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SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH ANTHONY BARRETT,

Defendant and Barrett.

CAPITAL CASE

Case No. S124131

**SUPREME COURT
FILED**

Imperial County Superior Court Case No. CF-5733
The Honorable Joseph W. Zimmerman, Judge

OCT 24 2014

RESPONDENT'S BRIEF

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DEATH PENALTY

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INTRODUCTION

In the early morning hours of April 9, 1996, Appellant Joseph Anthony Barrett brutally killed Thomas Richmond, his cellmate in the Administrative Segregation Unit of Calipatria State Prison. Because he thought Richmond was a “snitch” or a “rat,” Barrett stabbed Richmond multiple times in his vital organs with a knife Barrett carved out of his metal desk. Rejecting his claim of anticipatory self-defense, the jury found Barrett guilty of first degree murder and assault by a life prisoner causing death. The jury also found true the special circumstances that Barrett killed Richmond while lying in wait and that Barrett had been previously convicted of murder.

In the penalty phase, the prosecution presented evidence of Barrett’s previous crimes and other misconduct, taking place both inside and outside of prison, including multiple assaults on other inmates and staff and multiple instances of weapons possession. The defense presented evidence of Barrett’s difficult childhood and evidence of where Barrett would be housed should the jury return a verdict of life without the possibility of parole. The jury returned a death verdict.

On appeal, Barrett claims that the trial court erred during jury selection by failing to exclude all employees of the Department of Corrections and by erroneously denying his claim that one of the prosecutor’s peremptory challenges was discriminatory. Barrett’s jury selection claims should be denied because the trial court did not force an incompetent juror on Barrett and properly found that the prosecutor’s peremptory challenge to an African-American woman was not motivated by discriminatory intent.

As to guilt phase issues, Barrett raises multiple claims of prosecutorial misconduct and trial court error, both as to its evidentiary rulings and to its instructions to the jury, and a claim of “undue delay” in charging him with

murder. As to the instances of alleged prosecutorial misconduct, Barrett's claims should be denied because Barrett forfeited his claims by failing to make an objection and request and admonition at trial, the prosecutor's actions were permissible, or the prosecutor's actions did not prejudice Barrett. As to the instances of alleged trial court error, Barrett's claims should be denied because Barrett forfeited his claims by failing to raise them at trial, the trial court properly ruled on the evidentiary issues, including the admission of evidence, and properly instructed the jury, or because any error the trial court may have committed did not prejudice Barrett. Finally, Barrett failed to demonstrate that he was prejudiced by any "delay" between his commission of murder and his indictment for that murder.

Barrett also asks this Court to reexamine its numerous previous opinions holding that the lying-in-wait special circumstance does not violate a defendant's constitutional rights, to reverse the prior murder special circumstance because he committed that murder as a juvenile, and to find the death eligibility provision of the assault by a life prisoner statute unconstitutional. Barrett's claims should be denied because he offers no compelling reason for this Court to revisit its decisions finding no constitutional infirmity in the lying-in-wait special circumstance, offers no compelling reason why his prior murder committed as a juvenile should not be considered a special circumstance in his trial for capital murder committed as an adult, and fails to show that his custody status as a life prisoner fails to constitutionally narrow his eligibility for the death penalty.

As to penalty phase issues, Barrett claims that the prosecutor committed multiple instances of misconduct both while eliciting testimony and during closing argument, that the trial court committed numerous errors in its evidentiary ruling and instructions to the jury, and that his counsel provided ineffective assistance. Barrett further contends that his

constitutional rights were violated by the eleven-day jury separation during deliberations, the cumulative impact of all of the “errors” committed during his trial, and by California’s death penalty statute.

Barrett’s claims should be rejected. As to the instances of alleged prosecutorial misconduct, Barrett’s claims should be denied because here, too, he forfeited his claims by failing to make an objection and request an admonition at trial, the prosecutor’s actions during his questioning of witnesses and closing argument were proper, or the prosecutor’s actions did not prejudice him. As to the instances of alleged trial court error, Barrett’s claims should be denied because here, too, Barrett forfeited his claims by failing to raise them at trial, the trial court properly ruled on the evidentiary issues, including the admission of evidence, and properly instructed the jury, or because any error the trial court may have committed did not prejudice Barrett. Barrett’s claims of ineffective assistance of counsel should be denied because there are possible tactical reasons for undertaking the now-challenged actions and even assuming deficient performance, Barrett cannot demonstrate he was prejudiced as a result of counsel’s performance.

Finally, because Barrett agreed to the eleven-day jury separation, he has waived his ability to raise this claim on appeal. In any event, this separation neither violated Barrett’s rights nor prejudiced him. In addition, because either no errors were committed during Barrett’s trial or, to the extent error did occur, Barrett has failed to demonstrate prejudice, reversal of Barrett’s convictions and death sentence is not warranted and Barrett’s claim of cumulative error should be denied. Furthermore, Barrett has not presented sufficient reasoning to revisit this Court’s numerous previous decisions holding that California’s death penalty statute is constitutional.

Barrett received a fair trial. The evidence overwhelmingly supported the jury’s guilty verdicts and true findings in the guilt phase and its death

verdict in the penalty phase. The judgment should be affirmed in its entirety.

STATEMENT OF THE CASE

On July 10, 1998, an Imperial County Grand Jury returned an indictment charging appellant Joseph Anthony Barrett with the premeditated and deliberate first degree murder of Thomas Kent Richmond. (Pen. Code,¹ §§ 187, 189; count 1.)² The indictment also alleged two special circumstances: (1) Barrett was previously convicted of first degree murder, within the meaning of sections 190.2, subdivision (a)(2), and 190.05 [prior-murder special circumstance]; and, (2) Barrett intentionally killed Thomas Kent Richmond while lying in wait, within the meaning of section 190.2, subdivision (a)(1) [lying-in-wait special circumstance]. (1 Aug. CT 5-6.)

The indictment also charged Barrett with assault by a life prisoner (§ 4500; count 2) and two counts of possession of a deadly weapon by a prisoner. (§ 4502; counts 3 and 4.) (1 Aug. CT 6-7.) As to all four counts, the indictment alleged that Barrett suffered a prior conviction, which qualified as a serious or violent felony conviction or juvenile adjudication, within the meaning of section 667, subdivisions (b) through (i). (1 Aug. CT 6-7.)

On July 14, 1998, Barrett was arraigned on the indictment, counsel was appointed for Barrett, and the prosecution announced that it was seeking the death penalty for Barrett. (1 CT 3-4.)

¹ Unless otherwise indicated, all subsequent statutory references will be to the California Penal Code.

² The indictment also alleged that the murder in count 1 was a serious offense, within the meaning of section 1192.7, subdivision (c)(1). (1 Aug. CT 5.)

Jury selection began on September 15, 2003. (5 CT 1295-1297.) The jury was sworn on November 18, 2003. (44 CT 12548-12550; 46 RT 5628-5629.) On December 1, 2003, the prosecution began presenting evidence in the guilt phase of the trial. The prosecution rested on December 15, 2003. (45 CT 12564-12565, 12661; 48 RT 5714.) On December 16, 2003, Barrett's motion for acquittal under section 1118.1 was heard and denied by the trial court. (45 CT 12664-12670, 12680; 57 RT 7388-7392.)

On December 18, 2003, Barrett began presenting his evidence in the guilt phase. (45 CT 12686; 58 RT 7448.) The defense rested on December 30, 2003. (45 CT 12752; 63 RT 7980.) The prosecution presented a rebuttal case on December 30, 2003, and January 2, 2004. (45 CT 12752, 12761-12762; 63 RT 7982.) Barrett presented surrebuttal witnesses on January 2, 5, and 6. (45 CT 12762, 12766-12767, 12823; 64 RT 8281.) The prosecutor presented a final rebuttal witness on January 6, 2004. (45 CT 12823; 66 RT 8484.)

Following the presentation of evidence, reading of instructions, and arguments of counsel, the jury retired for deliberations on January 9, 2004. (46 CT 12917-12919; 69 RT 8844.) On January 14, 2004, the jury found Barrett guilty as charged. The jury also found true the lying-in-wait special circumstance allegation. (46 CT 12930-12944, 12949-12951; 72 RT 8873-8880.)

In a bifurcated proceeding, the parties stipulated that Barrett had previously been convicted of murder. (73 RT 8888-8889, 8896-8897, 8899-8901.) On January 26, 2004, the jury found true the prior-murder special circumstance allegation. (46 CT 12953, 12957-12958; 73 RT 8903-8904.)

On February 3, 2004, the prosecution began presenting evidence in the penalty phase of the trial. (46 CT 13021; 75 RT 8958.) On February 17, 2004, the prosecution rested and Barrett began presenting his evidence.

(46 CT 13096; 81 RT 9628.) Following the presentation of evidence, reading of instructions, and arguments of counsel, the jury retired for deliberations on February 24, 2004. (47 CT 13107-13161, 13166-13167; 84 RT 9998-10027, 10027-10091; 85 RT 10142-10179.) The jury returned a verdict of death on March 10, 2004. (47 CT 13179, 13185; 88 RT 10223-10225.)

On March 29, 2004, the trial court denied Barrett's motion for a new trial and denied the automatic request to modify the verdict of death pursuant to section 190.4, subdivision (e). The trial court imposed the death penalty for the first degree murder charged in count 1. The trial court also imposed the death penalty for the assault by a life prisoner charged in count 2, but stayed execution of that sentence. The trial court also imposed and stayed sentences on counts 3 and 4. (47 CT 13233-13234, 13238-13241, 13247-13250; 89 RT 10234-10236, 10238-10241.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution's Case-In-Chief

On February 29, 1996, Thomas Richmond, an inmate incarcerated at Calipatria State Prison (Calipatria), told correctional officer Jason Longcor that he had weapons in his cell and that he feared for his safety. (48 RT 5716-5718, 5781-5782.) Longcor advised Richmond to return to his cell. (48 RT 5722-5723.) Rather than immediately proceeding to Richmond's cell, as Longcor did not want Richmond to look like a "snitch," Longcor notified Sergeant Timothy Borem as to what Richmond had told him. (48 RT 5723, 5726-5727, 5789-5790.)

After completing the unit count that night, Longcor and Borem removed Richmond and his cellmate from their cell and put them in

separate showers. (48 RT 5727-5728.) The officers searched Richmond and found two inmate manufactured plexiglass knives. No other weapons were found in Richmond's cell. (48 RT 5729-5730, 5737-5738, 5791.) The officers then escorted Richmond to Borem's office where he was interviewed. (48 RT 5738-5740.)

Richmond told Borem that another inmate told him that there were weapons in his mattress and ordered him to hold on to them. (48 RT 5796-5800.) Richmond did not identify the inmate, or say why he was supposed to hold on to the weapons, but Richmond told Borem that he had been threatened by a few inmates previously over these weapons. (48 RT 5800, 5809.) Borem testified that Richmond did not want anyone to know that he gave up weapons voluntarily and did not want to transfer to the Administrative Segregation Unit (Ad Seg) for safety purposes. (48 RT 5824-5826.)

Inmates housed in Ad Seg included both those in protective custody, such as "snitches," and those who were management cases, i.e., inmates who have committed rules violations. (48 RT 5842-5843.) Richmond was sent to the Ad Seg as a management case.³ (48 RT 5740-5741, 5804-5805.) Richmond received a copy of his "114," a report which included the reasons why he was being transferred to Ad Seg, i.e., that Richmond was found with weapons. This form did not include who turned in the weapons or the circumstances surrounding how the weapons were found. (48 RT 5839-5843, 5848-5850.) In addition, for Richmond's safety, as he assumed

³ Lieutenant Glenn Trujillo, the watch commander on February 29, 1996, testified that he was not told that Richmond voluntarily gave up weapons and felt threatened; rather, all he knew was that Richmond had possessed weapons. (48 RT 5850, 5859.) Trujillo testified that if he knew the circumstances, he would have considered Richmond for protective custody. (48 RT 5883.)

that other inmates would check on the reason for Richmond's transfer into Ad Seg, Longcor did not include in his report that Richmond voluntarily gave up weapons. Rather, he included this information in a confidential disclosure form that was not available to inmates. (48 RT 5739-5740, 5741-5744, 5776.)

On April 9, 1996, Richmond and Barrett were housed in cell 146 in Ad Seg. While conducting his second count of inmates at approximately 2:00 a.m., correctional officer Jeffrey Wysocki looked through the window of cell 146 and saw Richmond on the top bunk and Barrett on the lower bunk. (48 RT 5889-5894, 5899-5902.) Between this count and third count, Wysocki did not see or hear anything unusual from cell 146. (48 RT 5902-5903.)

Wysocki and correctional officer Robert Avila started third count at approximately 4:45 a.m. When he got to cell 164, Wysocki noticed that the light was on and he saw Barrett, who was about six feet, two inches tall, and weighed about 190 pounds, standing at the door in his boxer shorts and a t-shirt. He and Avila also saw Richmond, who was around five feet, eight inches tall, and weighed about 160 pounds, slumped over on the lower bunk with stab wounds on his chest.⁴ (48 RT 5903-5905; 49 RT 6009-6011, 6013, 6038, 6056-6057, 6059-6060, 6075-6077, 6116; 50 RT 6244-6245; 52 RT 6767-6768.) While Barrett just stood at the door, Wysocki looked closer and saw that Richmond's head was slumped toward the desk, with the edge of the desk in Richmond's mouth. (48 RT 5905-5908; 49 RT 6059-6060.) From Wysocki's vantage point, it did not look like a fight had

⁴ While Avila testified that this incident was discovered during second count, he agreed that the time was approximately 4:53 a.m. (9 RT 6054-6055.)

taken place in the cell; rather, the cell looked ordinary and neat. (48 RT 5908-5909.)

