In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LESTER HARLAND WILSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S189373

Riverside County Superior Court Case No. RIF079858
The Honorable Elisabeth Sichel, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In 2000, a jury convicted appellant, Lester Harland Wilson, of the first degree murder of Uwe Durbin (Pen. Code, § 187) and two counts of forcible rape of Lisa R. (Pen. Code, § 261, subd. (a)(2). The jury found that Wilson committed those offenses while personally using a firearm. (Pen. Code, § 12022.5.) The jury also sustained the special circumstance allegations that the murder was committed in the course of a kidnapping and involved the intentional infliction of torture. (Cal. Pen. Code, §§ 190.2(a)(17) & (18).) (*People v. Wilson* (2008) 44 Cal.4th 758, 769.) During penalty phase deliberations, the court excused a juror for committing misconduct and the alternate who replaced him for being unable to impose the death penalty under any circumstance. Following the dismissal of these two jurors, the jury returned its verdict fixing the penalty at death. (*Id.* at p. 769, 813-814.)

On automatic appeal, this Court reversed the penalty phase verdict based upon the dismissal of the first juror for misconduct, but affirmed the underlying conviction. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 769, 814.) The penalty phase was re-tried in 2010. (CT 3023.) The jury found death to be the appropriate punishment for Durbin's murder. (CT 3156.) The trial court denied Wilson's modify the death verdict on December 17, 2010. (CT 3228-3231.)

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

STATEMENT OF FACTS PRESENTED AT THE PENALTY PHASE RETRIAL

A. Facts Relating to the Underlying Offenses and Special Circumstances

Uwe Durbin lived with Wilson and his wife, Barbara Phillips, for a period of time in 1997, and did auto repairs for the couple while he was staying at their home. (5 RT 797, 799.) On June 8, 1997, Wilson and

Phillips suspected that Uwe had stolen a TV and VCR from their home and went to look for him. They went to Mike Durbin's apartment. Mike was Uwe's brother and lived with his girlfriend, Lisa R., and her three children. (RT 795-796, 805, 809, 1234-1235.)

Mike answered the knock on his door. (RT 805.) When Mike opened the door, Wilson immediately put a gun to Mike's head, walked to the back of the apartment, and ripped the phone off the wall. (RT 806-807.) Wilson repeatedly asked Mike where he could find Uwe and his missing belongings. Mike had no idea what he was talking about. (RT 809, 811.)

Pointing his gun at Mike, he instructed Mike and his family to leave with him to look for Uwe. (RT 812-813.) Mike went with Wilson in his car while Lisa and the children went with Phillips in her car. Wilson kept his gun out as Mike began driving. Just as they pulled out of the driveway, they saw Uwe walking nearby. (RT 815-816.)

Wilson got out of the car and confronted Uwe about his missing property. Uwe denied having any involvement in the theft. In response, Wilson pointed his gun at Uwe and ordered him inside the car with Mike. (RT 817-818.) The two cars caravanned to three locations. First, to another home to look for the missing items, and second, to a home where Wilson's friends lived. (RT 819-823.)

Finally, they arrived at Wilson's house. (RT 825.) Once everyone was inside, Phillips began yelling about wanting her property back. Wilson then turned up the volume on the radio and shot Uwe in the knee. (RT 829-830.) Uwe fell to the floor, moaning in pain. When Mike stood up to intervene after his brother was shot, Wilson pointed the gun at him. Mike nevertheless asked that Lisa and the children be allowed to go upstairs, a request that Wilson granted. (RT 832-833.)

After having shot Uwe, Wilson ordered him to move to a nearby bedroom. Uwe was able to hobble over to the other room. Wilson then

proceeded to beat Uwe relentlessly for about half and hour using his fists and a glove filled with batteries. Uwe responded by moaning and lying on the floor. (RT 834-838.) Wilson stopped beating Uwe after he told Wilson where he could find the missing property. By that point, Uwe was bleeding from his face, nose and lips. (RT 840, 842.)

Wilson bound Uwe with duct tape and left the house with Mike to look for the television based on the information provided by Uwe. They came back empty-handed which fueled Wilson's anger. (RT 840, 844-848.) Wilson then dropped off Mike at his house, left his gun with Phillips, and then left again. (RT 848.) Meanwhile, Phillips, who was even more upset than Wilson, told Mike that they were all going to die. (RT 850.)

