench. In a sidebar discussion, counsel asserted that the challenge violated *Wheeler*, charging that the potential juror, an African-American woman, had said nothing during voir dire to indicate that she was predisposed to either side. Co-counsel added that of the several hundred women who passed through the jury selection process, this was one of only six African-American women. (59 RT 11670.)

The trial court found this sufficient to satisfy the first prong of the *Batson/Wheeler* procedure and asked the prosecutor to state his reasons for the challenge. (59 RT 11671.) The prosecutor responded that the prospective juror had checked a box on her questionnaire stating that she opposed the death penalty, that she explained in voir dire that she thought that innocent people had been executed, that she considered life a more severe punishment than death, and that she sat on a previous hung jury. The prosecutor went on to aver that he had an absolute policy of challenging people who had served on a hung jury. (59 RT 11671.)

After the defense responded that the potential juror had not actually served on a hung jury, the trial court held "It's a proper use of peremptory challenge." (59 RT 11671.)

2. Juror 59

Prospective juror 59 was a 51 year old married African-American woman with three children adult children. She had been a teacher and was working as a credit card fraud investigator. Her husband was working as a sales manager. She held a Masters degree in health administration and had lived in Salinas for 24 years. She was a Jehovah's Witness who did not believe in sitting in judgement of others, but could follow the law as instructed even if it differed from what she thought it should be. Although her husband had once been convicted of drug possession, she thought he had been treated fairly and he had been in recovery from his addiction for four years. She had no firearms at her house, and did not want any. She wrote that she had been aware of the crime when it occurred, and had discussed it with family or friends, commenting "the people involved in this act of violence did not have any regard for human life at the time." She concluded the general portion with an assertion that Kekoa was innocent until proven guilty. (9 CT 2679-2689.)

She declared herself neutral as to the death penalty, then wrote that she could not sit as a juror to sentence another person to die. She then checked that she would not automatically vote for either penalty, but would consider the evidence and vote accordingly. In making the decision, she wrote that it would be helpful for her to hear evidence of Kekoa's

background, noting that "his possible substance abuse or anger abuse put him in this position." (92 CT 2691-2693.)

When questioned by the trial court about the seeming conflict between her religious beliefs and her neutrality on the death penalty, Juror 59 clarified that she would not want to sit in judgment of another, but if called into jury service would obey the laws of the land. "If I had to sit as a juror, I would have to follow the law. But as a private citizen, I would not want to do that." (53 RT 10430-10431.) Asked if it was a reasonable possibility that she could vote for death if she sat on the jury, she replied "If the evidence warrants it, then I would have to do that." (53 RT 10431.)

The prosecutor asked Juror 59 only one question, a question he asked of every potential juror in that panel, "If in a murder case, you were part of a jury that found the defendant guilty of murder with special circumstances, could you thereafter, if you felt it was appropriate, return a verdict of death?" Juror 59 replied "I support it." (53 RT 104465-10446.) Defense counsel also addressed Juror 59's religious beliefs and confirmed that she would follow the law if selected to serve on the jury. She also agreed to apply the law regarding the selection of penalty and answered "True" when asked if she felt "capable of giving either penalty that you felt was justified." (53 RT 10485-10486.)

Juror 59 was the target of the prosecutor's second peremptory

challenge. Defense counsel asked that she remain in the room as counsel approached the bench. There, the trial court asked "Same issue?" When counsel confirmed that it was, the judge turned to the prosecutor, saying simply "Mr. Alkire." The prosecutor explained his peremptory by relying on the juror's checkbox answer and explanation in her questionnaire and his previous experiences with Jehovah's Witnesses. He also noted Juror 59's answer to the check list question concerning general views of the death penalty was the only one to create a new category, "neutral", and that she had written there about not being able to sentence another human to die. The prosecutor concluded that he had discussed the juror with his investigator who thought that the juror had created "an artificial distinction between a reference to the four walls of the courtroom and her religious views" He concluded that the investigator did not believe that she was being truthful in that regard, and the prosecutor himself had a "bad feeling" about her. (59 RT 11674-11674.)

The trial court found that the challenge was not race based. (59 RT 11675.)

3. Juror 47

This potential juror was a 33 year old Latino man who was engaged to be married. He had been employed by the Salinas School District for three years. He held an AA degree and had studied business. His sister

worked as a correctional officer with the California Department of Corrections. He had once been arrested and convicted of false imprisonment and battery. (9 CT 2525-2537.) Juror 47 had not formed any fixed opinions about the death penalty, and had not spent any time thinking about it. His answers all indicated that he had not formed any determination to choose one penalty over the other, and that he would consider both. (59 CT 2538-2541.)