Wysocki told Barrett, “You’re celly doesn’t look too fucking good.” Barrett replied, “Well, he’s not.”⁵ (48 RT 5910.) Barrett seemed normal and calm and neither Wysocki nor Avila saw any blood or scratches on him. (48 RT 5911; 49 RT 6060-60601, 6064.) As another correctional officer stood outside the cell, Wysocki and Avila went to notify Sergeant Fred Hazel, who was in the control booth monitoring the count, of the situation. (48 RT 5911-5912; 49 RT 6089; 50 RT 6175-6177.)

Wysocki and Avila returned to cell 146 with Sergeant Hazel. Barrett was eating an apple about six feet from Richmond. Wysocki and Hazel removed Barrett from cell 146 and took him to a holding cell. (48 RT 5912-5916; 49 RT 6029-6030, 6063; 50 RT 6309-6310.) Barrett did not appear to have any scratches on him and appeared calm and collected. (48 RT 5919; 49 RT 6064, 6114-6115; 50 RT 6178-6179, 6183-6187, 6259-6260, 6310.) Moreover, Barrett did not look like he had been in a struggle – he did not appear uncomfortable, his hair was in place, and he was neither sweating nor breathing heavily. (50 RT 6294-6295, 6310.)

Hazel saw that Richmond was sitting on the lower bunk with his head on the edge of the desk with his mouth open. Hazel saw four wounds on the right side of Richmond’s chest and noticed that Richmond’s feet appeared to be in a pool of coagulated blood. (50 RT 6181-6182.) Hazel also noticed what appeared to be blood spatter between the shelving unit and table. (50 RT 6241-6243.)

⁵ Wysocki testified later that it may have been Barrett who responded to the effect of, “My celly isn’t doing too good.” (59 RT 6014.) Avila testified that he heard Wysocki say, “Oh, Barrett, what did you do?” and that Barrett did not respond. (49 RT 6058-6061.)

Wysocki did not see any signs of a struggle in cell 146, nor did he see any red substance or any weapons. (48 RT 5922-5925; 49 RT 6023.) Hazel testified that cells usually looked trashed after a cell fight and that cell 146 did not look that way. (50 RT 6195-6196, 6256-6257.) However, Hazel was unable to obtain a camera to take pictures of the cell. (50 RT 6226-6227.)

While Barrett was being escorted to the holding cell, an inmate yelled out to Barrett, "What is wrong with your celly?" Barrett just smiled and kept walking. (49 RT 6115, 6121.)

After Barrett was placed in a holding cell, Wysocki, Hazel and Michael Green, a Medical Technical Assistant, entered cell 146 to check Richmond. (48 RT 5920; 50 RT 6302-6306.) Wysocki and Green put Richmond on the floor so Green could check for any vital signs. Richmond was not breathing, had no pulse, and exhibited no signs of life. (48 RT 5921-5922; 50 RT 6311-6313.)

Green began administering CPR. While blood squirted out of the numerous stab wounds on Richmond's chest during CPR, Richmond was still unresponsive. (50 RT 6314.) Greene observed both lividity and rigor mortis in Richmond and noticed that Richmond was cold. (50 RT 6315-6317.) As it was too crowded inside the cell to continue to properly administer CPR to Richmond, Wysocki and Green brought him outside the cell. (50 RT 6192-6193, 6313-6314, 6317.)

After Greene had continued to administer CPR for fifteen more minutes outside the cell, an institutional ambulance arrived and Richmond was transported to the prison emergency room. (50 RT 6318-6319.) While there, Hazel noticed that Richmond had wounds on the left side of his rib cage, left shoulder area, in his mouth, and into his right breast plate. (50 RT 6198-6199.) Greene noted that Richmond suffered six chest wounds, as

well as a puncture wound on the back of his shoulder and a wound on the left side of his face. (50 RT 6355-6358.)

After another ten minutes of unsuccessfully trying to resuscitate Richmond with CPR, a Gold Cross ambulance was called and Richmond was transported to Pioneers Memorial Hospital. (50 RT 6200, 6261-6265, 6318-6320.) Although Richmond demonstrated no signs of life, and his joints were stiff and his body cool, resuscitation efforts continued as there was an unstated rule that no one died on the prison grounds. (50 RT 6364-6367.)

The Gold Cross ambulance arrived to transport Richmond at about 5:35 a.m. (50 RT 6378-6383.) Although Richmond had no heartbeat and no blood pressure, Michael Pearson, an employee of Gold Cross, continued to administer CPR en route to Pioneers Memorial Hospital. (50 RT 6383-6386.) Once the ambulance was off of the prison grounds, Pearson called hospital physician Dr. Albert Johnson. Dr. Johnson concurred that further resuscitation efforts would be futile and pronounced Richmond dead at 5:59 a.m., while the ambulance was still en route to the hospital. (50 RT 6386-6387.) Pearson delivered Richmond's body to the emergency room at the hospital. (50 RT 6387.)

Ralph Smith, an investigator with the coroner's division of the Imperial County Sheriff's Office, was assigned to investigate Richmond's death. (51 RT 6405-6406.) Upon arriving at Pioneers Memorial Hospital at 7:19 a.m. on April 9, 1996, Smith began a preliminary examination of Richmond's body. Smith determined that Richmond was five feet, nine inches tall, and weighed 160 pounds. (51 RT 6407-6408.) Smith observed stab wounds to Richmond's face, neck, chest, and left hip. He also saw dried blood from the wounds. Smith noted that Richmond had rigor mortis in his neck and shoulders and lividity (blood pooling) on his back. (51 RT

6408-6412.) Smith opined that Richmond had been dead for a couple of hours, but not more than three. (51 RT 6429.)

Smith transported Richmond's body to Frye Chapel in Brawley, the contracted mortuary, for an autopsy. Smith was present during the autopsy and William Willard, another investigator, took photographs. (51 RT 6413, 6426-6427, 6490-6505.)

Dr. Christopher Swalwell, a deputy medical examiner, performed the autopsy of Richmond. (51 RT 6522-6525.) Richmond had a stab wound on the left side of his cheek, near the jawbone and a stab on the back of his head that went through the scalp. (51 RT 6531-6532.) Richmond also had four stab wounds on the right side of his chest, a stab wound on his left arm near his shoulder, a couple of wounds on the left side of his back, two wounds on the left side of his chest, and a wound on his left hip. (51 RT 6536-6540.) Richmond also suffered a few other injuries, including two cuts on his hands that were consistent with defensive wounds. (51 RT 6540-6543.)

Dr. Swalwell testified that Richmond's cause of death was multiple stab wounds. (51 RT 6559.) He testified that six of the wounds were potentially fatal, including the wounds that hit his liver, right lung, stomach, and heart. Dr. Swalwell testified that there was an "element of overkill" to the wounds inflicted on Richmond. (51 RT 6551-6559.)

In response to a hypothetical question posed by the prosecutor, Dr. Swalwell opined that a weapon eight and one-half inches long, three-quarters of an inch wide at its widest point, and one-inch thick at its thickest point, sharpened to a point at one end with a cloth around the other end for a two-inch long handle, would be consistent with the type of weapon used to inflict Richmond's wounds. (52 RT 6595.)

During cross-examination, Dr. Swalwell testified that he was not able to determine where Richmond was when he received his wounds, or what

Richmond was doing prior to the infliction of his injuries. (52 RT 6647-6648, 6653-6655, 6664-6665.) Dr. Swalwell also testified that there was nothing preventing Richmond from moving his extremities and that his wounds were consistent with having been inflicted during a struggle. (52 RT 6669, 6680.)

Meanwhile, while Barrett was in a holding cell, correctional officers Raymond Leon and William Brumbaugh observed Barrett squatting down and looking around. Although Barrett had a calm and cool demeanor, the officers decided that Barrett should get x-rayed to see if he was hiding any contraband. (53 RT 6983-6984; 54 RT 7051-7053, 7055-7056, 7065-7067.) Brumbaugh asked Barrett how he was doing and Barrett responded, "fine." When Brumbaugh asked how Barrett's celly was doing, Barrett replied that his celly had "steel poisoning." (54 RT 7072.)

Marco Pineda, an x-ray technologist working at Calipatria, took x-rays of Barrett's pelvis and abdomen. (54 RT 7084-7086.) After taking the x-rays, Pineda suspected that Barrett was hiding contraband in his body. (54 RT 7087.)

After getting x-rayed, Barrett was escorted to the central infirmary for contraband watch. (53 RT 6984-6986; 54 RT 7052-7053, 7088-7089.) Correctional officer Robert Cannon came in contact with Barrett in the infirmary. Cannon advised Barrett that the x-rays showed that he was hiding contraband and asked Barrett if he was ready to give the weapons up. Barrett refused to do so. (54 RT 7093-7094.)

A while later, correctional officer William Wright was on contraband watch. (54 RT 7112-7113.) Barrett called Wright over to his cell door in the infirmary and said, "Here is the weapon." Barrett then slid under the door a weapon made of a razor blade with some tape for a handle. (54 RT 7113-7117.) Wright described the weapon as a slashing instrument about one-inch in length and a quarter-inch wide. (54 RT 7120.)

Katrina Sweet, a Medical Technical Assistant working in Ad Seg at Calipatria, was called to perform an examination on Barrett at about 8:50 a.m. on April 9, 1996. (52 RT 6693-6695.) Barrett did not complain of any injuries and Sweet did not see any wounds on Barrett. (52 RT 6695-6697.) Barrett would not allow Sweet to conduct a body exam on him because she was a female. (52 RT 6697.)

However, Barrett also refused to allow a male Medical Technical Assistant, Roberto Victa, to perform an exam. (52 RT 6700-6703; 53 RT 6982-6983.) Barrett was angry and uncooperative but, to the extent he could observe Barrett, Victa did not see any visible fresh wounds on Barrett. (52 RT 6707-6709.) Although Barrett had some sores that looked like blisters on his hands, his hands were not swollen or bruised and did not exhibit any defensive wounds. (52 RT 6709-6720, 6726-6727, 6730-6734, 6747; 53 RT 6974-6976.)

Robert Swetich, a correctional officer with the Security and Investigations Unit at Calipatria, also met with Barrett that morning. Swetich described Barrett as calm and arrogant, and testified how Barrett joked about Swetich's wife. Swetich saw no defensive wounds on Barrett. (53 RT 6789-6792.)

Swetich was also tasked with recording and preserving evidence in this case, the first homicide at Calipatria and the first homicide he had investigated. (52 RT 6749-6750; 53 RT 6894.) Swetich made a videotape of the cell and its contents, which was played for the jury.⁶ (52 RT 6750-6758.) Swetich testified that there appeared to be blood on the floor and an apple core in the toilet. There was also blood underneath the desk and on

⁶ Swetich also made a videotape of Wysocki and Avila reenacting the way the bodies were found, which was also played for the jury. (53 RT 6786-6787, 6953-6955.)

the chair and some blood spatter⁷ on the wall. In addition, both mattresses, as well as linens, were on the lower bunk, and there was blood on the sheets and pillowcases. (52 RT 6754-675, 6762-67635; 53 RT 6801.)

Swetich testified that he did not find any weapons or contraband, but that it appeared something had been cut out of the steel desk. Swetich described the cell as looking “neater” than if there had been a cell fight. (52 RT 6756-6759, 6766; 53 RT 6795-6800.)

During cross-examination, Swetich testified that he did not interview any inmates occupying the cells next to cell 146. (53 RT 6890.)

At about 8:45 a.m. on April 9, 1996, Sam Tozer, a plumber for the prison, was called to cell 146 to see if he could retrieve an item believed to have been flushed down the toilet. (53 RT 6900-6905.) Tozer was able to retrieve a piece of metal with a piece of white cloth on it and some string. Tozer testified that the piece of white cloth could have been part of a handle. (53 RT 6905-6906, 6912-6913.) Tozer testified that the items found could only have come from cell 146. (53 RT 6911, 6927-6928, 6950-6951.)

At 9:15 a.m., correctional officer Leon arrived at the administration building in Ad Seg to pick up the weapon retrieved by Tozer. (53 RT 6958-6960.) Leon photographed the weapon and described it as being a piece of flat metal stock measuring about 8 and one-half inches long, three-quarters of an inch wide, and one-inch thick at its thickest point. The metal was sharpened to a point at one end and had material wrapped around the other end as a handle. (53 RT 6960-6962.) Leon also took a photograph of the desk in cell 146 and matched the weapon found in the toilet to what had been cut out of the desk. (53 RT 6963-6964.) Leon testified that inmates can sharpen weapons using the concrete in their cells. (53 RT 6964-6965.)

⁷ Swetich referred to blood “splatters.” (52 RT 6762-6763.)

Leon testified that the last chain-of-custody note indicated that he checked the weapon out of evidence on July 7, 1998. However, Leon denied having it in his possession the previous five years. (53 RT 6997-6998.) Leon further testified that the weapon being discussed is the same one he received from Tozer and that the chain of custody notes do not always accurately reflect who had what and when. (54 RT 7019-7020, 7027, 7046-7047.)

Ray Vialpando, a case records analyst at Calipatria, was the prosecution's final witness in its case-in-chief. Vialpando testified that Barrett was a life prisoner. (56 RT 7294, 7300-7302.) Vialpando also testified that Barrett was 16 years old at the time of the offense that led him to prison and that he had been found guilty of that offense by a jury. (56 RT 7330-7331.) Vialpando further testified that Richmond had been serving a determinate term of 13 years. (6 RT 7302.)⁸

B. Defense Case

Ray Vialpando also testified for the defense. He testified that Richmond was incarcerated for three counts of second degree robbery and one count of first degree burglary. Vialpando testified that each one of these serious felonies could qualify as a "strike." (58 RT 7448-7450, 7452-7453.)