When Wilson returned, he came back with three men. (RT 852.) They unrolled a plastic tarp to cover the bedroom. Wilson and two of the men then took turns severely beating Uwe. (RT 853-854.) The beating continued non-stop for about an hour. They used various implements to inflict injury, including weights, Drano, and a chain used to choke Uwe. (RT 857, 859.) Wilson brought his dog in the room to maul Uwe. When the dog refused, Wilson beat the dog. (RT 859, 871.) As the beating continued one of the men told Mike that he was a victim of circumstance and they were going to die. Mike tried to offer him compensation to let them go but was not successful. (RT 856-857.) Eventually, the men emerged from the room covered in Uwe's blood and their own sweat from the exertion of beating him. (RT 853.)

Mike was taken into the same room with Uwe and bound. Mike thought Uwe would surely be dead assuming he could not survive the beating. Uwe's blood and parts of Uwe's head were splattered around the room. (RT 859, 861, 864.) Uwe did not even look human at that point. Somehow Uwe was still breathing and moaned every now and then. (RT

863.) Wilson laughed and smiled like he was participating in a game. (RT 864.)

While in the room with his brother, Mike saw one of the men urinate in a cup and then pour the urine down Uwe's throat. (RT 867-870.) He also saw a propane blow torch used to burn Uwe on his stomach and bleach poured on Uwe's cuts. Uwe continued to moan but did not otherwise react. (RT 873-875.)

Wilson eventually brought Lisa downstairs and told Mike that he was going to let her and the children go. (RT 876.) She left with Nicole Thompson, a woman who was friendly with the men Wilson had brought back to the house. Thompson left with Lisa and the children and eventually went to Thompson's home. Soon after they arrived, Wilson arrived as well. (RT 1268, 1277-1278.) He took Lisa and one of her children, Matthew, who was a baby, to a nearby park. (RT 1279-1281.) It was dark outside by this point. (RT 1281.) At the park, Wilson told her that he needed assurances that she would not say anything if he let her go. She repeatedly told him that she would not. (RT 1281-1282.) After he parked the car, he ordered Lisa to take her pants off and to move her baby to the other side of the car. He then pulled his pants down and raped her. Matthew was next to her as Wilson had intercourse with her. (RT 1284.) Afterwards, Wilson informed Lisa that they were going back to his house and he would let everyone leave, except for Uwe. (RT 1282-1283.)

Wilson took Lisa to pick up her other children from Thompson and then went back to his house. (RT 1284.) When they returned, Wilson and Phillips argued about how to proceed. Phillips did not want to let everyone go. Wilson felt they had to let them go because they did not have the capability to dispose of that many bodies. (RT 1285.) Lisa could hear Uwe moaning in the back room and heard Wilson threaten to burn him with the blowtorch if he did not quiet down. (RT 1286.)

Wilson then dispatched Mike and Phillips to look for a bike somewhere. (RT 884-887, 1288.) While they were gone, Wilson told Lisa that he "wanted more pussy." He told her to take her pants off and bent her over the dining room table and raped her again. (RT 1289-1291.) When he was done, he ordered Lisa to help him move Uwe to the car. (RT 1291.) When Lisa saw Uwe he was wrapped in plastic and barely alive. (RT 1293.) She tried to help Wilson carry Uwe, but he was too heavy. Right around that time, Mike and Phillips returned and Mike took over carrying Uwe for Lisa. (RT 1294.)

Wilson and Mike loaded Uwe into the backseat of Wilson's car and Wilson covered him with a sheet. (RT 890.) Mike asked if he could take Uwe to the hospital, but Wilson did not respond. (RT 891.) He heard Wilson saying that he was going to dig a ditch in the dessert and pour Drano over Uwe's body so it would dissolve. (RT 892.)

Wilson finally told Mike and Lisa that they could leave. They got in their car and drove away. (RT 894-895.) They were too scared to return to their apartment for fear that Wilson would change his mind and come find them again. After stopping at several places they went to Mike's mom's house and called 911 at about 1:00 a.m. (RT 897-899.)