When asked by the trial court how he felt about the death penalty, Juror 47 replied "If I was on the jury and the evidence and your guidance as to what the law was determine that that was what was supposed to be, then I would probably vote yes. But if it was the other way, probably no." Asked if it was a reasonable possibility that he could vote to impose death, Juror 47 replied "Yes." (53 RT 10409.) The trial court also probed his conviction and learned that he had been prosecuted by the Monterey County District Attorney's office. Juror 47 said that he now considered the experience particularly valuable in his maturation, and that the probation order to seek counseling was "probably the best thing for my twenties that could have ever happened to me." Asked if he had any axe to grind against law enforcement or the district attorney's office, he replied "No. In fact, I think that we are lucky to have them." (53 RT 10411.)

Like Juror 20, the prosecutor asked Juror 47 only whether he could

return a death verdict if appropriate. Juror 47 replied "Yes." (53 RT 10445-10446.) Similarly, the defense asked only if there was any reason why he could not be fair and impartial to both sides in the case. Juror 47 replied "No." (53 RT 10479.)

When Juror 47 was challenged, the defense asked that he remain while the parties approached the bench. The trial court first asked "Just need to ask one question. Is this going to happen on every juror now?" Defense counsel replied "On the minorities." Counsel then explained the challenge:

> This is a Latino man of 33 years of age. Answered his questions in the questionnaire, he would consider the death penalty. He was not automatic in either direction. Doesn't have anything I recall as being particularly pro to the prosecution or negative to the defense. And he gave as much as anything, your Honor, the people of Latin, of Latino, extraction have a right to be on a jury in this country and this right is not only our client's right to have a cross-section of the community but his right to be on the jury or other juries. (59 RT 11676.)

The trial court ruled that the defense had not made a prima facie showing to require the prosecutor to explain his challenges. (59 RT 11676.)

4. Juror 32

Prospective juror 32 was a 44 year old African-American woman, married with four children and employed as a finance supervisor

by the city of King City. Outside of a sister employed as a correctional officer in Maryland, and acquaintances with local police officers at work, she had little contact with either law enforcement or legal professionals. Fifteen years earlier, her brother had been arrested in Maryland but otherwise she had little contact with the criminal justice system. (8 CT 2371-2383.)

Juror 32's opinions on the death penalty were likewise unremarkable. She chose the "will consider" option when asked for her general views on the death penalty, and explained "My position on the death penalty would all depend on the case, evidence and the crime." Regarding the relative severity of LWOP versus the death penalty, she considered the death penalty "an easy way out" and wrote "they should be made to live the rest of their life to think about the crime." She noted that she would not automatically choose either penalty, but did check the box indicating that she would hold the prosecution to a higher standard of proof in the guilt phase because of the possibility of the death penalty. Finally, she indicated that penalty phase information about Kekoa's background would not be helpful in her sentencing choice. (8 CT 2384-2387.)

The trial court began his questioning by asking Juror 32 whether she

now understood the question.[41] The Juror 32 responded that she now understood the question differently, and would not hold the prosecution to any higher standard of proof. (52 RT 10289-10290.) The trial court also asked about her brother's criminal difficulties. She responded that she had no qualms about talking in public about that subject, and explained that she had requested privacy on the questionnaire because she was not familiar with the process. She related that she had not seen that brother for about 19 years, and believed that he had been treated fairly. (52 RT 10291-10292.) Questioned about her views of the relative severity of punishments, Juror 32 confirmed that she considered LWOP more severe than death, and that she leaned toward LWOP for that reason. She had no hesitancy, however, in affirming that in an appropriate case, she could vote for the death penalty, depending upon the evidence. (52 RT 10293-10294.)

---

[41] Several prospective jurors in the same group did not understand the question concerning burden of proof. The question read: "Would you hold the People to a higher standard of proof (i.e. higher than proof beyond a reasonable doubt), in the first phase of this case (when guilt is decided) because it is a case in which the potential penalty is death?" (8 CT 2385.) The trial court first addressed the issue in detail with potential juror 6, and explained the nature of a burden of proof in more detail. (52 RT 10219.) He added further detail with another juror. (52 RT 10246.) By the time he reached Juror 32, the trial court referred back to those discussions to determine if the potential jurors who answered "yes" to the question had misunderstood and wanted to change their answers.

The prosecutor had no specific questions for Juror 32. When he asked as part of his general concluding question whether she could return a verdict of death against this defendant, she replied that she could. (53 RT 10466.) Defense counsel focused on Juror 32's statement that she believed LWOP to be the more severe penalty, and determined that she would not vote for death if she believed that mitigating evidence outweighed aggravating evidence. Defense counsel also reviewed her willingness to apply either penalty, to which she responded "I could go either way. Depends on the evidence." (53 RT 10466-10468.)

When the prosecution challenged Juror 32, defense counsel objected and asked that she stay in the courtroom. At sidebar, counsel noted that the juror presented no obvious disqualifications and no apparent predisposition toward any outcome. Counsel also noted that of the eight peremptory challenges the prosecutor had used to that point, three were to African-American women and that there was only one remaining African-American in the pool of potential jurors. (59 RT 11678-11679.)