⁸ Correctional officer Michael Fisher testified in an Evidence Code section 402 hearing outside the presence of the jury. Fisher testified that a letter dated March 16, 1996, written from inmate Keith Barnard was found in Barrett's property on April 9, 1996. This letter revealed that Barnard gave Barrett permission to assault Richmond for giving up weapons. (55 RT 7206-7253.) However, because the prosecution could not produce evidence that this letter was ever actually delivered to Barrett, and because of a memorandum from the acting warden indicating doubt as to whether Barrett ever received that letter, the trial court ruled that the March 16, 1996, letter would be inadmissible at trial. (56 RT 7263-7285.)

Barrett testified in his own defense. As of April 1996, Barrett had been in Ad Seg for about a year. (58 RT 7468.) Barrett described himself as a “good wood,” which meant he was a white inmate in good standing with other white inmates. He testified that child molesters, rapists, informants, and other inmates in protective custody were not “good woods.” (58 RT 7471-7472, 7474.) Barrett denied ever being in a gang. (58 RT 7475.)

Barrett further testified that it was against the self-imposed “rules” that inmates live by to implicate another inmate. In addition, an inmate should not go out of his way to give weapons up. (58 RT 7490-7491.) Weapons were common in Ad Seg in April 1996. (58 RT 7499-7500, 7504.)

Barrett testified that he met Richmond when they became cellmates in Ad Seg in March 1996. (58 RT 7504-7505.) Although an inmate does not technically have to accept someone as a cellmate, refusing to do so is frowned upon by other inmates. (8 RT 7506-7507.) Barrett and Richmond exchanged “114s,” reports which indicate the reason why someone is placed in Ad Seg but does not include any confidential information, and got acquainted. (58 RT 7507-7508.) Barrett, having been in Ad Seg for some time, explained to Richmond how Ad Seg operated. (58 RT 7509-7510.)

As Richmond seemed rather “blasé,” Barrett became concerned about how Richmond actually ended up in Ad Seg. (58 RT 7510-7511.) In response to Barrett’s questions, Richmond told him that another inmate had told him that there were knives in his mattress and asked him to hold them. When an officer conducted a cell search and found them, Richmond said he claimed responsibility for them. (58 RT 7511-7512.) Barrett testified that he never received any information contradicting Richmond’s story. (58 RT 7512.)

Barrett and Richmond committed several rules violations together. They both went to yard with weapons and were caught. (58 RT 7513-7514.) They both also received “115,” which were disciplinary notices, for flooding their cell. (58 RT 7514-7515.) Barrett thought he had an agreement with officers whereby he would accept full responsibility for flooding the cell in exchange for charges against Richmond being dropped. When he found out that Lieutenant Fast had “violated” this “agreement,” Barrett spit in his face. (58 RT 7515.)

As a result of the spitting incident, Barrett was moved to cell 146, where he was the sole occupant for several weeks. (58 RT 7515-7516.) At this time, Barrett started making a knife from the steel in his desk top. (58 RT 7517-7518.) Meanwhile, Richmond had apparently been caught with weapons and caught “gassing” (i.e., throwing bodily fluids or feces on) an officer. (58 RT 7516-7517.) Richmond was then also moved into cell 146. Barrett and Richmond got along with each other and Barrett did not hide from Richmond the fact that he was making a weapon; in fact, Richmond assisted Barrett in making this weapon. (58 RT 7522-7524.) Barrett got some cuts on his hands from making his weapon. (59 RT 7597.)

Once Barrett had cut the weapon from his desk, he put a handle on it and began sharpening it. (58 RT 7525-7526.) Barrett had Richmond help him sharpen his weapon until Barrett became suspicious of Richmond receiving “kites” that he would not share with him, although it was “common courtesy” to share kites with your cellmate. Richmond offered no explanation for his behavior and Barrett did not inquire further of him. (58 RT 7527-7528.)

Not only did Richmond not share his “kites,” but Barrett testified that Richmond began acting like something was on his mind. Barrett gave him the benefit of the doubt; if Barrett had asked Richmond about his behavior,

Barrett testified it would have been as if Barrett was accusing or disrespecting Richmond. (58 T 7528-7529.)

On April 8, 1996, Richmond received an unwrapped knife with a handle through the side of the cell door. Barrett testified that he almost stabbed Richmond right there because an unwrapped knife is intended for immediate use. Barrett speculated that Richmond did not use it on him right away because he was sharpening his own weapon. (58 RT 7530-7532; 59 RT 7563-7564.) Barrett could think of no reason why Richmond would want to attack him. (59 RT 7564, 7589.)

Barrett stopped sharpening his knife. Wearing boxer shorts and a t-shirt, Barrett got on the bottom bunk and put the knife under his pillow. He did not get under the covers as that would have put him in a more vulnerable position. (59 RT 7565.) Richmond, still with his knife, got on the top bunk. (59 RT 7565-7566.) Barrett, still not wanting to do anything that would be perceived as disrespecting Richmond, did not say anything. (59 RT 7566-7567.) Barrett laid on his bunk for hours, through the first count. (59 RT 7567-7571.)

Prior to second count, Barrett testified that he saw Richmond slide his legs over and step down onto the desk. Because other inmates, including Richmond previously, get off the top bunk by jumping straight to the floor, Barrett had no doubt that Richmond was coming after him. (59 RT 7572-7575.) Barrett grabbed his knife from under his pillow and sprang up. He then saw that Richmond had his knife in his left hand. (59 RT 7575-7577.)

Barrett, thinking that Richmond was going to attack him, struck Richmond with his knife. Barrett shoved Richmond back with his left hand while striking him in the side with the knife in his right hand. Barrett continued to stab Richmond as Richmond climbed back on the top bunk. Barrett testified that he was upset and scared but that he and Richmond did not talk during their altercation. (59 RT 7577-7579.)

Richmond grabbed the mattress off of the top bunk and used it to try to block Barrett as Richmond came down on the desk again. Richmond still had his knife so Barrett still perceived him as a threat. (59 RT 7579-7580.)

As he and Richmond struggled with the mattress, Barrett lost his balance and fell to the floor. The mattress ended up on the lower bunk. Richmond, still holding his knife, ended up sitting on the lower bunk. Barrett and Richmond just looked at each other for a while. (59 RT 7581-7585.)

Barrett testified that when it looked like Richmond was going to stand up, Barrett struck Richmond again with his knife. (59 RT 7585-7587.) After Barrett struck Richmond in the chest, Richmond fell backwards and rolled over onto the desk. Barrett jumped on the bunk and stabbed Richmond several more times. (59 RT 7587-7588.) Barrett stopped when he thought Richmond was dead. (59 RT 7588-7589.)

Barrett then washed the blood off of himself and flushed the bloody clothes down the toilet. (59 RT 7590.) Because he did not want officers finding weapons, Barrett retrieved Richmond's knife from under the bunk, snapped it in half, and flushed it down the toilet. (59 RT 7590-7593.) Barrett realized that his knife was too big to flush, as it was, so he bent his knife before flushing it down the toilet. (59 RT 7592-7593.)

Barrett then looked around the cell to find other contraband to "keister," i.e., to hide in his anus. As he did so, he straightened up the cell by putting books and cups back on the shelf. (59 RT 7594-7595.) Barrett then sat on the toilet and waited for second count. Barrett testified that the officers shined a light into the cell but did not stop. Flabbergasted as to why the officers did not stop, Barrett turned on the light and tried to figure out what to do. (59 RT 7603-7605.)

Barrett then stood near the cell door and when the officers came by for third count, Barrett stepped away. Words were exchanged with the officer but Barrett testified that he could not remember what was said. (59 RT 7606-7607.) Because he eats when he's nervous, Barrett began eating an apple. (59 RT 7607.) When he was handcuffed and taken to a holding cell, Barrett was not allowed to take anything, including his apple. (59 RT 7607-7608.)

Barrett denied telling anyone that Richmond died of "steel poisoning." He also testified that he did not find anything about the situation amusing. (59 RT 7608.) Barrett admitted that he refused to allow himself to be examined at first, due to modesty and wanting a lawyer, but eventually complied when the officers told him they would examine him by force if necessary. (59 RT 7609-7610.)

During cross-examination by the prosecutor, Barrett admitted killing Richmond on April 9, 1996. Barrett also admitted committing a crime at the age of 17 and being sentenced to life in prison. He first entered adult prison at age 18. (59 RT 7611-7614.) Barrett came to Calipatria at the end of 1992. (59 RT 7614.)

Barrett admitted having been sent to Ad Seg several times, but never for protective custody. Barrett had been in Ad Seg for about 14 months prior to killing Richmond. (59 RT 7614-7615.) Barrett was in Ad Seg for stabbing a suspected child abuser several times in the back while he was reading a bible on the yard. (59 RT 7651-7653.)

Under further questioning from the prosecutor, Barrett admitted the following acts of violence and weapons possession, in addition to stabbing the suspected child abuser: "keister[ed] a piece of metal" on May 31, 1995; slashed another inmate on August 14, 1995; possessed inmate manufactured weapons on September 11, 1995; assaulted another inmate with a weapon on February 26, 1996; possessed two weapons, along with

razorblades, lighters, and metal, which were discovered in the walls of his cell, on February 21, 1999; possessed a weapon found in his cell wall on January 31, 2000; possessed razorblades on February 2, 2000; battered an inmate on the yard with a weapon on March 10, 2002; and possessed razorblades on July 15, 2003. (59 RT 7653-7670.)

Barrett testified that he did not know Richmond until they were first celled together in March 1996. (59 RT 7672.) Barrett testified that he was suspicious of everybody that was put in his cell and admitted that he may have made a few inquiries about Richmond. (59 RT 7674-7677.) Barrett admitted that an informant could not be “good wood” and stipulated that if a known informant was placed in his cell, it would be dangerous for that informant. (59 RT 7671-7672.)

As to the April 9, 1996, incident, Barrett admitted inflicting wounds on Richmond and continuing to attack him, even as Richmond retreated, because Richmond still had a weapon. (59 RT 7693-7969, 7698.) Barrett testified that, as far as he knew, Richmond did not stab him. (59 RT 7702-7703.)

Barrett also admitted altering the crime scene and destroying and then flushing down the toilet Richmond’s weapon, the discovery of which could have exonerated him. (59 RT 7708-7710.) Barrett also acknowledged that the plumber was only able to retrieve his weapon from the toilet. (59 RT 7710.)

On redirect examination, Barrett testified that he did not have any adverse information about Richmond prior to Richmond’s death; Barrett did not know Richmond “snitched” or voluntarily gave up weapons. (59 RT 7714-7716.) Barrett testified that he “keistered” the razorblade from his cell after killing Richmond because he felt his life could still be in danger. (59 RT 7719.)

Lisa DiMeo, a forensic specialist, testified for the defense. (60 RT 7738-7742.) DiMeo reviewed the evidence in this case, including the videotapes made by prison personnel, and examined the cell. (60 RT 7745-7750.) She opined that the evidence gathering and processing was less than perfect. (60 RT 7750.)

Specifically, DiMeo testified that more attention should have been paid to maintaining the integrity of the evidence. Here, not all of the bedding and clothing was preserved, some of the blankets were placed in improperly labeled bags, and some stains were not properly documented. (60 RT 7767, 7777-7779, 7798-7799.)

Based on what she reviewed, DiMeo opined that the condition of the cell was consistent with what would be expected after a cell fight. (60 RT 7774.) She further opined that the evidence supported a conclusion that Richmond had a sharp weapon in his hand that was independent from Barrett's weapon. (60 RT 7803-7806, 7810-7812, 7813-7814.) DiMeo testified that the lack of significant blood on the top bunk supported her opinion that there was a fight – in other words, she testified that if someone was attacked on the upper bunk, the attack would likely end there. (60 RT 7812-7813.)

On cross-examination, DiMeo testified that she is not required to be licensed by the state for the type of work she does. She also admitted that she works out of her home, not in a lab certified by the state. (60 RT 7819.) She further conceded that if Richmond did, indeed, have a weapon, it would be important to examine it, which could not be done in this case. (60 RT 7827.) She reiterated her opinion that Richmond was not on the upper bunk when he received his injuries. She further testified that although she did not know for sure whether Richmond had a weapon, the evidence supports that conclusion. (60 RT 7833-7836, 7842, 7855-7856.)

Christopher Poore, an inmate who was on death row at San Quentin prison at the time of Barrett's trial, also testified for the defense. (63 RT 7944.) Poore testified that he was in Ad Seg at Calipatria from 1995 through 1997 and that he knew both Richmond and Barrett, although not well. (63 RT 7946-7947, 7949-7951.)

Poore testified that he and Richmond communicated a couple of times through kites and that Richmond asked him if he had a weapon he could have. (63 RT 7950-7951.) Richmond indicated through kites that he was trying to cell up with Barrett so that he could stab Barrett. (63 RT 7954-7955, 7961.) Poore testified that he saw a weapon going to Richmond "on the line." (63 RT 7956.) Poore further testified that he woke up during the night of April 9, 1996, to the sounds of a struggle. (63 RT 7962-7963.)

Poore testified that it was common for weapons to be fished along the tier. He stated that if a weapon is sent without anything wrapped around it to hide it from the officers, it was to be used immediately. (63 RT 7965.) Poore also testified that an inmate in trouble with his "community" could get out of trouble by "putting in work" for that community. (63 RT 7695-7966.)

During cross-examination, Poore admitted that he did not tell Barrett that Richmond was seeking a weapon with which to stab him, despite never hearing anything bad about Barrett and despite both he and Barrett being "good woods." (63 RT 7969-7970.) Poore also testified that he saw several unpackaged knives moving around the night Richmond was killed. (63 RT 7972-7974.)