Meanwhile, as Wilson and Phillips were driving, their car broke down on the 91 freeway just after midnight. (RT 1147-1152.) The next morning, an employee of a warehouse found Uwe's dead body in a drainage ditch along the 91 freeway near where Wilson's car had broken down. (RT 957, 1170-1171.) An autopsy revealed that Uwe had five bullet entry wounds to his head in addition to a bullet wound to the knee. (RT 1105, 1108, 1130.) Uwe's body was riddled with major trauma. His skull, jawbone, nose, and two ribs were fractured. (RT 1102, 1105, 1122, 1124-1125.) He had major bruising to his face, back, and the back of his thighs which was consistent with a shoe print. The autopsy examination also revealed contusions and

ligature marks around his neck, incise wounds on his arm possibly from broken glass, and a discolored portion of skin consistent with being burned with a blowtorch. (RT 1109, 1117, 1126-1128.)

B. Prior Crimes Evidence

In 1992, Katri K., came to the United States from Finland to babysit when she was 21 years old. (RT 1331.) She met Wilson, began dating him, and moved in with him and his mother. (RT 1333.) In April of 1992, Katri became angry when she spotted Wilson in a car with another woman. (RT 1337.) When they met at his mom's house later, he called her a bitch and hit her several times on the head. (RT 1337-1338.) She had bruises around her eye from the incident. (RT 1338.) A similar incident occurred in July of 1992, when they argued about Wilson seeing other women. On that occasion, Wilson chased her around the house and choked her so badly that she lost consciousness. (RT 1340, 1344.)

Several weeks later, Wilson and Katri had another argument because he had not responded to his pager. She broke the pager by stomping on it and also might have hit him during the argument. (RT 1349-1350.) Wilson responded by pushing and hitting her. (RT 1350.) He then took her to another room, continued to physically abuse her and forced her to have sex with him. (RT 1351.) She resisted and did not want to have sex because they were fighting. He forced her to have both vaginal and anal intercourse and put his penis in her mouth. She cried, felt sick and was in pain during the rape and afterwards. (RT 1352-1353.) During the incident Wilson pulled a gun out of a bag. (RT 1354.) She called a friend to pick her up, who in turn took her to the hospital and called the police. (RT 1357-1358.) Katri's friend saw that she was upset, shaking, and had a hard time speaking about what happened. The bruises were already starting to appear on her face. (RT 1369-1371.)

In 1996, Wilson was identified as the driver of a vehicle that had shot at another vehicle. (RT 1319-1320, 1324.)

C. Victim Impact Evidence

Helga Durgin-Axt, recalled her son, Uwe, being a good person and always wanting to help others. (RT 1408.) Their family was very close, particularly Uwe and Mike. (RT 1403, 1408.) They would all eat dinner together on Sunday evenings before Uwe died. (RT 1408.) The family changed after Uwe's death and the loss had taken control of her family. (RT 1409-1410.) When Lisa and Mike's son, Matthew, was three years old he came to live with her and she has raised him ever since. (RT 1409.) Mike took Uwe's death very hard and was no longer the same. (RT 1411.) Helga missed Uwe tremendously, a feeling which has never gone away. (RT 1410, 1411.)

Mike and Lisa's relationship was ruined after Uwe's murder and they were no longer together. (RT 900.) Mike had nightmares of being killed and would wake up in a cold sweat. (RT 900-901.) His family was no longer happy and his mother was not the same. (RT 901.) Lisa's older son, Josh, who was present at Wilson's house, started having violent outbursts after the incident and was taken by Child Protective Services for a period of time. (RT 901.) Mike replayed how he could have done things differently in his mind and felt guilty for not having made different decisions on that day. (RT 902, 950.)

As a result of the trauma she experienced, Lisa's life has never been the same. Even many years later, she was still afraid of people and had nightmares. She went into a downhill spiral after the incident. Although she sought counseling she remained sad and angry. (RT 1298.)

D. The Defense's Evidence in Mitigation

Wilson was conceived when his father, Lester Wilson Sr., raped his mother Marsha, who was 12 or 13 years old. (RT 1555, 1557.) Marsha married Wilson's father when she was 15 years old and had another child with him. They moved from Indiana to California. (RT 1561.) Lester Sr. was abusive to Marsha. He would slap and bite her. On one occasion he tried to kill her when he held her down and choked her. He told her she would not live to see her 18th birthday. (RT 1562.) They split up soon after that. (RT 1563.)

Marsha sent her kids to Indiana to be cared for by both sets of grandparents several times throughout their childhood. (RT 1535, 1568, 1574.) While in Indiana, Wilson did poorly in school partly because he was worried that his mother was being abused. (RT 1535.) He spent a good portion of time with his Grandma Looney, his father's mother. She was a strict disciplinarian. Many kids lived with her, both relatives and foster children. (RT 1581.) When the children would do something wrong she would hit them with an extension chord or switches from trees. She also locked the kids in a closet with the water heater as punishment. (RT 1472, 1509, 1583-1584, 1591.)