The prosecutor immediately responded with reasons for his peremptory challenge:

> This is a woman who had answered the question, juror stated she is not really sure if she could vote for the death penalty. She is a person whose brother was himself prosecuted for assault and armed robbery. I'm always concerned when jurors have close relatives like that who themselves have been

> prosecuted on serious offenses. In addition, she is someone who feels the death penalty is an easy way out. . . . Between this feeling that that's the easier way out and the fact that she specifically expressly said she is not really sure if she could vote for the death penalty, I am extremely uncomfortable with someone sitting on the jury who herself can't vote for death. (59 RT 11679.)

The defense replied that the prosecutor's use of four of his first eight challenges to exclude racial minorities sent a "chilling message about their lack of equality", noting that the juror's answers were neutral to both sides, and was clearly a capable juror. The prosecutor retorted that most of the people on the panel were minorities that he was not singling anyone out. The prosecutor added that race was not an issue in the case, the victims were not black and there was on ly one black witness. (59 RT 11679-11680.) The trial court pointed out that the question was not whether the case had racial issues but whether the prosecutor was using race as a criteria for his peremptories. (59 RT 11680.)

The defense again noted that to an outside observer, the prosecutor's developing pattern of challenges signaled that race was indeed a factor in the challenges and that qualified minorities were being excused for no other apparent reason. The prosecutor responded that "no juror has a right to the courtroom" who was unwilling to return an appropriate decision in the case. He then attacked counsel for making a "reflexive, knee-jerk objection" noting that there was a *Wheeler* objection to his very first peremptory

challenge, and that there had been four such challenges in his eight peremptories. (59 RT 11681-11682.)

The trial court ruled "I do not believe after listening to Mr. Alkire that this is race based." (RT 11682.)

5. Juror 156

Prospective juror 56 was a 46 year old Hispanic woman with three adult children who worked as a senior telephone operator for a local medical center. Her questionnaire answers were primarily unremarkable, although she noted that she had once been removed from her home by SWAT officers conducting a raid on a neighboring house. (13 CT 3641-3653.)

In the penalty portion of the questionnaire, she checked that she would consider the death penalty, and noted that with age and maturity her views about the death penalty have changed. Beside the spaces allowing for explanations of her feelings, she wrote "private". She checked that she would not automatically vote for either penalty, and would find evidence of Kekoa's background helpful in the decision. She, like others, checked the box suggesting that the prosecution should be held to a higher standard in capital cases. (13 CT 3654-3657.)

The trial court's questions clarified that she had misunderstood the burden question and that she would not impose any burdens other than

those the law requires. Juror 156 agreed that she did not need to explain her death penalty views in private, and said that she would only consider the death penalty "after every avenue of testimony and evidence was exhausted". She told the judge that deciding for death would be hard, but it would also be possible. (55 RT 10846-10847.)

In another arena, Juror 156 asked for a private hearing concerning knowing someone in jail. At an in camera hearing, she disclosed that her nephew, the son of a Court employee, had been arrested and was currently in jail awaiting trial. She was hesitant to disclose the fact in open court because of her sister-in-law's position, not knowing if the fact was known at the courthouse. She had no particular information about his case and would keep the cases separate. (55 RT 10848-10851.)

Back in the courtroom, Juror 156 explained that her failure to answer a question concerning an automatic vote to avoid a penalty phase came from her inability to understand the question. The trial judge then asked if she objected to the death penalty and she replied "No." (55 RT 10851-10852.)

The prosecutor asked Juror 156 to explain her answers to the judge concerning application of the death penalty. She explained that she knew that they were dealing with someone's life and that she took that "with the utmost seriousness" and that with someone's life in the balance "you better

make sure that that's exactly, you know, what you have got everything, all you ducks in a row, you know in your heart that that's what's got to be done." She went on to explain that she could decide for death, but would not do so lightly. (55 RT 10904-10905.) The defense did not question this potential juror.

When the prosecutor challenged Juror 156, defense counsel asked her to remain and approached the bench. At sidebar, counsel noted that this challenge was the fifth to an ethnic minority out of thirteen total, and that the resulting jury would be "overwhelmingly non-minority." Counsel noted that the prosecutor had earlier claimed that there was a majority of minorities in the panel at first, and that the challenges had resulted in a jury that was primarily free of minorities. The prosecutor replied that this was only his second challenge to a Hispanic juror, then went on to explain his challenge. He claimed that the juror was "extremely weak on the death penalty", and would only vote for death after every avenue had been exhausted, and that the choice for death would be very difficult. The prosecutor did not believe that she would return a death verdict and excused her for that reason. (59 RT 11685-11686.)

The trial judge ruled that the challenge was not race based. The judge also commented "Appears to me that what may be going on here is the defense is purposely passing perempts in order to get to certain jurors

who may be racially motivated." (59 RT 11686.) Counsel responded that the trial court's supposition was not correct. (59 RT 11679-11680.)