C. Prosecution's Rebuttal

Inmate Robert Wilson, who was housed in Ad Seg at Calipatria in April 1996 and knew both Barrett and Richmond, testified that he and his cellmate, Christopher Poore, received kites from Barrett prior to April 9, 1996. (63 RT 7989-7995.) Wilson testified that the kites indicated that

Barrett thought Richmond was a “rat” and that he was going to investigate Richmond and “deal with him.” (63 RT 7994-7995, 8032-8036.) Wilson also testified that Barrett laughed because Richmond was helping Barrett cut a knife out of the desk that Barrett was going to stab him with. (63 RT 8015-8016.) Wilson further testified that Richmond never sent a kite to his cell asking for a weapon. (63 RT 7999-8000, 8027-8028.)

Wilson admitted that he did not know Barrett well and that he neither saw Barrett write the kites nor was he familiar with Barrett’s handwriting. (63 RT 8005, 8007-8008, 8034, 8036.) However, Wilson testified that his cellmate, Christopher Poore, was a “shot-caller” and important kites would come to his cell and both he and Poore would read them. (63 RT 8033-8034.)

Wilson testified that he “flushed” the kites after he and Poore read them. (63 RT 7995-7996.) He testified that he would have gotten in trouble with Poore had he kept the kites. (63 RT 8023.)

During cross-examination, Wilson admitted that he had used violence in the past and had been sent to Ad Seg because he stabbed someone, but that he did not like violence anymore. (63 RT 8019, 8041.) Wilson also admitted that Barrett had someone beat him up for not dealing with his cellmate after being asked to do so by Barrett. (63 RT 8038-8041.)

Inmate Michael Hill testified that when he was in Ad Seg at Calipatria prison in April 1996, air vents connected his cell with the cell occupied by Barrett and Richmond. (63 RT 8047-8048.) Hill testified that he talked to Barrett through the air vents and Barrett told him that Richmond got himself sent to Ad Seg to avoid paying a debt on C yard. (63 RT 8056-8057.) They also argued through the vents about whether Barrett had enough proof that Richmond was a “rat”; Barrett declined Hill’s suggestion

to send Richmond out to “hit” someone on the yard as a “heart check,” and instead told Hill, “No, I’m killing him.” (63 RT 8058-8060.)⁹ Hill testified that he woke up in the morning of April 9, 1996, hearing Richmond yelling, “Why?” He also heard Barrett call his name to help him get rid of a knife. (63 RT 8048-8049, 8052.)

During cross-examination, Wilson testified that he wanted Barrett to get the death penalty because killing Richmond was against Aryan Brotherhood “policy.” (63 RT 8090-8091, 8103-8104.) Wilson also testified that he did not tell Richmond that Barrett was going to kill him because he thought he had more time and because he was scared. (63 RT 8123-8124.)

Inmate James Magee testified that he met Barrett in Ad Seg at Calipatria in 1993 and met Barrett again in 1997 at Pelican Bay. Magee was not in Calipatria in 1996. (64 RT 8137-8139, 8146.) Although Magee testified that he recently disassociated himself from the Aryan Brotherhood, he was an Aryan Brotherhood affiliate in 1997 at Pelican Bay. (64 RT 8139-8140.) Magee testified that Barrett admitted stabbing Richmond to death because he had information that Richmond was a “rat.” (64 RT 8137-8139, 8141-8143.) Although he testified that Barrett did not go into much detail, Magee recalled that Barrett never mentioned self-defense or that there were two weapons in the cell, and that Barrett had told him he had cut the knife from a desk, stabbed Richmond in the heart and liver, and

⁹ Hill’s testimony was contradictory at times. For example, although Hill testified that he and Barrett argued through the vents about the killing of Richmond, he also denied having such conversations with Barrett. (63 RT 8056.) Hill further testified that although he received kites from Barrett and knew how Barrett signed his kites, none of the kites were in reference to killing Richmond. (63 RT 8052-8053.) However, he later testified that the information about Richmond “locking up” to avoid paying a debt on C yard was “on kites.” (63 RT 8056-8057.)

found the guards' reactions to seeing Richmond's dead body "funny." (64 RT 8143-8146.)

During cross-examination of Magee by Barrett's counsel, Magee testified that he was "not sure" who was running Calipatria for the Aryan Brotherhood from 1995 through 2003. (64 RT 8170-8171.) Magee testified that he did not report what Barrett told him because it became a moot point once the Aryan Brotherhood put a contract on Barrett's life for not making a serious attempt to kill another inmate he had been ordered to kill. (64 RT 8153-8155, 8162.) Magee testified that he himself was "in the hat" with the Aryan Brotherhood, i.e., a contract is out on his life, for dropping out of that gang. (64 RT 8197-8198.)

Elissa Mayo, a crime scene reconstructionist and senior criminalist with the Department of Justice, testified in rebuttal. Mayo testified that although the evidence in this case was not collected in the manner one would expect if a scene was processed properly, based on her review of the evidence there was no indication that more than one weapon was used during the altercation in cell 146. (64 RT 8207, 8211, 8215, 8218-8219, 8221.) She testified that the stab marks she examined were both consistent with each other and consistent with Barrett's knife having caused all of the marks on the mattresses and sheets. (64 RT 8221-8223.) Mayo further opined that the assault could have initially taken place while the mattress was on the upper bunk and that the stab marks on that mattress were inconsistent with a knife being used on a folded mattress. (64 RT 8222-8223.)

During cross-examination, Mayo admitted that because of the poor job done processing the scene, her ability to reconstruct and evaluate the evidence was limited; however, she claimed that she could draw some conclusions. (64 RT 8229.) Mayo also testified that the evidence does not indicate that Richmond sustained the majority of his injuries while on the

upper bunk and that she could not exclude the possibility that Richmond was not on the upper bunk when he was first stabbed, (64 RT 8230-8231, 8263.) Mayo further testified that two of the cuts on one sheet and one cut on the other sheet did not correspond to marks on the mattress the sheets were on; however, Mayo testified that if she was mistaken in her assumption as to which sheet was the top and which was the bottom, then the cut on one sheet did correspond to one on the mattress. (64 RT 8243, 8251-8252.)

Ray Vialpando was recalled for the prosecution's rebuttal case and testified that Richmond had not lost any credits for misbehavior since entering the state prison system in August 1995 and that he had no behavior problems until entering Ad Seg at Calipatria. (64 RT 8269-8270, 8272-8273.) He testified that the pending "115s" at the time of his death stemmed from his actions in Ad Seg. (64 RT 8272.)

D. Defense Surrebuttal

Barrett testified on surrebuttal that Magee read his paperwork while at Pelican Bay, but he denied making any statements to Magee regarding the killing of Richmond. (64 RT 8281.) Barrett also denied discussing with Hill whether he should stab Richmond. (64 RT 8284-8285.) Barrett finally denied discussing assaulting Richmond with Poore. (64 RT 8285-8286.)

Inmate Edwards Vargas testified on surrebuttal that he was in Ad Seg at Calipatria in April 1996 and knew both Barrett and Richmond because they were in cell 146 and he was in cell 145. (65 RT 8311-8312.) Vargas denied having any conversation with an officer about this case and denied remembering anything about the homicide in this case. (65 RT 8312-8316.)

Michael Capeci, an investigator in the district attorney's office, testified on surrebuttal. He testified that Vargas told him during a telephonic conversation in October 2003 that he saw through a hole in his

cell that Barrett was sharpening something. He also testified that Vargas told him a knife came from the upper tier from an inmate named "Shorty." (66 RT 8469-8470, 8473-8475.) Capeci further testified that Vargas told him he heard Richmond plead for his life during the assault and that the assault would pause for ten to fifteen minutes and then start up again. (66 RT 8475.)

During the prosecution's cross-examination, Capeci clarified that Vargas said he saw Barrett sharpening his weapon on the night of the homicide. (66 RT 8474.) Vargas also told Capeci that he heard Barrett call Richmond a "little bitch" and to stop screaming "like a little bitch." (66 RT 8476-8478.) Vargas told Capeci that he did not actually see a knife come down from the upper tier.¹⁰ (66 RT 8478.)

II. SPECIAL CIRCUMSTANCE

Barrett stipulated that he previously committed a first degree murder. (73 RT 8888-8889, 8896-8897.)

¹⁰ During his cross-examination of Capeci, the trial court allowed the prosecutor to take Capeci on direct. Capeci testified that Vargas described Richmond as "harmless" and referred to him as a "youngster" and as a "little lamb." (66 RT 8484-8488.) Vargas never told him that both Barrett and Richmond had weapons during the assault; rather, Vargas described one weapon. (66 RT 8491-8492.) Vargas also told Capeci that he tried to get the attention of staff during the altercation but was unable to do so. (66 RT 8492-8493.)

On cross examination by Barrett's counsel, Capeci acknowledged that the transcript of his interview with Vargas reflected that Vargas said he did actually see a knife come down from the upper tier. (66 RT 8493, 8498-8499.) However, Vargas thought that the knife was for him because he was in trouble with his "own people," i.e., Hispanic inmates. (66 RT 8495.) Vargas also said that he could hear Barrett choking Richmond during the assault. (66 RT 8494-8495.)

III. PENALTY PHASE

A. Prosecution's Case

Kenneth Condencia testified that at about 3:00 p.m. on April 19, 1982, when he was 14 years old, Barrett, armed with a knife, and another person robbed him when he was getting off of the bus from school. (75 ER 8958-8595.) Barrett ordered him to give him all of his money; Condencia gave Barrett all the money he had, which was less than a dollar. Barrett and his cohort then ordered him to take off his clothes; Condencia complied until they told him to take off his pants. (75 RT 8959-8962.)

On cross-examination, Condencia said that he had not been harmed during the robbery. He also testified that Barrett appeared to be about his age and that the person with Barrett was black. (75 RT 8963-8964.)

Andrew Dimitriou testified that he and a friend were robbed while coming home from school by Barrett and his cohort on April 19, 1982, about 15 minutes after they robbed Condencia. (75 RT 8965-8967.) When Barrett and his friend, identified by Dimitriou as a "Mr. Lamar," demanded money from Dimitriou and brandished a knife and a brick, Dimitriou complied and gave them his money. Barrett and Lamar also took Dimitriou's friend's jacket and backpack. (75 RT 8967-8968.) During cross-examination, Dimitriou testified that he was not physically harmed during the robbery. (75 RT 8970.)

Christopher Sychala testified that at about 8:00 p.m. on October 11, 1986, Barrett approached and started walking with him and a female friend. (76 RT 9011-9012.) While they were walking, the group encountered some African-Americans. Barrett, holding a knife behind his back, called the men "niggers." (76 RT 9012-9015.) Sychala testified that he walked away with his female friend, but Barrett soon caught up with them and they proceeded down the street. (76 RT 9016-9017.)

When Barrett asked Spychala's female friend to buy him a beer, she refused; Barrett then said, "Fuck you, what is your boyfriend going to do?" (76 RT 9016-9017.) Barrett then cut Spychala on the neck and shoulder with a buck knife. Although Spychala partially deflected the knife with his hand, it took 8 or 9 stitches to close the wound and Spychala still has a scar. (75 RT 8985-8986, 8990; 76 RT 9018-9020, 9044.) Spychala did not have a weapon when Barrett attacked him. (76 RT 9043-9044.)

While Spychala was talking to the police, Barrett walked by and Spychala identified Barrett as his assailant.¹¹ (76 RT 9021-9024.)

During cross-examination, Spychala testified that it appeared that Barrett and his female friend knew each other. (76 RT 9028-9029.) Although he had not used drugs that night, he testified that he could tell Barrett had been drinking. (76 RT 9027-9028.) Spychala did not have an argument with Barrett and did not recall the African-Americans being aggressive toward Barrett first. (76 RT 9031-9032, 9040-9041.)

Frank McCoy, a retired detective from San Francisco, testified that he investigated the homicide of James Jackson that occurred on October 5, 1986.¹² (76 RT 9049-9050.) McCoy determined that a 10 pound dumbbell,

¹¹ Officer Brian Boyd testified that on October 11, 1986, he came in contact with Spychala who had been slashed in the neck. (75 RT 8985-8986.) Spychala identified Barrett as his attacker by pointing him out as he walked by. (75 RT 8989-8990.) Boyd arrested Barrett and found a folding buck knife on him that appeared to have blood stains on it. (75 RT 8990.) Barrett told Boyd he was wanted for murder. (75 RT 8990-8992.)

¹² James Hunt, a retired police officer from San Francisco, testified that he was called to the residence of James Jackson on October 6, 1986, at about 5:00 p.m. to conduct a well-being check. (75 RT 8973-8974.) As he received no response after knocking on Jackson's door, Hunt returned a few hours later with a key obtained from Jackson's mother. (75 RT 8974-8975.) After entering the apartment with other officers, Hunt testified that the whole interior was ransacked and that Jackson's dead body was on the

(continued...)

found at the scene, had killed Jackson. Barrett's fingerprints were on the dumbbell. (76 RT 9050-9051.)

McCoy made contact with Barrett on October 11, 1986, after Barrett had been arrested for assaulting Spychala that evening. After waiving his rights, McCoy interviewed Barrett about the Jackson murder. Barrett admitted murdering Jackson and stealing numerous items from Jackson's apartment. An audiotape of McCoy's interview with Barrett was played for the jury. (76 RT 9051-9052, 9056, 9068-9069.)

On cross-examination, McCoy testified that Barrett was cooperative and slightly nervous. (76 RT 9070.) McCoy also testified that Barrett took responsibility for the murder and that the missing items were consistent with what Barrett said he stole from Jackson's apartment. (76 RT 9072.) McCoy testified that Jackson was a high school teacher and explained what a "chicken hawk" was, i.e., a man who goes to certain parts of San Francisco looking for younger male companionship. (76 RT 9071-9072.)