Meanwhile, five years after splitting with Lester Sr., Marsha married Michael Woodson. (RT 1565.) He was a street hustler and abusive to Marsha and her kids. (RT 1570.) During the times that Wilson and his sister were living with Marsha and Woodson, Woodson threatened Wilson and gave him "whoopings." Woodson was a lot bigger than Wilson and would hit him with his fists. (RT 1514-1516.) Woodson, for his part, admitted he was not a good parent but provided for his family materially. (RT 1610, 1612-1613.) At the time he felt that he was teaching Wilson how to be tough. (RT 1609, 1613, 1623-1625.) At one point, Woodson was accused of murder and Wilson, a teenager at the time, was interviewed

by police and used as a witness. (RT 1615-1616.) Woodson was ultimately acquitted. (RT 1615.)

Wilson's mother likewise was not an ideal parent. She would leave the home for periods of time, once checking into a mental hospital following a nervous breakdown. (RT 1516, 1571-1572.) Whenever things got rough at home, she would send the kids to Indiana. (RT 1556, 1558, 1574, 1612.)

Wilson did poorly academically. School records were not available for his time spent in Indiana because they were destroyed in a fire, but records in California revealed that he went to ten different schools. (RT 1601-1603.) In third grade, Wilson was placed in a special education class due to his behavioral problems. He was frequently late and was absent 21 out of 72 days. In class, he did not get along with others and often seemed "out of it." (RT 1463, 1466, 1486, 1491-1492.)

A large portion of the penalty phase dealt with bad acts committed by Wilson's biological father, Lester Wilson Sr., although it was unclear how much time Wilson actually spent with him. Wilson Sr. gave Wilson the nickname "Pimp" when he was a small boy. (RT 1507.) Wilson Sr. sexually abused one of his daughters when she was twelve years old and then violently raped her when she was sixteen years old. (RT 1429-1433.) He sexually abused another daughter, who in addition to her own abuse, had witnessed Wilson Sr. participate in a drive-by shooting, kill someone in front of her, and beat up a woman. (RT 1455-1458.) He kidnapped yet another daughter and her sister. (RT 1471.) He also sexually abused Wilson's full sister when Wilson was present. (RT 1507.) Ultimately, Wilson Sr. went to prison for murdering his girlfriend. (RT 1431, 1457, 1471.)

A number of Wilson's relatives, including his 15-year-old daughter, testified that they have kept in touch with him during his incarceration, love

him, appreciate advice from him, and intend on maintaining a relationship with him. (RT 1479-1480, 1495-1496, 1537, 1552-1553.)

ARGUMENT

I. DOUBLE JEOPARDY DOES NOT BAR RETRIAL OF THE PENALTY PHASE FOLLOWING A REVERSAL BASED ON STATE STATUTORY GROUNDS

Wilson argues that double jeopardy protection bars retrial on the penalty phase in this case because the basis for reversal involved the erroneous dismissal of a hold-out juror. To support his argument, Wilson asserts that the state should not be given a second chance to seek the death penalty when "the trial court manipulated the penalty phase jury to ensure a death verdict." Wilson also offers policy justifications for why retrial should be barred in the instant case. (AOB 19-52.) However, so long as there has been no acquittal, there is no bar to a capital penalty phase retrial. It is well-established that the double jeopardy guarantee imposes no limitation on the power to retry a defendant who has succeeded on appeal when the reversal is not based on the sufficiency of evidence. Wilson's assertion that retrial should be barred because the trial court was purportedly biased and manipulated the verdict, is forfeited, and in any event wholly unsubstantiated. Finally, Wilson's policy considerations are insufficient to overcome existing authority which supports retrial in this instance. Wilson's argument should be rejected.

A. Facts Related to the Basis of This Court's Reversal of the Initial Penalty Phase

Wilson was convicted of the underlying charges and a penalty phase commenced in 2000. During the second day of deliberations, the jury informed the court that it could not come to a unanimous decision. (ORT

3365-3366.)[1] After speaking with the attorneys, the court gave the jury the option of continuing deliberations until the end of the day or returning on Monday. The jury chose the latter. (ORT 3367-3370.)