6. Juror 200

Prospective Juror 200 was a 40 year old woman from the Philippines who was married and had two school age children. She was a full time scientist at a clinical laboratory and also taught part-time at Hartnell College. But for her misunderstanding of question 27 regarding the burden of proof (the same question that confused many other jurors), her questionnaire answers to the general questions were unremarkable. (14 CT 4038-4050.)

In the penalty portion of the questionnaire, Juror 200 explained that she would consider the death penalty, felt that all factors should be considered before making the choice for death, and that the death penalty "must really be warranted" (14 CT 4051, emphasis in original.) She explained that she was aware of news reports concerning cases in which the death penalty appeared to be warranted, but it was later determined that the defendant was innocent. In response to the question asking whether death or LWOP was the more severe punishment she wrote: "Being in prison is not exactly living a 'quality' life. Also watching behind your shoulder or living in fear that other inmates might kill you is probably very difficult." (14 CT 4051.) She concluded that she was not predisposed toward either

penalty and would consider Kekoa's background in her sentencing choice. (14 CT 4052-4054.)

The trial court's voir dire of Juror 200 was limited to two areas. The judge first sought more detail about the person she knew who had been in jail, and learned that her husband had been arrested once, about ten years before they met. The judge also asked about her death penalty answers. When she mentioned having heard about innocent people who had bee sentenced to death, the trial judge told her that television was fiction and asked what sort of things would, in her mind, warrant the death penalty. The prospective juror replied that she needed to be sure that she was convinced of guilt beyond a reasonable doubt. Asked if she would require any higher burden than that, she concluded that she would not. (56 RT 11029-11031.)

The prosecutor did not question Juror 200, and the defense asked only if she could vote for LWOP if warranted. She agreed that she could. (57 RT 11250.)

When the prosecutor made a peremptory challenge, the defense asked the prospective juror to remain in the courtroom and approached the bench. At sidebar, defense counsel cited *Wheeler* and explained that not only was Juror 200 a minority (described as Asian, but actually a Pacific Islander), she was female. The trial court asked if this was a gender based

objection, and the defense agreed that it was. The defense charged that of the prosecutor's 16 challenges, twelve had been to women. The prosecutor replied that seven of the eleven in the jury box were currently women. The trial court found no prima facie showing of discriminatory purpose, and overruled the objection. (59 RT 11689-11690.)

D. The Trial Court Erred in Applying the First Stage Test to the Challenges to Jurors 47 and 200

As shown above, the trial court's first task when presented with a *Batson/Wheeler* objection is to determine whether the defense has presented a prima facie showing that the prosecutor has exercised a peremptory challenge due to an impermissible bias. (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1309; *People v. Fuentes*, *supra*, 54 Cal.3d at p. 716.) In accomplishing this task, the trial court's duty is simple and straightforward: to make a sincere and reasoned evaluation of the facts, and a clear and unambiguous ruling. (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1323; *People v. Fuentes*, *supra*, at p. 716, fn. 5.)

Here, the trial court expressly or impliedly found that a prima facie showing of bias had been made for all but two of the challenges. As shown above, the analysis of those challenges shifts to a second and third stage review. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1106; *People v. Arias*, *supra*, 13 Cal.4th at p. 135.) As to potential jurors 47 and 200,

however, the trial court expressly found that there had been no prima facie showing.

This Court traditionally utilizes a deferential standard of review when evaluating a trial court's finding that a prima facie case of discrimination has not been established and reviews the entire record for evidence to support the trial court's ruling. (See *People v. Howard, supra*, 1 Cal.4th at p. 1155.) However, the rulings were made by the trial court prior to the United States Supreme Court's holding in *Johnson v. California* (2005) 545 U.S. 162, 168, finding the then prevalent California iteration of the first step analysis to be overly restrictive, and reiterating that the defendant's first step burden was merely to show an inference of discriminatory purpose.[42] Because the trial court did not state the nature of the standard it had applied to the first stage analysis, this Court should assume that the judge applied the then appropriate test requiring a showing that it was more likely than not that the prosecutor had a discriminatory purpose to the challenge. (*People v. Crew* (2003) 31 Cal.4th 822, 859.) Because it is likely that the trial court applied an overly restrictive test to assess the first stage showing, this Court should conduct a *de novo* review.

---

[42] The Supreme Court used the dictionary definition of inference "a 'conclusion reached by considering other facts and deducing a logical consequence from them.' " (*Johnson v. California, supra*, 545 U.S. at p. 168, fn. 4.)

(*People v. Zambrano*, *supra*, at p. 1105.)

There was a sufficient inference of discriminatory purpose shown with each of these jurors to satisfy the first stage burden. Juror 47 was a young Latino Man who, more than most of the other jurors, had characteristics in common with Kekoa, another young minority man. He presented no obvious disqualifying characteristics, and none of his responses to either general or death penalty questions were out of line with jurors accepted by the prosecutor. While he had been prosecuted by the Monterey County District Attorney's office, he considered that experience an important positive turning point in his life. The lack of any apparent reasons for disqualification other than his race, coupled with the fact that the trial court had previously found reasons to suspect that the prosecutor was utilizing race as a reason to exercise peremptory challenges, is sufficient to raise an inference that this challenge was racially motivated.