Numerous correctional officers also testified as to Barrett's misconduct while incarcerated. Barrett possessed weapon stock in 1991 (76 RT 9077-9101), kicked another inmate in 1994 (76 RT 9102-9105, 9110-9112), started toward a correctional officer with his fists clenched while calling the officer a "punk ass little pussy bitch" for taking an unauthorized television from his cell in 1994 (76 RT 9114-9131), hit an inmate in the back while the inmate was sitting on a curb in 1995 (76 RT 9136-9143), possessed a piece of metal weapon stock in his anus in 1995 (76 RT 9146-9167), assaulted an inmate with a weapon on the yard in 1995 (77 RT 9179-9190), slashed another inmate during a fight on the yard in

(...continued)

bed. (75 RT 8975-8977.) He also saw a weight bench with bar bells and free weights on the floor. (75 RT 8978-8979.)

1995 (77 RT 9192-9201), possessed an inmate manufactured weapon in 1995 (77 RT 9203-9222), slashed another inmate with a weapon in 1996 (77 RT 9225-9240), possessed weapons in 1996 (77 RT 9241-9261), spit in the face of a lieutenant in 1996 (78 RT 9272-9274, 9281-9282), assaulted a correctional officer in 1997, leaving the officer with a bloody nose and cut lip (78 RT 9283-9285), possessed weapons and an "Ad Seg" vest used for protection by the staff, which Barrett had taken apart and removed the metal, in 1997 (78 RT 9291-9308), admitted setting up a cell fight and being able to get out of his cell in 1997 (78 RT 9311-9337), attacked an inmate who was handcuffed from behind in 1999 (78 RT 9339-9356), possessed weapons in 1999 (78 RT 9358-9366), threw feces at an officer in 1999 (78 RT 9379-9386), possessed weapons in 2000 (78 RT 9372-9374), possessed weapons while transferring into the Secured Housing Unit in Tehachapi in 2000 (78 RT 9390-9398), assaulted an inmate in 2002 (78 RT 9399-9413), and possessed weapons in 2003. (78 RT 9417-9426.)

The prosecutor also introduced victim impact testimony from Richmond's mother and sisters. (79 RT 9449-9459.) Richmond's mother, Carolyn Cox, testified that Richmond was her only son so news of his death made her heart sink. (79 RT 9449.) She testified that she was under a doctor's care for nerves and a heart problem and that her family has not been the same since Richmond's death. (79 RT 9449-9451.)

Richmond's older sister, Kimberly Colangelo, testified that Richmond, as the only male left in the family, was a strong role model and the children adored him. (79 RT 9453-9454.) He was the family's center and kept them strong. She testified that she has not been able to emotionally reconnect with her mother, as her mother had been in and out of the hospital and on many medications. (79 RT 9454-9456.) Richmond's younger sister, Christina Richmond, testified that her family used to be close, but now they are far apart. (79 RT 9457-9459.)

B. Defense Case

Charles Rand, Barrett's former juvenile probation officer, testified for Barrett during the penalty phase. (81 RT 9628-9629, 9633, 9639.) Rand testified that as a child, Barrett lived in a predominantly black neighborhood which had a lot of crime. (81 RT 9637-9639.) Rand testified that Barrett's father had been absent since Barrett was three years old and that Barrett had no adult supervision or structure while growing up. Barrett's family struggled financially and his family members abused alcohol and drugs. As he had no one to protect him, Barrett ran away many times and lived on the streets. However, he had a loving attachment to his younger sister. (81 RT 9639-9645.) Rand testified that he was able to talk to Barrett before his testimony and believed that Barrett now had the insight he lacked growing up. (81 RT 9646-9647.)

On cross-examination, Rand testified that one incident that brought Barrett to his attention was Barrett's assault on an elderly man in his eighties. Barrett had also committed two robberies that same day. (81 RT 9649-9650.) Rand testified that Barrett never returned to the Log Cabin Ranch after a furlough and, in fact, committed a murder while on this furlough.¹³ (81 RT 9650-9652.) Rand also acknowledged that Barrett failed to participate in therapy. (81 RT 9660-9661.)

James Esten, a retired correctional consultant, testified for Barrett. (82 RT 9700-9701.) Esten testified about future dangerousness and prison classification levels. (82 RT 9706-9707, 9712-9713.) Esten testified that Barrett was eligible for an indeterminate Secured Housing Unit (SHU) term and would be single-celled in Pelican Bay Prison, which was designed to

¹³ On redirect examination, Rand testified that the victim in Barrett's first murder tried to orally copulate Barrett and had provided him liquor, marijuana, and pornography. (81 RT 9656-9658.)

house the most violent inmates, if he was sentenced to life without the possibility of parole. (82 RT 9713-9714, 9720-9722, 9726.) Esten played for the jury a video depicting the conditions at Pelican Bay. (82 RT 9722-9725.)

On cross-examination, Esten testified that past behavior of an inmate is the best predictor of that inmate's future behavior and admitted that Barrett was a danger to other inmates and staff. (82 RT 9736-9737, 9741.) Esten also admitted that he did not interview Barrett and had never been a correctional officer. (82 RT 9738.) Esten further testified that an indeterminate SHU term does not mean that an inmate will never reenter the prison's general population and that a majority of those sentenced to life in prison without the possibility of parole are in the general population. (82 RT 9741.)

Esten also acknowledged that there had been assaults, including several murders, at Pelican Bay and that inmates have been discovered with weapons. (82 RT 9741-9742.) Esten testified that no system is fool-proof, that no one in prison is one-hundred-percent safe, and that a violent inmate is going to be violent no matter where he is housed. (82 RT 9746-9747, 9755-9756.)

On redirect examination, Esten testified that Pelican Bay is more secure than death row. (82 RT 9756-9757.) Esten also testified that inmates get less violent with age and that all inmates sentenced to life without the possibility of parole will die in prison. (82 RT 9761-9762, 9767.)

Barrett testified on his own behalf in the penalty phase. He testified that he did not want his family to plead for his life because he was responsible for his actions. He further testified that he thought that people should not hide behind lawyers and that the jurors should be the one who got to ask the questions. (82 RT 9776, 9778-9779.) He was surprised at

the jurors' honesty during voir dire. Barrett stated that he has been a "model citizen" in court because the court's staff had treated him with dignity and because he had given his word to the transportation team that he would not cause any trouble. (82 RT 9778-9779, 9785.) Barrett denied ever being a member of a prison gang. (82 RT 9787-9788.)

Barrett was born in New Jersey but his earliest memories are of Canada because his family moved there after his father deserted from the Marines. Barrett's parents broke up when he was about three-years-old and his younger sister was about two-years-old. Barrett testified that his mother "kidnapped" his sister and him from their father and took them back to the United States. (82 RT 9790-9792.)

When his family moved to San Francisco, Barrett testified that they first stayed in a shelter and then moved to the "ghetto." (82 RT 9795.) His mother only occasionally had a job. His mother's female lover, and her "mulatto" son, lived with them. Barrett testified that he and his sister stuck out in their predominantly black neighborhood. (82 RT 9795-9797.) Barrett regularly fought others on the school bus. (82 RT 9800-9801.)

Barrett did not want to discuss the reason he did not return to Log Cabin, but testified that he "pretty much" lived on the streets after his failure to return. (82 RT 9804.) Barrett testified that his assault of an elderly man was the single most shameful thing he had ever done. (82 RT 9799-9800.) Barrett also admitted that when he was stopped by a police officer after assaulting Spychala, he confessed to murdering Jackson. (82 RT 9806.)

Barrett testified that he had been to numerous prisons, including Vacaville, Mule Creek, Soledad, and Folsom. (82 RT 9807-9810.) He testified that Calipatria was exceedingly violent in 1996. (82 RT 9816.)

Barrett testified that he has accepted that he will never get out of prison. (82 RT 9821.) He also testified that he has had cellmates after killing Richmond. (82 RT 9822-9823.)

Barrett then read an allocution to the jury. In this statement, Barrett told the jurors that he respected them, but that he did not believe in the “system.” He stated that he was impressed with their honesty and, if he had to do it over again, would represent himself during trial. (82 RT 9827-9828.)

Barrett stated that no one could understand how prison affected you unless you lived there. (82 RT 9828.) He told the jury that although he was “bothered” by the loss Richmond’s family felt, he felt no remorse for Richmond. (82 RT 9828-9829.) Barrett also stated that he regretted the pain he has caused his own loved ones and his own wasted potential. (82 RT 9831.)

Barrett told the jury that he does not believe in “psychobabble” or “excuse making” and that he accepts responsibility for the things he’s done and lives by his own “personal philosophy” and “morality.” (82 RT 9829-9831.) He also hoped that his experiences would be able to benefit someone else and that his “knowledge will help another choose wisely or repair a flawed correctional system.” (82 RT 9831.)

Barrett complained about the lawyers in this case. He understood that his own lawyers did not want to see a client die, but found some of the things his lawyer said “offensive.” (82 RT 9831.) Barrett also stated that he had not responded to the prosecutor’s “provocations” because he gave his word to his security detail that he would cause no trouble and because he was returning the dignity and respect that the court and its staff afforded him. (82 RT 9831-9832.)

Barrett testified that prison was like his “house,” and that is why he acted the way he did towards “child rapists,” “serial rapists,” and “baby

killers.” He stated that he posed no danger to anyone who is not a threat to him, but “if you pose a danger, I will be a danger.” (82 RT 9832-9833.)

During the prosecutor’s cross-examination, Barrett again admitted to assaulting an elderly man and beating him with his own cane. (82 RT 9835-9837, 9843.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED BARRETT’S MOTION TO EXCLUDE ALL CORRECTIONAL DEPARTMENTAL EMPLOYEES AS PROSPECTIVE JURORS

Barrett claims that the trial court’s refusal to excuse all correctional departmental employees¹⁴ as prospective jurors deprived him of an impartial jury and due process. Specifically, Barrett contends that Juror 12, an employee of CDCR, was “impliedly biased” as a matter of law due to her employment, and that her presence on his jury violated both his federal constitutional rights and his rights under state law. Barrett further argues that he has preserved his right to appeal the trial court’s denial of his motion to exclude employees of CDCR as prospective jurors despite his failure to use all of his available peremptory challenges at trial. (AOB 91-137.) Barrett’s claim should be denied. As a threshold matter, Barrett has forfeited his ability to raise this issue on appeal because he failed to exercise all of his available peremptory challenges at trial. In any event, even if preserved for appeal, Barrett’s claim fails because the trial court’s denial of Barrett’s motion did not “force” an incompetent juror upon him.

¹⁴ The California Department of Corrections has been renamed the California Department of Corrections and Rehabilitation. Accordingly, respondent will use the acronym “CDCR” to refer to this agency.

A. Trial Court Proceedings

On August 20, 2003, the trial court noted that even though there would be a “fair amount” of CDCR personnel on the jury panel, given the location of the trial, it knew of no law that proscribed them from sitting as jurors on this case. (14 RT 2158.) After Barrett’s counsel pointed out that the prosecution and defense often stipulate not to use correctional officers as jurors, the court stated that it “can’t exclude a group of people like that on speculation. I’m not going to do it.” The court further noted that “You can’t decide which way these people will go. They all have their own mind.” (14 RT 2158-2159.) The court finally noted that “we routinely, as long as the prisons have been here in this county, have corrections officers and other [CDCR] personnel sit as jurors in criminal cases.” The court told Barrett’s counsel that “unless somebody can find some specific law that says correctional officers or any other [CDCR] employee can’t sit on a criminal case, I’m going to allow them on the jury panel.” The court, however, did state that it would “allow maybe a little leeway on voir dire.” (14 RT 2160-2161.)

On October 2, 2003, Barrett’s counsel again raised the issue of CDCR personnel as prospective jurors, due to the potential that a large number of witnesses would be correctional officers. (26 RT 2961.) In response, the court noted that such jurors would not necessarily be predictable:

So, I mean, I don’t know that you’re doing – it’s like people always want me to throw off the Border Patrol and Customs guys from the criminal juries. And I’ve found that sometimes one professional peace officer is the most critical person there is toward another peace officer. They’ll say, “That guy, he screwed up. He didn’t follow the rules. He did something wrong.” And they are not afraid to let them know. Sometimes it goes the opposite of the way you might think.

(26 RT 2962.) The court indicated that it would examine such prospective jurors individually:

I want to take them one at a time. I'm not going to exclude any cognizable segment of the population of Imperial County. I want to talk to them, see what they say

...

Well, I'm going to talk to them one at a time. I am not going to make any blanket recusals of certain people, of certain occupations or anything, any particularized class.

(26 RT 2961-2963.)

During *Hovey*¹⁵ voir dire, which took place during October and November 2003, the trial court again stated that although it may dismiss for cause prospective jurors that work at Calipatria and either know witnesses or have some knowledge about the case, it would not generally exclude CDCR personnel just because they have a "certain classification or work at a certain place":

If you can find me a case from Pelican Bay or anywhere else that I should exclude them, I will. And if you can't, correctional officers are on. Otherwise, I am not going to excuse them because of their job or anything else.

(35 RT 4135-4136; see also 44 RT 5245 ["If there's a law that says they can't serve, I'll boot them for cause. Otherwise, we will keep them"].)

True to its word, the court dismissed for cause during *Hovey* voir dire all CDCR employees that it found could not be impartial. (See, e.g., 28 RT 3066-3069 [Athey], 3073-3077 [Arias]; 33 RT 3853-3855 [Horta]; 34 RT 3920-3924 [Jacobob], 3926-3941 [James]; 35 RT 4189-4190 [Mercado]; 36 RT 4305-4316 [Olmos], 4351-4353 [Paramo], 4353-4368 [Partida]; 40 RT 4669-4670 [Portillo], 4718-4727 [G. Ramirez], 4748-4760 [Renteria]; 41 RT 4806-4808 [Rock], 4835-4839 [Rodriguez], 4924-4925 [Sanders]; 43

¹⁵ *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

RT 5083-5086 [Castillo], 5103-5105 [Diioli], 5178-5179 [McPhetridge]; 44 T 5386-5399 [Gandara]; see also AOB 95-98.)

On November 14, 2003, after the conclusion of *Hovey* voir dire and prior to general voir dire, Barrett filed a written motion seeking to exclude CDCR personnel from the jury panel. In this motion, Barrett argued that because CDCR personnel will constitute a substantial number of the prosecution's witnesses, assist with transporting Barrett to and from court, and are presumably aware of security procedures in the courtroom, they had an "implied bias" that precluded them from serving on Barrett's jury. Barrett further argued that CDCR personnel, based on their employment, may be aware of information not otherwise available to jurors and are thus likely to be biased against Barrett, both because of his status as an inmate and because of his reputation. (44 CT 12523-12530.)

Barrett's motion was heard on November 17, 2003. The trial court first noted that "every other small county in the state that has a state prison . . . [treats an employee of CDCR] just like any other prospective juror" and that it had already excused a large number of such prospective witnesses after individual examination during *Hovey* voir dire. (45 RT 5440-5441.) After Barrett's counsel again advised the court that in cases arising out of a prison setting, it was his experience the parties usually stipulate to excuse all correctional officers from the jury panel because of their supposed bias and knowledge of courtroom security (45 RT 5440-5443), the trial court reiterated that "there is no case that says you can't do this. And to the extent they answer the questions correctly, I can't treat them like a separate part of society and say, 'You can't be on a jury.'" (45 RT 5442.)

After noting that only eight prospective jurors employed by CDCR as correctional officers remained on the panel, four from Calipatria and four from Centinela (45 RT 5443-5444), the court denied the motion:

And I have to assume people, when they answer questions under oath, they're being honest. I can't assume that they're concealing things, because so very many of them were honest. And they just said, "I can't do this. I know too much about this." And they were right up front on it.

So I think – I understand the reason for bringing the motion. I would have brought it myself if I was in your position.

But we've developed a little culture down here in Imperial County that is different than the whole rest of the state with regard to this, is the way I understand it. They don't do it in any of the other prison communities.

(45 RT 5445-5446.)

At the end of *Hovey* voir dire, a total of 17 prospective jurors employed by CDCR remained on the panel. This included the person who would become Juror 12, a correctional officer from Centinela, who was the sole CDCR employee to actually serve as a juror. (38 RT 4406; 29 CT 8042.)

B. Barrett Has Forfeited His Ability to Raise This Claim on Appeal Because He Failed to Use All of His Available Peremptory Challenges and Failed to Express Dissatisfaction with the Jury

Barrett claims that, despite his failure to exercise all of his peremptory challenges, and despite his failure to express dissatisfaction with the jury as constituted, his claim is preserved for appeal. (AOB 119-127.) Not so. This Court has held numerous times that the exhaustion of all peremptory challenges and an expression of dissatisfaction with the jury as constituted are prerequisites for preserving a claim on appeal that the trial court erred in denying a for-cause challenge to a sitting juror.

““[A] defendant who wishes to preserve a claim of error in the improper denial of a challenge for cause must (1) use a peremptory challenge to remove the juror in question; (2) exhaust his [] peremptory challenges or justify the failure to do so; and (3) express dissatisfaction with

the jury ultimately selected.” [Citations.]” (*People v. Souza* (2012) 54 Cal.4th 90, 130; see also *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1087.) Here, as Barrett admits, he did not exercise all of his peremptory challenges. (AOB 119; see also 46 RT 5628.) He further admits that he did not express dissatisfaction with the jury as seated. (AOB 126-127; see also 46 RT 4628 [“Defense will pass for cause or for peremptories, Your Honor”].) Therefore, he has forfeited his claim of error.

Barrett argues that this forfeiture rule should not apply to his case because “this ‘rule’ actually arose as a factor in prejudice assessment, rather than as a rule of issue preservation” and that his failure to use all of his peremptory challenges or express dissatisfaction with the jury should be excused. (See AOB 119-125.) However, given that his motion was denied and the nature of the remaining prospective jurors, Barrett’s attempt to avoid the forfeiture rule is unavailing.

Barrett acknowledges that the case he relies on to support his contention that he was not required to exercise all of his peremptory challenges to preserve his claim on appeal, *United States v. Martinez-Salazar* (2008) 528 U.S. 304, 315 [120 S.Ct. 774, 145 L.Ed.2d 792], has been held by this Court not to apply to state court trials because *Martinez-Salazar* involved the Federal Rules of Criminal Procedure, which do not require a defendant to use a peremptory challenge as a prerequisite for raising on appeal a trial court’s denial of a for-cause challenge. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 487.) As this Court has clearly held:

. . . [T]o preserve this claim [that the trial court erred by denying a motion to exclude CDCR employees as prospective jurors] for appeal we require, first, that a litigant actually exercise a peremptory challenge and remove the prospective juror in question. Next, the litigant must exhaust all of the peremptory

challenges allotted by statute and hold none in reserve. Finally, counsel ... must express to the trial court dissatisfaction with the jury as presently constituted.

(*People v. Mills* (2010) 48 Cal.4th 158, 186; see also *People v. Bivert* (2011) 52 Cal. 4th 96, 114 [requirement of an “express statement of dissatisfaction” necessary to preserve this issue for appeal in any case tried after 1994].)

Barrett further argues that with seven employees of CDCR still in the jury pool, and six peremptory challenges remaining, he was faced with a “Hobson’s choice” between, on the one hand, using a peremptory challenge on Juror 12 and ending up with another CDCR employee on the jury and, on the other hand, passing for cause in the hopes that Juror 12 “might be less impliedly biased than the other remaining [CDCR] employees.” (AOB 126.) However, rather than being faced with a “Hobson’s choice,” Barrett actually had several options: (1) Barrett could have continued to exercise his peremptory challenges to excuse remaining CDCR employees¹⁶; (2) If Barrett used his remaining challenges and was still dissatisfied with the jury, he could have requested further peremptory challenges from the trial court¹⁷; or (3) Barrett could have expressed his dissatisfaction with the jury

¹⁶ Given the sizeable number of prospective jurors remaining, the prosecutor’s remaining peremptory challenges, and the possibility that the trial court would excuse for cause one or more of the remaining CDCR employees (see, e.g., 46 RT 5585-5586, 5599-5600 [trial court excuses correctional officer Borrego for cause during general voir dire]), there remained a very real possibility, if not probability, that, had Barrett further exercised his remaining peremptory challenges, the jury would not have included *any* CDCR employees.

¹⁷ Barrett’s reliance on *People v. Box* (1984) 152 Cal.App.3d 461, 464 (AOB 126-127) is misplaced. In *Box*, the appellant demanded and was statutorily entitled to 26 peremptory challenges, but the trial court only granted him 10, and appellant used nine. Here, however, Barrett received
(continued...)

to the trial court. Had Barrett proceeded to use his remaining peremptory challenges, asked for more if he was still dissatisfied, and made clear his dissatisfaction with the jury to the trial court, the court would then have had the opportunity to address the issue, short of excluding all CDCR employees as potential jurors. However, Barrett claims he chose to speculate both that he *might* run out of peremptory challenges and be faced with a “more biased” juror than Juror 12 and that his motion was sufficient as an “express statement of dissatisfaction” with the constituted jury. However, as stated above, such speculation is insufficient to preserve Barrett’s claim for appeal. The claim has been forfeited.¹⁸

C. The Trial Court’s Denial of Barrett’s Motion Did Not Result in an Incompetent Juror Being “Forced” on Barrett

In any event, even if Barrett’s claim is cognizable on appeal, this Court should deny Barrett’s claim because his jury was impartial. To prevail on his claim that the trial court denied him due process and a fair trial by denying his motion to exclude employees of CDCR as prospective jurors, Barrett “must demonstrate that the court’s ruling[] affected his right to a fair and impartial jury.” (*People v. Yeoman* (2003) 31 Cal.4th 93, 114.) Although Barrett used peremptory challenges to excuse some of those prospective jurors he claims should have been excused for cause, “the loss of a peremptory challenge in this manner “provides grounds for reversal

(...continued)

all of the peremptory challenges he was entitled to, did not request any more, and failed to use six of his challenges.

¹⁸ Barrett asserts his trial counsel cannot “waive [his] right to an unbiased jury without his express consent.” (AOB 125.) As demonstrated below, Barrett’s jury was impartial; accordingly, notwithstanding forfeiting his ability to challenge the trial court’s denial of his motion to exclude all CDCR employees from the venire, there was no waiver of Barrett’s right to an unbiased jury.

only if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*””” (*Ibid.*, emphasis in original) Consequently, “[T]he only for-cause challenges that are relevant on appeal are challenges made to sitting jurors.” (*People v. Baldwin* (2010) 189 Cal.App.4th 991, 1000.) In other words, “[E]ven if the trial court erroneously denied for-cause challenges to prospective jurors who were later excused by peremptory challenges, the defendant cannot show that his right to an impartial jury was affected by the denial of the for-cause challenges, unless the trial court erroneously denied a challenge for cause to a sitting juror.” (*Id.* at pp. 1000-1001.)

Here, the only sitting juror subject to Barrett’s motion to exclude all employees of CDCR was Juror 12, a correctional officer at Centinela state prison. This Court dealt with a similar situation in *People v. Avila* (2006) 38 Cal.4th 491, 538-539, where the defendant claimed the trial court improperly denied his challenges for cause to 12 prospective jurors, but 11 of those 12 did not sit on the jury because they were each excused by a peremptory challenge. In reviewing the defendant’s claim, this Court examined the merits of the defendant’s challenge to the one juror who ultimately sat on the jury, but this Court did not address the merits of the challenges to the other 11, stating, “As for the 11 other prospective jurors defendant contends should have been dismissed for cause, they could not have possibly affected the jury’s fairness because they did not sit on the jury.” (*Id.* at pp. 539-540.) Likewise, here, it is unnecessary to examine the merits behind Barrett’s challenges to any of the prospective jurors who did not sit on the jury because they could not have possibly affected the jury’s fairness.

Here, Juror 12 was not “impliedly biased” based on her employment as a correctional officer at Centinela prison under either state or federal law. The legislature has set forth a statutory scheme to exclude certain law

enforcement officials from serving on certain juries. (Code of Civ. Proc., § 219, subd. (a).) Excluded from service on a criminal jury are county deputy sheriffs, city police officers, state department of justice agents, district attorney investigators, officers with the state highway patrol, certain harbor officers, port officers, and transit officers, and officers with the University of California Police Department and the California State University Police Department. (Code of Civ. Proc., §§ 830.1; 830.2, subds. (a), (b), and (c); 830.33, subd. (a).) Included as a type of “peace officer,” but *not* listed in Code of Civil Procedure section 219, subdivision (a)’s exclusion from jury service are certain correctional officers with the Department of Corrections and Rehabilitation whose “primary duties . . . shall be the investigation or apprehension of inmates, wards, parolees, parole violators, or escapees from state institutions, the transportation of those persons, the investigation of any violation of criminal law discovered while performing the usual and authorized duties of employment, and the coordination of those activities with other criminal justice agencies.” (§ 830.2, subd. (d).)

The legislature was presumably aware of the scope of the duties of correctional officers (see, e.g., Code of Civ. Proc., § 830.2, subd. (d)) and specifically did *not* exclude them from jury service, even for the type of trial in the present case. Therefore, since the only automatic exclusion from jury service are those officers listed in Code of Civil Procedure section 219, the trial court lacked the authority to automatically exclude correctional officers as a class from Barrett’s jury panel.

As to *specific* individuals, a prospective juror is disqualified and thus subject to challenge for cause on the basis of *actual bias*, i.e., “the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.” (Code of Civ. Proc., § 225, subd. (b)(1)(C).) A juror is also disqualified for

implied bias, “when the existence of the facts as ascertained, in judgment of law disqualifies the juror.” (Code of Civ. Proc., § 225, subd. (b)(1)(B).)

Code of Civil Procedure section 229 specifically *limits* the causes for which a challenge for implied bias may be made to those set forth in that section. (*People v. Ledesma* (2006) 39 Cal.4th 641, 669-670 [“Under California law, a juror may be excused for ‘implied bias’ only for one of the reasons listed in Code of Civil Procedure section 229, ‘and for no other’”].) The grounds for “implied bias” set forth in this section include being a relative to a party, victim, or witness, having an interest in the action separate from an interest as a member of the public, having an unqualified opinion as to the merits of the action, or having a state of mind evincing enmity or bias against a party. (Code of Civ. Proc. § 229, subds. (a)-(f).)

As for implied bias under the federal constitution, Barrett relies primarily on federal cases (see AOB 102-107), which are not binding on this Court. (See, e.g., *People v. Camacho* (2000) 23 Cal.4th 824, 830, fn. 1; *People v. Cummings* (1974) 43 Cal.App.3d 1008, 1019.) As for state cases, the United States Supreme Court has set forth no particular test to determine implied bias. (See *United States v. Wood* (1936) 299 U.S. 123, 145-146 [57 S. Ct. 177, 81 L. Ed. 78] [“Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula”]; *Smith v. Phillips* (1982) 455 U.S. 209, 217-218 [102 S.Ct. 940, 71 L.Ed.2d 78] [the constitutional right to an impartial jury is preserved by the opportunity to show actual bias on the part of a juror].)