The inference of discriminatory purpose found in the challenge to Juror 200 is even stronger than that to Juror 47. At the time of her challenge, the defense had recognized that the prosecutor appeared to be singling out women in general, and specifically middle class, middle aged minority women. Juror 200, like Juror 47, presented no obvious characteristics that would call for a peremptory challenge other than her gender and racial characteristics. The defense pointed out that the

prosecutor had used the bulk of his challenges to disqualify women, and the court was aware that the prosecutor had made suspect challenges to other minority women. Given these statistical and practical factors, the showing was sufficient to raise an inference of discriminatory purpose and require the prosecutor to advance race neutral grounds for the challenge. Since neither of these jurors presented any qualities that would ordinarily draw a challenge, the challenges should be found to be discriminatory.

E. When Dealing With The Third Stage Analysis,The Trial Court Appeared to Merely Accept the Prosecutor's Explanations and Did Not Conduct the Required Evaluation of Those Explanations

The United States Supreme Court has described the trial court's duty of assessing the credibility of the prosecutor's proffered race-neutral reasons at the third stage of the *Batson* test as embodying the "decisive question" in the *Batson* analysis. (*Hernandez v. New York*, *supra*, 500 U.S. at p. 365.) As such, both this Court and the lower federal courts have recognized that the final step of the *Batson* analysis imposes a special obligation on the trial court to carefully evaluate the prosecutor's explanations for each questioned peremptory challenge. As this Court has explained, the trial court is "obligated to evaluate 'all the circumstances of the case' in the step three evaluation of whether the prosecutor's race-neutral reasons" for peremptorily challenging the prospective jurors

were "sincere and credible." (*People v. Reynoso* (2003) 31 Cal.4th 903, 925 [quoting *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280].)

Similarly, the federal courts have held that the trial court must conduct a meaningful and searching evaluation of the prosecutor's proffered reasons in order to properly discharge its obligations at the third step of the *Batson* analysis. As the Ninth Circuit has explained: "The trial court must not simply accept the proffered reasons at face value; it has a duty to 'evaluate meaningfully the persuasiveness of the prosecutor's [race]-neutral explanation[]' to discern whether it is a mere pretext for discrimination.'" (*Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101, 1108 [quoting *United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969].)

In *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830, the Ninth Circuit described the "ideal procedures" that a trial court should employ to evaluate a *Batson* challenge. (*Ibid.*) In order to facilitate appellate review, the Ninth Circuit said the trial court's "three-step inquiry" should be "clearly-delineated."[43] (*Ibid.*) As for the critical third step of the *Batson* analysis, the Ninth Circuit called this stage the "real meat of a *Batson* challenge." (*Ibid.*) "To fulfill its duty [at the third step], the

---

[43] See also *United States v. Joe* (4th Cir. 1991) 928 F.2d 99, 103 ("[T]he failure of the [trial] court to rule at each step of the *Batson* analysis deprives ... [a reviewing] court of the benefit of its factual determination and the reasons supporting its ultimate holding").

[trial] court must evaluate the prosecutor's proffered reasons." (*Ibid.*) The *Lewis* court noted that because the determination at the third stage assesses the credibility of the prosecutor's proffered reasons, the trial court's own observations are of "paramount importance." (*Ibid.*) However, the court noted, "[o]ther factors come into play in a court's evaluation of a prosecutor's reasons as well." (*Ibid.*)

> For example, if a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination. Similarly, a comparative analysis of the struck juror with empaneled jurors "is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." (Footnote/citation.) After analyzing each of the prosecutor's proffered reasons, our precedent suggests that the court should then step back and evaluate all of the reasons together. The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge.[44] (Footnote/citation.)
>
> A court may enlist the help of counsel in order to evaluate "the totality of the relevant facts" thoroughly. Particularly when afforded the opportunity to review a transcript of the jury selection proceedings, defense counsel may be able to point to weaknesses in the prosecutor's proffered reasons demonstrated by the record. [...]

---

[44] At this point in its opinion, the Ninth Circuit observed in a footnote that an argument could be made "that a court *must* allow counsel to present argument during the step-three inquiry, unless the record clearly shows that a decision in the defendant's favor is warranted. After all, the defendant bears the ultimate burden of persuasion [...], and has only been allowed to establish a prima facie case before step three." (*Lewis v. Lewis*, *supra*, 321 F.3d at p. 831, fn. 27 [italics added].)

> Thus, a court engaging in the third step of *Batson* has various tools at its disposal in order to fulfill its duty to determine whether purposeful discrimination has occurred. In an ideal setting, a court would use most, if not all, of these tools in evaluating a *Batson* motion.
> (*Lewis v. Lewis*, *supra*, 321 F.3d at pp. 830-831.)