Here, Juror 12, as a correctional officer at a state prison, was not statutorily excluded from serving as a juror in Barrett’s case. Furthermore, she was not excludable under state law for having any “implied bias” as a

result of her employment as she was not “a relative to a party, victim, or witness,” did not have “an interest in the action separate from an interest as a member of the public,” and did not have “an unqualified opinion as to the merits of the action, or hav[e] a state of mind evincing enmity or bias against” Barrett.¹⁹ (See Code of Civ. Pro. § 229, subs. (a)-(f).) Finally, even assuming the federal decisions cited by Barrett are persuasive, there is no potential here for the type of “emotional involvement” that these cases found to be grounds for disqualification. Unlike other employees of CDCR who were excused for cause, Juror 12 did not work in the prison where Barrett’s crime took place, did not know either Barrett or the circumstances of his crime, did not know the witnesses who would be testifying, and did not evince any prejudice toward Barrett. Thus, the mere fact that Juror 12 was a correctional officer did not render her unable to be impartial under either state or federal law

Nor did Juror 12 evince any “actual bias” toward Barrett. A trial court is in the best position to determine whether a potential juror is sincerely willing and able to listen to the evidence and the instructions, and

¹⁹ Barrett’s reliance on *People v. Terry* (1994) 30 Cal.App.4th 97 for the proposition that Juror 12 in impliedly biased under state law (AOB 127-132) is misplaced. In *Terry*, the California Court of Appeal held that a deputy prosecutor was impliedly biased in a case where he was a member of the same office prosecuting appellant. (*People v. Terry, supra*, 30 Cal.App.4th at p. 101.) However, Juror 12 *did not work for the agency prosecuting Barrett*. Rather, she was a correctional officer at an entirely different prison from where Barrett committed his crimes, did not know Barrett, the circumstances of his crime, or any witnesses who would be testifying. In these circumstances, the fact that Juror 12 worked for the same state agency that employed a number of witnesses did not constitute implied bias under state law. (See *People v. Terry, supra*, 30 Cal.App.4th at p. 103, emphasis added [“It is imperative, therefore, for jurors in a criminal case to have *no relationship to the office which is prosecuting the defendant*”].)

render an impartial verdict based on that evidence and those instructions. (*People v. Hillhouse, supra*, 27 Cal.4th at pp. 488-489.) “A reviewing court must allow the trial court to make this sort of determination. The trial court is present and able to observe the juror itself. It can judge the person’s sincerity and actual state of mind far more reliably than an appellate court reviewing only a cold transcript.” (*Ibid.*) Therefore, this Court affords a trial court broad discretion in assessing the qualifications of jurors challenged for cause, and a trial court’s evaluation of a prospective juror’s ability to serve is rarely disturbed on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1243.) This Court generally defers to a trial court’s resolution of the conflicting and confusing answers often given by prospective jurors because the trial court is aided by observing the prospective juror firsthand. (*People v. Bonilla* (2007) 41 Cal.4th 313, 339.) A trial court’s resolution of these factual matters is binding on appeal when supported by substantial evidence. (*Ibid.*)

Therefore, before an appellate court will find error in failing to excuse a potential juror, the potential juror’s inability to perform a juror’s functions must be shown by the record to be a “demonstrable reality.” The court will not presume bias, and, again, will uphold the trial court’s exercise of discretion on whether a potential juror should be discharged for good cause if supported by substantial evidence. (*People v. Beeler* (1995) 9 Cal.4th 953, 975, 989.)

In this case, substantial evidence supports the trial court’s decision not to excuse Juror 12 for cause. In other words, substantial evidence demonstrates that Juror 12 was impartial and therefore an “incompetent” juror was not forced upon Barrett due to the trial court’s denial of his motion to excluded CDCR employees from the jury panel.

Here, although Barrett contends that Juror 12’s questionnaire and voir dire answers suggested bias (AOB 116-119), they in fact show the opposite.

In her juror questionnaire, Juror 12 indicated she was not a member of any organization that takes a position on the death penalty (29 CT 8038), believed in the right to defend oneself (29 CT 8047), and had no bias against Barrett (29 CT 8054). During *Hovey* voir dire, Juror 12 stated that she had not heard anything about this case (38 RT 4403), would not treat Barrett differently due to his status as an inmate (38 RT 4405), and would neither expect to receive pressure from her coworkers regarding jury service nor let anyone else's opinion affect her. (38 RT 4405-4406.) Barrett's counsel passed on her. (38 RT 4406.) In general voir dire, Juror 12 indicated she was not prejudiced against Barrett, promised to listen to the evidence, and promised to hold the prosecution to proving guilt beyond a reasonable doubt. (46 RT 5489-5491.) Juror 12 further stated that she was able to put aside her duties as a correctional officer and accept the duties and responsibilities as a juror. (46 RT 5543-5544.)

Therefore, substantial evidence demonstrates that Juror 12 was not "incompetent." She was not impliedly biased due to her employment and was not actually biased against Barrett.²⁰ Thus, because only one juror subject to Barrett's motion actually sat on Barrett's jury, and that one juror was not biased, the trial court's denial of Barrett's motion did not affect Barrett's right to be tried by a fair and impartial jury. Accordingly, Barrett's claim should be denied.

²⁰ Because, as demonstrated above, Juror 12 was not biased against Barrett, and the trial court's denial of his motion did not affect his right to a fair trial, his contention that the court's "error" violated his rights by undermining his ability to intelligently exercise peremptory challenges (AOB 132-137) should be summarily rejected.

II. THE TRIAL COURT PROPERLY DENIED BARRETT'S *WHEELER* MOTION

Barrett claims that the trial court's "erroneous" denial of his *Wheeler*²¹ motion violated his federal and state constitutional rights. Specifically, Barrett contends that the prosecutor's claimed reason for using a peremptory challenge on prospective juror Lisa B. - that her written questionnaire reflected ambivalence about judging others - was pretextual, and that a comparative juror analysis "confirms" that this strike was based on race. (AOB 138-159.) Barrett's claim should be rejected because substantial evidence, including evidence arising from comparative analysis, demonstrates that the prosecutor's use of a peremptory challenge on Lisa B. was not motivated by discriminatory intent.

A. Trial Court Proceedings

In her juror questionnaire, prospective juror Lisa B. was asked in Question 59, "How do you feel about being on jury service?" She answered, "Jury service imposes the right of one person to pass judgment on another person. I would not like that responsibility to have to do that to another person." (7 CT 1833.) In response to Question 68, which asked, "Do you have any religious or moral feelings that would make it difficult or impossible for you to sit in judgment of another person?" Lisa B. answered, "Not quite sure. Have not been able to define my own thoughts regarding being able to pass judgment. I know that I wouldn't like to be responsible in that position." (7 CT 1836.) As to question 87, "Is there any reason why you would prefer not to serve as a juror in this case?" Lisa B. responded, "Wouldn't like to be the one to have to judge another person. Not based on any other reason, but because that would be too much power for 1 person." (7 CT 1840.)

²¹ *People v. Wheeler* (1978) 22 Cal.3d 258.

Near the end of his allotted time for questioning during general voir dire, the prosecutor began to question prospective juror Lisa B. After Lisa B. answered in the negative to the prosecutor's question regarding her being a math teacher, he realized that he had confused prospective juror Lisa B. with another prospective juror with the same last name. (46 RT 5616-5617.) The trial court gave the prosecutor "another minute" to look at Lisa B.'s questionnaire and finish his questioning. (46 RT 5617.) After briefly questioning Lisa B. as to why she crossed out some of her answers on her questionnaire regarding her views on self-defense, and quickly questioning two other prospective jurors, the trial court told the prosecutor he was out of time. (46 RT 5617-5619.) As Barrett's counsel had also confused Lisa B. with another prospective jurors, the trial court offered Barrett's counsel "a minute or two to talk to Lisa B[.] if you want to." Barrett's counsel declined the court's offer. (46 RT 5619-5620.)

After voir dire, the prosecutor used a peremptory challenge to strike prospective juror Lisa B. (46 RT 5624.) Barrett's counsel immediately made a *Wheeler* motion stating, "There's only one Black American in the jury panel, and she was kicked seemingly with no cause. There's nothing to distinguish that juror from other jurors and, I think, to exclude that juror would deprive my client of a fair defense." (46 RT 5624-5625.) After the trial court invited the prosecutor to articulate for the record why he excused Lisa B., the prosecutor explained that he had concerns over her answer to questions 59 and 68 on her questionnaire, regarding her views on passing judgment on people. The prosecutor stated that he did not question her on these responses because he ran out of time:

I didn't get to that question. I have her marked down as I was going to challenge her for cause. I didn't get to that question because I was running out of time. All I got to ask her was one question.

(6 RT 5625-5626.)

The trial court denied the *Wheeler* motion stating that concerns with a juror being able to pass judgment is “a valid, non-racial reason.” (46 RT 5627.)

B. Substantial Evidence Demonstrated That the Prosecutor’s Use of a Peremptory Challenge to Strike Lisa B. Was Not Motivated by Discriminatory Intent

The use of peremptory challenges to remove prospective jurors solely on the basis of their membership in a racial or other cognizable group is prohibited by the state and federal constitutions. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 [106 S.Ct. 1712, 90 L.Ed.2d 69].)²² However, peremptory challenges are presumed to have been based upon constitutionally permissible grounds. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193.)

[T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative.

(*People v. Wheeler*, *supra*, 22 Cal.3d at p. 275.) Therefore, peremptory challenges “based on ‘hunches’ and even ‘arbitrary’ exclusion are permissible” provided they are not based on impermissible group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 165, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th. 536, 555, fn. 5.)

The following three-step procedure governs review of a prosecutor’s use of peremptory challenges:

²² An objection at trial referencing only *Wheeler* is sufficient to preserve a *Batson* claim being raised for the first time on appeal because the claims are so closely related. (*People v. Conwell* (2005) 37 Cal.4th 50, 66, fn. 3, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

First, the defendant must make out a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” [Citations.] 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.” [Citation.]

(*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129], fn. omitted; *People v. Zambrano*, *supra*, 41 Cal.4th at p 1104.) Importantly, “the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834]; see also *People v. Stevens* (2007) 41 Cal.4th 182, 192.)

The role of the reviewing court considering a trial court’s denial of a *Wheeler* motion is a limited one. This Court reviews the trial court’s ruling on the question of purposeful racial discrimination for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 971.) It is presumed that the prosecutor used peremptory challenges in a constitutional manner, and this Court gives deference to the court’s “ability to distinguish bona fide reasons from sham excuses.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98, fn. 21.) When the trial court “makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.” (*People v. Avila*, *supra*, 38 Cal.4th at p. 541; *People v. Boyette* (2002) 29 Cal.4th 381, 422; *People v. Alvarez*, *supra*, 14 Cal.4th at pp. 196-197.)

In situations where a trial court expressly states that it does not believe that a prima facie case has been made, then invites the prosecution to justify its challenges for the record on appeal, the issue of whether a prima facie

case has been made is not rendered moot, and there is no implied finding of a prima facie case. (*People v. Howard* (2008) 42 Cal.4th 1000, 1018; *People v. Welch* (1999) 20 Cal.4th 701, 746.) However, where, as here, the trial court did not specifically rule as to whether a prima facie case exists, this Court has held that where a prosecutor proffers reasons for excusing a juror, the issue of whether a prima facie case existed has been rendered moot. (*People v. Lewis* (2008) 43 Cal.4th 415, 471.) Accordingly, in the present case, only the third step of the *Wheeler* motion is at issue.

“[T]he critical question in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor’s justification for his peremptory strike.” (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339, 123 S.Ct. 1029, 154 L.Ed.2d 931.) The credibility of a prosecutor’s stated reasons for exercising a peremptory challenge “can be measured by, among other factors ... how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.” (*Id.* at p. 339, 123 S.Ct. 1029.)

(*People v. Lewis, supra*, 43 Cal.4th at p. 469.)

As to this final stage of a *Wheeler* motion, trial judges are in the best position to assess the credibility of prosecutors and evaluate their reasons for exercising peremptory challenges. (See *People v. Jones* (2011) 51 Cal.4th 346, 360-361; *People v. Jackson* (1996) 13 Cal.4th. 1164, 1197; *People v. Turner, supra*, 8 Cal.4th at p. 168.) Therefore, a trial court’s ruling that a prosecutor’s proffered justifications for use of his or her peremptories are non-discriminatory is entitled to review under the deferential substantial evidence standard if the court made a sincere and reasoned effort to evaluate those justifications. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1104.) However, even where the trial court denies a *Wheeler* motion without comment or discussion, where the prosecutor’s stated reasons are neither inherently implausible nor unsupported by the record, the finding of the trial court is entitled to deference. (See *People v.*

Vines (2011) 51 Cal.4th 830, 849-850; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

Barrett first contends that the prosecutor's professed reason for his use of a peremptory challenge on prospective juror Lisa B. was pretextual because he did not question her about her expressed difficulty with judging others during *Hovey* voir dire. In support of this contention, Barrett notes that the *Hovey* proceedings were not strictly limited to eliciting prospective jurors' views on capital punishment and that inquiries were made of other prospective jurors' views on judging others. (AOB 147-153.) Barrett's contention is unpersuasive.

The purpose of the sequestered inquiry about penalty under *Hovey* is . . . to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would "vote against the death penalty without regard to the evidence produced at trial."

(*People v. Davenport* (1995) 11 Cal.4th 1171, 1203, quoting from *People v. Clark* (1990) 50 Cal.3d 583, 597.) A prospective juror's views on judging others is thus not part of a *Hovey* inquiry.

Although Barrett is correct that the trial court and attorneys did ask questions outside *Hovey*'s strictures, including questions about judging others (see AOB 147-153), what Barrett overlooks is that Lisa B.'s *Hovey* voir dire took place on the very first day (of 15 days) of *Hovey* voir dire, when the trial court's admonitions about the limitations of *Hovey* voir dire were still fresh in the minds of the attorneys.²³ (See, e.g., 28 RT 3015 ["Wait a minute. We are here to talk about death qualification, not general voir dire"], 3028-3029 [" . . . [Y]ou all stipulated to do the *Hovey* voir dire

²³ At Barrett's counsel's request, the trial court did indicate that it would continue to consider hardships should they arise during *Hovey* voir dire but otherwise stated that it did not "want to go into general voir dire right now. We'll do the death qualification." (28 RT 3041.)

on their views on the death penalty, and I agreed to that. If we went any further we would be really violating – seriously violating the rule”], 3055 [“That would be a very pertinent question at a later date”].) Therefore, the fact that during the course of the 15 days of *Hovey* voir dire, the inquiries became broader and violated the strictures of *Hovey* voir dire,²⁴ does not mean that the prosecutor’s decision *not* to go beyond *Hovey* limitations and respect the trial court’s admonitions *on the first day of Hovey* voir dire constituted substantial evidence that his reason for striking Lisa B. was pretextual, especially when coupled with the limited time the prosecutor had to question Lisa B. during general voir dire.

Barrett next contends that comparative juror analysis provides evidence that the prosecutor excused Lisa B. for a discriminatory purpose. Specifically, Barrett argues that a “side-by side comparison[]” between Lisa B. and Jurors 8 and 12 regarding their “expressed qualms about rendering judgment” demonstrates that the decision to strike Lisa B. was discriminatory. (AOB 153-158.) Not so.

This Court has held that comparative juror analysis is appropriate for the first time on appeal at the third step of the *Wheeler* test if an Barrett relies upon such an analysis on appeal and “the record is adequate to permit the urged comparisons.” (*People v. Lenix* (2008) 44 Cal.4th 602, 621-622.) In conducting such an analysis, the issue is not whether the challenged prospective jurors are similarly situated to jurors who were accepted, but whether the record shows the party exercising the peremptory challenges

²⁴ During the course of *Hovey* voir dire, the trial court did, at times, make further attempts to get the attorneys to limit their questioning to death qualification. (See, e.g., (29 RT 3149-3150, 3173-3174; 30 RT 3284-3285, 3300-3301, 3366-3367; 31 RT 3402-3404, 3433-3434, 3490, 3500-3501, 3535-3536; 32 RT 3605-3607, 3619, 3697-3699; 33 RT 3882; 34 RT 3959, 3995; 35 RT 4094-4095, 4098, 4110; 38 RT 4404; 43 RT 5092-5093; 44 RT 5358-5359, 5396-5398.)

honestly believed the jurors were not similarly situated in legitimate respects. (*People v. Lewis, supra*, 43 Cal.4th at p. 472; *People v. Huggins* (2006) 38 Cal.4th 175, 233.)

Although comparative analysis is one form of relevant circumstantial evidence, it is “not necessarily dispositive [] on the issue of intentional discrimination.” (*People v. Cruz* (2008) 44 Cal.4th 636, 658 quoting *People v. Lenix, supra*, 44 Cal.4th at p. 622.) The reviewing court must still be mindful of the inherent limitations of conducting comparative juror analysis “on a cold appellate record.” (*People v. Lenix, supra*, 44 Cal.4th at p. 622, citing *Snyder v. Louisiana* (2008) 552 U.S. 472, 483-484 [128 S.Ct. 1203, 170 L.Ed.2d 175].)

[A]lthough a written transcript may reflect that two or more prospective jurors gave the same answers to a question on voir dire, “it cannot convey the different ways in which those answers were given. Yet those differences may legitimately impact the prosecutor’s decision to strike or retain the prospective juror. When a comparative juror analysis is undertaken for the first time on appeal, the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers.” [Citation.] Observing that “[v]oir dire is a process of risk assessment” [citation], we further explained that, “[t]wo panelists [i.e., prospective jurors] might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court’s factual finding.”

(*People v. Cruz, supra*, 44 Cal.4th at pp. 658-659, quoting *People v. Lenix, supra*, 44 Cal.4th at p. 623; see also *Snyder v. Louisiana, supra*, 552 U.S. at p. 483 [“We recognize that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful

that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable”].)

Here, the limited comparative analysis performed by Barrett does not support his claim that the prosecutor’s reason for challenging Lisa B. was pretextual. Even ignoring the weaknesses of conducting a comparative analysis for the first time on appeal and using a cold record in performing such an analysis, the comparisons urged by Barrett show that jurors he claims were comparable had significant distinctions and that the record supports the prosecutor’s race- neutral reason for challenging Lisa B.

Barrett argues that because a number of prospective jurors who expressed a desire not to serve as a juror were not struck by the prosecutor demonstrates that the prosecutor’s decision to remove Lisa B. was discriminatory. (AOB 153, 156-157.) But the prosecutor did not strike Lisa B. because of any desire on her part not to serve as a juror that was unrelated to her expressed discomfort with rendering judgment. (See, e.g., the other responses cited by Barrett: 46 RT 5508 [Juror 3 not wanting to serve due to nervousness about following the process], 5529 [Claudia A. not wanting to serve because it would interfere with her daily life], 5543 [Juror 6 did not want to be tied up during the holiday season], 5535-5536, 5553-5554 [Rafael C. and Roy B. did not want to serve because of the length of the trial]; 8 CT 2267 [Juror 4 hoping to get discharged as she was “not too happy”].)

Lisa B.’s expressed concerns about judging others, the sole reason cited by the prosecutor for excusing her, were not shared by either Juror 8 or Juror 12. As to Juror 8, she expressed no problems with judging others in response to questions 59 and 68 on her questionnaire. (5 CT 1329, 1332.) During *Hovey* voir dire, although Juror 8 indicated some reluctance about imposing the death penalty (see 28 RT 3029-3036), she expressed no reservation about rendering judgment on someone. Juror 12, like Juror 8,

did not indicate on her jury questionnaire that she would have any difficulty in judging someone. In fact, in responding to question 59 , she said, “I have never had the chance to serve on jury dut[y], I believe it’s our civic duty.”²⁵ (29 CT 5049.) During *Hovey* voir dire, Juror 12 confirmed that she was “neutral” on the death penalty. Furthermore, during general voir dire, Juror 12 sated that, “. . . I have a job to do, a job to listen to all the evidence before I make a judgment on this.” (46 RT 5490.)

Although there were some similarities between Lisa B. and Jurors 8 and 12,²⁶ the fact that *Lisa B. was the only one of the three to express reservation about judging another person*, which was the very reason set forth by the prosecutor for exercising a peremptory challenge on her, belies Barrett’s contention that comparative analysis lends support to his claim that the prosecutor’s reason was pretextual.

Here, the trial court’s decision finding that the prosecutor’s reason for striking Lisa B. was not based on a discriminatory intent, and to thus deny Barrett’s *Wheeler* motion, was supported by substantial evidence. Lisa B. expressed in her questionnaire that she was very reluctant to pass judgment on another person, not just as it related to sentencing, but in general. The fact that the prosecutor did not specifically question Lisa B. about her

²⁵ Juror 12’s response to question 6 where she stated, “I always wondered if this was my place to make such a permanent decision” was not in reference to any problem with judging someone but, rather, was in response to whether she had ever given any thought before as to whether she was for or against the death penalty. (29 CT 8038.)

²⁶ In a footnote, Barrett also references Alternate Juror 4 as a suitable person with whom to compare Lisa B. for comparative analysis. (See AOB 156, fn. 87.) However, as with Jurors 8 and 12, Alternate Juror 4 expressed no qualms about judging others, only about imposing the death penalty. (See 12 CT 3387 [In response to question 59 on the jury questionnaire, she answered “I feel it is my civic responsibility to serve as a juror”], In response to question 68 regarding any moral or religious feelings making it difficult to judge another, she indicated “No”]; 12 CT 3375; 31 RT 3411.)

answers during voir dire does not lessen the concern a prosecutor would have about having a juror who could not pass judgment. That the prosecutor heeded both the limitations of *Hovey* voir dire and the trial court's admonitions during individual voir dire, and expressed confusion between Lisa B. and another prospective juror with the same last name and ran into time constraints during general voir dire, does not transform this legitimate and strategic concern into racial discrimination. A comparative analysis in fact confirms that Lisa B. was the only prospective juror who expressed such concerns, certainly to the extent that she did.

Therefore, because the prosecutor's reason for striking Lisa B. was not "inherently implausible," and was, in fact, based on accepted trial strategy, and was supported by the record, the trial court's finding is entitled to deference. Accordingly, Barrett's claim should be denied.

III. THE TRIAL COURT PROPERLY DENIED BARRETT'S MOTION FOR ACQUITTAL AND MOTION FOR A NEW TRIAL BECAUSE NEITHER THE PROSECUTOR'S ACTIONS NOR ANY PRETRIAL PUBLICITY PREJUDICED BARRETT

Barrett contends that the prosecutor's discussion with Barrett outside the presence of the jury, but within earshot of a newspaper reporter, in which Barrett made an admission about his prior murder and where this exchange was reported in the local newspaper, prejudiced him and required granting his motion for acquittal or motion for a new trial. (AOB 160-177.) Barrett's claim should be denied. Even assuming the prosecutor violated an ethical obligation when he engaged with Barrett when defense counsel was absent, any such conduct did not prejudice Barrett as this conversation was outside the presence of the jury and there is no evidence that any of the jurors read about this exchange in the newspaper.

A. Trial Court Proceedings

Prior to trial, the trial court issued a "gag order":

That no party to this action, nor any attorney connected with this case, nor judicial officer or public employee or official, including police, correctional officers, sheriffs or other deputies or their agents, nor grand jurors, nor witnesses, nor anyone subpoenaed to testify at this trial shall release for public dissemination any statement of defendant or witnesses, documents or exhibits, or any evidence admissible or inadmissible about this case, nor express for public dissemination any weight, value or effect of such evidence.

(2 RT 88-89.)

On November 20, 2003, prior to opening statements in the guilt phase, the trial court gave the jury some preliminary instructions, which included an admonition to “not read or listen to any accounts or discussions of the case reported by the newspapers or other news media including radio, television, the internet, or any other electronic source.” (47 RT 5699.) On December 2, 2003, the court reminded the jury of this admonition:

As you'll recall, I've reminded you on a couple of occasions, and I want to remind you again this morning and I'll probably be doing this on occasions throughout the trial, but during the course of this trial you're not to read, listen to, or view any media accounts of the proceedings in this trial. If there's newspaper stories or any type of television coverage, you're going to have to have someone put those papers away for you, if you want to read them, and read them after the trial, because you can only be guided by the evidence as it actually occurs in the trial and not from some other account of the evidence. So I just want to remind you.

(49 RT 5958.)

On that same day, outside the presence of the jury, and in response to comments Barrett directed to the prosecutor about his aspirations for higher office, the time it took to bring Barrett to trial, and the failure by the District Attorney's Office to get a first degree murder conviction in another case, the prosecutor told Barrett, “You're forgetting about your past, Mr. Barrett. You were a 17-year-old who killed someone with a dumbbell.”

Barrett responded, "I don't dispute that." (50 RT 6165.) This exchange was reported in an article in the Imperial Valley Press published on December 3, 2003. (9 Aug. CT 2475-2476.)

As the exchange between Barrett and the prosecutor involved Barrett's prior murder, the substance of a special circumstance allegation and a fact not to be considered by the jury at that point in the trial, Barrett's counsel asked the trial court to cite the prosecutor for misconduct "for this communication outside the presence of counsel without our consent." (50 RT 6166.) As a remedy, Barrett's counsel asked the court to either dismiss the case or strike the prior murder special circumstance allegation. Counsel specifically did *not* ask for a mistrial:

We feel we got, probably, the finest jury selection in this case on both sides any counsel could get. Inasmuch as we couldn't anticipate the same type of jury selection, we are not asking for a mistrial at this point.

(50 RT 6166; see also 56 RT 7377-7378.) Barrett's counsel also asked that the jury be polled as to whether any juror had seen or heard about the article and asked that the jury be admonished not to read the Imperial Valley Press for the duration of the trial. (50 RT 6166-6167.)

The trial court, while deferring a ruling on Barrett's counsel request to find that the prosecutor committed misconduct, did agree to question the jurors as to whether any of them had seen or heard of the article and to admonish them not to read the Imperial Valley Press for the remainder of the trial. (50 RT 6168-6170.) The trial court polled each juror and alternate individually and asked if he or she read the article; every juror and alternate told the trial court that he or she did not read the article. (50 RT 6170-6172.) The jurors also replied in the negative to the court's question as to whether anyone tried to discuss the article with them. (50 RT 6173-

6174.) The trial court then instructed the jurors not to read the Imperial Valley Press for the remainder of the trial.²⁷ (50 RT 6172-6173.)

On December 16, 2003, Barrett's counsel argued his motion to dismiss under section 1118.1. As part of his motion, Barrett's counsel again asked the court to find that the prosecutor committed misconduct by talking to Barrett outside the presence of his counsel and to impose a sanction. (45 CT 12664-12669; 57 RT 7395 [Citing civil cases, Barrett's counsel requested "[t]hat at a minimum, what we're requesting is a dismissal of the case, striking of the death penalty enhancement, the striking of the prior murder enhancement, the citing of the prosecutor, the disqualifying (sic) the prosecutor, and the disqualification of his office".]) The trial court first stated, "I want the record to be clear here for any reviewing court that this was – all happened out of the presence of the jurors. It happened out of the presence of the defense lawyers and out of the presence of the Court." (57 RT 7392.) The court also indicated that it researched the law on prosecutorial misconduct and could not "find a single case so far where the misconduct did not occur in the presence of the tri[e]r of fact, would it be the judge or the jury . . . That is where the harm is." (57 RT 7393.)

The trial court denied Barrett's motion and declined to impose any sanctions because, as the jury was unaware of what happened, Barrett was not prejudiced:

²⁷ The trial court followed up regarding that admonition. On December 8, 2003, the trial court inquired of the jurors if they read the article in the Imperial Valley Press relating to this case that was published the previous day. All of the jurors indicated that they had not. (52 RT 6593-6594.) Similarly, on December 22, 2003, the court asked the jurors if any of them had read the articles about the case published on the previous Friday or Sunday in the Imperial Valley Press; again, all of the jurors indicated that they had not read any article. (60 RT 7736.)