In this case, the manner in which the trial court addressed the *Batson/Wheeler* motions fell far short of the "ideal procedures" set forth in *Lewis*. As a preliminary matter, for the bulk of the challenges the trial court's analysis was not "clearly-delineated." In those instances, only two steps of the *Batson* analysis are apparent from the record: a determination that the appellant had established a prima facie case and that the prosecutor had proffered explanations for the challenges which the trial court "accepted" and deemed "satisfactory."

Specifically, as to Juror 20, the trial court's response after hearing the prosecutor's justification was simply "It's a proper use of a peremptory challenge." (59 RT 11671.) Regarding Juror 47, the trial court said only "I do not believe after listening to Mr. Alkire that this is race based." (59 RT 11682.) As to Juror 156, the trial court concluded "I didn't think that the exercise of his peremptory challenge is race based."[45] (59 RT 11686.)

---

[45] Here the trial court also added "Also appears to me that what may be going on here is the defense is purposely passing perempts in order to get to certain jurors who may be racially motivated." This comment indicates that the trial court was evaluating the challenges, at least in part, on his assessment of the defense tactics instead of their

The only challenge that the trial court addressed factually, concerned Juror 59, whose Jehovah's Witness faith drew scepticism from the prosecutor. The trial court's ruling, in its entirety was:

> This does not appear to me to be a race biased use of a peremptory challenge. I do remember quite will this particular juror in the questioning, in the court's questioning where she did make a differentiation between wanting to sit in judgment but could do that because she had to submit to the civil authorities under civil law. I do not see this as being race based.
> (59 RT 11675.)

In this ruling, the trial court simply affirmed that the juror had said that she could sit as a juror even though her religion forbade making judgments on others because this was a secular matter, not a religious one, and she was bound to follow secular law. The court did not purport to evaluate her credibility or the persuasiveness of the prosecutor's purported use of the same language to disqualify her. Thus while this ruling did refer to the trial court's recollection of the voir dire, it contained no more analysis of the prosecutor's justification that the more cursory rulings. None satisfy the requirements for making a sincere and reasoned evaluation of the prosecution's attempts to justify its challenges.

This case thus bears some similarity to *U.S v. Alanis* (9th Cir. 2003)

---

merits, and supports the analysis that the judge did not properly conduct a third stage review.

335 F.3d 965. In *Alanis*, the defense objected to the prosecutor's use of all six of her peremptory challenges to strike men from the jury. (*Id.* at p. 966.) The trial court found a prima facie case that the strikes had been exercised on the basis of the prospective jurors' gender and directed the prosecutor to provide reasons for her challenges. (*Id.* at pp. 966-967.) The prosecutor then "offered a gender-neutral explanation for striking each man." (*Id.* at p. 967.) After the prosecutor gave these reasons, the trial court denied defense counsel's *Batson* motion, with the explanation: "It appears to the court that the government has offered a plausible explanation based upon each of the challenges discussed that is grounded other than in the fact of gender of the person struck. The *Batson* challenge is denied." (*Ibid.*)

On appeal, the Ninth Circuit found that the district court had "properly conducted steps one and two of the three-step *Batson* process" but had erroneously failed to "proceed to the third step and to announce a deliberate decision accepting or rejecting the claim of purposeful discrimination." (*Ibid.*) The Ninth Circuit specifically rejected the argument that the district court, by ruling that the prosecutor's gender-neutral explanations were "plausible," had properly addressed step three of the *Batson* analysis:

> The government argues that the district court in fact conducted step three of the *Batson* process by deeming the prosecutor's gender-neutral explanations "plausible." But under *Batson* it is not sufficient for equal protection purposes that a trial court deem a prosecutor's gender-neutral explanations facially plausible. Rather, in determining whether the challenger has met his or her burden of showing intentional discrimination, the district court must conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be available, as we noted above. *Batson*, 476 U.S. at 93, 106 S.Ct. 1712. The district court's deeming the prosecutor's explanation "plausible" was not the required "sensitive inquiry."
> (*U.S. v. Alanis*, *supra*, 335 F.3d at p. 969, fn. 3.)

Similarly, in *Lewis v. Lewis*, *supra*, 321 F.3d 824, the prosecutor exercised a peremptory challenge against one of two African-American prospective jurors in the venire and the trial court found a prima facie *Batson/Wheeler* violation. (*Id.* at p. 827.) The prosecutor then proffered six reasons for striking the prospective juror, including the fact that one of the juror's relatives worked as a jailer, which the prosecutor said he thought "might cause issues" given various circumstances of the case. (*Id.* at pp. 827-828.) In response, the trial court rejected some of the prosecutor's proffered reasons and then "conducted an abbreviated analysis of the record support" for the proffered reason concerning the juror's relative and stated that "'the argument with respect to the jail' was 'probably ... reasonable.'" (*Id.* at p. 832.) The trial court then "declined to listen to defense counsel's argument and denied the *Batson/Wheeler* motion." (*Ibid.*)

The Ninth Circuit deemed the trial court's statement that the prosecutor's proffered reason was "reasonable" as "more like the analysis required in *Batson* step two than in step three." (*Ibid.*) "During *Batson*'s third step, the [trial] court has an affirmative duty to determine if purposeful discrimination occurred." (*Ibid.*) In *Lewis*, the Ninth Circuit concluded that the trial court's ruling that the prosecutor's proffered reason was "'probably . . . reasonable' simply does not fulfill such a duty." (*Ibid.*)

Here, as in *Lewis*, it appears the trial court "either skipped the second step entirely . . . or confused it with the third step." (*Lewis v. Lewis*, *supra*, 321 F.3d at p. 831, fn. 28.) After the prosecutor proffered his reasons, the trial court simply stated that it "accept[ed]" the prosecutor's representations and that his explanations were "satisfactory." At no time did the trial court distinguish between the issue presented at *Batson*'s second step – whether the prosecutor had proffered race-neutral reasons for the peremptory challenges – and the issue presented at *Batson*'s third step – whether purposeful discrimination had occurred.

As in *Alanis* and *Lewis*, the trial court simply did not conduct a proper step-three inquiry. After the prosecutor proffered his reasons for challenging the prospective jurors, the trial court denied appellant's motions with conclusory statements. The trial court said nothing to show that it had meaningfully evaluated the prosecutor's proffered reasons or inquired

into the "genuineness of the [prosecutor's] motive." (*Purkett v. Elem*, *supra*, 514 U.S. at p. 79.) In fact, except for the one instance noted above, the court made no reference to any of the prosecutor's stated reasons at all.

Such a perfunctory inquiry does not satisfy the trial court's obligations at the third stage of the *Batson* analysis. [46] "Although the

---

[46] The perfunctory manner in which the trial court ruled on appellant's motion can be contrasted with cases in which trial courts were found to have conducted an appropriate analysis at the third step of the *Batson* test. For example, in *Williams v. Rhoades*, *supra*, 354 F.3d 1101, the Ninth Circuit found that the trial court conducted an appropriate third-step analysis. In *Williams*, the trial court considered various reasons proffered by the prosecutor for challenging a prospective African-American juror and rejected one of them as invalid. (*Id.* at pp. 1105-1106.) However, the trial court found that the other reasons advanced by the prosecutor were "entirely legitimate" and noted that the juror's "demeanor," the "difference between the way she responded to one side versus the other," and her "evasive answers" all provided "legitimate reasons" for the prosecutor's challenge. (*Id.* at p. 1108.) The Ninth Circuit found that the trial court's analysis satisfied the third step of the *Batson* test because the trial court "did not merely accept the prosecutor's explanation at face value; it evaluated his statements in light of the evidence to discern whether he was being truthful." (*Id.* at pp. 1108-1109.)

Similarly, in *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, the Ninth Circuit found that the "trial judge understood the nature of the third step of the *Batson* inquiry." (*Id.* at p. 1047.) The appeals court noted that after the prosecutor articulated his reasons for the challenges, the trial judge took a recess "to evaluate the prosecutor's reasons and, recognizing that it was a close question, ruled that the prosecutor was credible and that 'there exists a valid basis for the excusal.'" (*Id.* at p. 1047.) The appeals court pointed out that the prosecutor's proffered reasons were properly sustained when "[d]efense counsel, although given an opportunity to do so by the trial judge, offered no rebuttal to the prosecutor's explanations." (*Id.* at

[trial] court is not required to 'comment on all of the evidence' before it, ... an adequate step three *Batson* analysis requires something more than a 'terse,' ... 'abrupt,' ... comment that the prosecutor has satisfied *Batson*...." (*Riley v. Taylor* (3rd Cir 2001) 277 F.3d 261, 291 [citations omitted].) Without more, "there is no basis on this record to determine if the [trial court] undertook, or even [was] aware of, the required *Batson* step three inquiry." (*Ibid.*) Here, the record is devoid of any basis to conclude that the trial court did not merely accept the prosecutor's proffered reasons at face value.[47]

F. The Prosecutor's Facially Race-Neutral Reasons Were Pretextual, Concealing a Discriminatory Purpose

As demonstrated above, the trial court failed to conduct an appropriate analysis of the third step of the *Batson* inquiry. Had the trial court done so, the prosecutor's stated reasons for excusing the four prospective jurors would have been revealed as pretexts for improper discrimination. In order to rebut a prima facie case, the proponent of the

---

pp. 1048-1049.)

[47] See, e.g., *United States v. Harris* (6th Cir. 1999) 192 F.3d 580, 588 ("[T]he district court's terse analysis of the *Batson* challenge leaves us with little to review. It seems to have made no effort to weigh the credibility of the prosecutor's asserted reasons for striking the panelists, relying instead on impermissible factors in reaching its conclusion.")

strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," (*Batson, supra*, 476 U.S. at p. 98, n. 20 [quoting *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 258]), and the asserted reasons must be "related to the particular case to be tried." (*Batson, supra*, 476 U.S. at p. 98.)

The prosecutor attempted to justify his challenge to Juror 20 by her general lack of support for the death penalty, but advanced her service on a previous "hung" jury as the actual reason for the strike. (59 RT 11671.) In fact, Juror 20 had not served on a hung jury. She confirmed for the trial court that her previous jury did not conclude deliberations because of injuries and illness. The prosecutor took no care whatsoever to question her about her attitudes toward this incident and his reliance on a mistaken view of what had happened to justify the application of his "absolute policy" shows that his explanation for the challenge is merely a pretext for a hidden discriminatory purpose.

The prosecutor based his challenge to Juror 59 on her religious views toward judgment, averring that her answers about not wanting to sentence another person to die and her "artificial distinction" between the four walls of the courtroom and her religious views led him to a "bad feeling" about her. The prosecutor did not take time to question her about these views or to attempt to understand what she had said. Contradicting

what the prosecutor claimed, Juror 59 explained how her religious views worked in conjunction with her duties as a citizen. She drew a thoughtful distinction between divine judgment and the type of judgement called for in secular matters, and specifically in jury service. She concluded that she would be able to render a verdict and that she could choose either penalty. Again, when examined, the prosecutor's attempt to explain his challenge is hollow and a pretext for discrimination.

The prosecutor's attempt to justify his challenge to Juror 32 was the weakest of all. He attempted a three part explanation, relying upon the prosecution of a "close relative" who had been prosecuted for a serious offense, her statement that death was an "easy way out", and an express statement that she was not sure if she could vote for the death penalty. All of these reasons fail when examined against the record. Juror 32's relative was biologically close, her brother. Otherwise, she was not close at all and had not been in contact with him for 19 years. She did believe that LWOP was a more severe sentence than death, but clearly understood the nature of penalty selection and agreed that she would not substitute her beliefs into the penalty selection process. Finally, she repeatedly stated that she would consider death as a penalty choice, and stated that she would not automatically choose either penalty, but rather choose the penalty supported by the evidence presented.

The challenge to Juror 156 was also flawed. When confronted with the defense contention that his challenges had left the panel with little minority representation, the prosecutor replied that this was only his second challenge to a Hispanic juror, ignoring the overall impact of his conduct on the diversity of the panel. He also characterized the juror as "extremely weak on the death penalty" and stated that he did not believe that she would return a death verdict. The juror actually had no qualms whatsoever about the death penalty. Her concerns were for the reliability of the convictions, not the nature of the penalty itself. When reviewed, the gravamen of Juror 156's answers was that she would want to be very careful about convicting a person who could be sentenced to death and want to be sure that the person deserved the penalty, but that she had no reservations about the morality of the death penalty.

Even a cursory examination of the prosecutor's attempts to justify his challenges raises red flags. None withstand the type of analysis a trial judge is required to conduct having found prima facie evidence of discrimination. As show above, the explanations are not supported by fact and are thus likely to be pretexts covering an unstated discriminatory purpose. Further, the assertion of a pretextual reason undermines the prosecutor's credibility. (See *Lewis v. Lewis*, *supra*, 321 F.3d at p. 831; *Riley v. Taylor*, *supra*, 277 F.3d at p. 283 ["The relative plausibility or

implausibility of each explanation for a particular challenge may strengthen or weaken the assessment of the prosecutor's explanation as to other challenges."].)

G. Reversal of the Entire Judgment is Required

The various reasons given by the prosecutor as support for the contested challenges were contradicted or unsupported by the record. As shown above, the prosecutor's proffered reasons were, instead, pretexts for racial discrimination.

Even if this Court were to find that one or more valid, race-neutral reasons remained for any of the four challenges, the sheer number of reasons falling squarely in the pretext category is strong evidence that the reasons given as a whole are insufficient and lack credibility. (See, e.g., *Lewis v. Lewis*, *supra*, 321 F.3d at p. 831 [the proffer of faulty reasons, even if offered together with otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a *Batson/Wheeler* challenge should be sustained].)

Finally, as noted, the appellate record does not support a finding that the trial court engaged in a reasoned attempt to evaluate each of the prosecutor's various reasons for challenging each of the four African-American jurors at issue here. All the trial court did was to enter a global finding that the prosecutor's reasons appeared sufficient and not

race-based. As this Court held in *People v. Silva*, *supra*, 25 Cal.4th at p. 386, 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. The trial court did not perform its duty here, and the result was a jury tainted by the biased use of peremptory challenges.

Accordingly, reversal of the entire judgment is required. (*Batson*, *supra*, 476 U.S. at p. 97; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

-o0o-

Arguments IX through XVIII and Proof of Service in Volume 2