The following day, the court received a letter from Juror No. 1 expressing his concerns regarding deliberations. (ORT 3370-3371, Supp. OCT 63.) His letter made several assertions with respect to statements made by the sole African-American juror on the jury, Juror No. 5. In essence, Juror No. 1 stated that Juror No. 5 considered facts not in evidence, told other jurors that they could not understand his decision because they were not Black, opined that life in prison was worse than the death penalty, and made statements during breaks leading Juror No. 1 to believe that he had made up his mind before deliberations. (Supp. OCT 63.)

After reading the letter, the court found that it had the duty to investigate the allegations. (ORT 3373-3375.) It began by seeking clarification from Juror No. 1. Juror No. 1 recalled that during the guilt phase, Juror No. 5 made comments during a break that "This whole thing is a problem with authority, and this is what happens when you have no authority figure." (ORT 3380.) Juror No. 5 made similar statements during breaks on two other occasions. (ORT 3383.) He explained that when jurors asked for reasons behind his decision, Juror No. 5 would respond that he knew what is going on because "this is a black thing." (ORT 3384.) Juror No. 5 expressed his inability to vote for the death penalty as to this particular defendant. He explained that it was a "cultural thing" and that Black kids have different relationships with their fathers, therefore Wilson could not be responsible for what he had done. (ORT

[1] In keeping with appellant's notation, the Reporter's Transcript generated from the first trial will be abbreviated as "ORT."

3388.) Juror No. 1 also felt that Juror No. 5 has considered facts not in evidence. (ORT 3384.) Specifically, Juror No. 5 said that he knew that more abuse occurred than what was alluded to during trial. When asked to show proof that more abuse existed, Juror No. 1 said, "I don't expect you to understand." (ORT 3387.) Finally, Juror No. 1 testified that Juror No. 5 expressed that he believed that life in prison was worse than the death penalty. (ORT 3388.)

Before the court could make an inquiry, both Juror No. 12 and Juror No. 6 expressed a desire to speak to the judge regarding concerns about deliberations. (RT 3398.)

None of the jurors, other than Juror No. 1, heard Juror No. 5 make any statements during the guilt phase outside of deliberations. (ORT 3408-3409, 3420-3421, 3431, 3438, 3444-3445, 3451-3452, 3458-3459, 3469, 3478, 3487-3488.) All the jurors recalled, and Juror No. 5 admitted, that he made the statement that Black kids have a different relationship with their fathers. (ORT 3387, 3413, 3424, 3432-3433, 3438, 3440-3441, 3447, 3453, 3461, 3471-3472, 3480, 3489, 3487-3498.) Eight jurors recalled, and Juror No. 5 admitted, that he stated that Black kids do not admit to being abused. (ORT 3424, 3433, 3453, 3461, 3471, 3480, 3497.) Nine jurors stated that Juror No. 5 said that he did not expect them to understand where he was coming from because they were not Black. (ORT 3384, 3410-3411, 3422-3423, 3432-3433, 3445-3446, 3453, 3460-3461, 3471, 3480.) Juror No. 5 said that he may have said words to that effect. (ORT 3497.) Three jurors heard Juror No. 5 speculate that more abuse occurred than was shown. (RT 3385, 3413-3414, 3441.) Juror No. 5 denied making that statement in the context of abuse. (ORT 3497.) Finally, seven jurors heard Juror No. 5 say something to the effect that life in prison without the possibility of parole was worse than the death penalty. (ORT 3388, 3425, 3434, 3455, 3462, 3482, 3491.) Juror No. 5 explained that in response to

being told that he was letting Wilson get away with something, Juror No. 5 responded that, "Do you call life in prison getting away?" He also indicated that he understood that the death penalty was worse than life in prison. (ORT 3499.)

After hearing from the jurors, the court told counsel that this was one of the most difficult issues it had faced in dealing with juror misconduct. (ORT 3503.) In making its factual findings, the court found that Juror No. 5 made statements outside deliberations during the guilt phase. (ORT 3522.) The court acknowledged some divergence in the testimony, but Juror No. 5 largely confirmed the statements attributed to him initially by Juror No. 1. Specifically, the court found that Juror No. 5 made the statements, "you don't understand because you're not black," and "you can't understand because you're not black." When asked if he could consider relevant information, Juror No. 5 stated, "I don't expect you to understand, you're not Black." Juror No. 5 also asserted that, "Black people don't admit to being abused," and "Black kids have different relationships with their fathers." (ORT 3522.)

The court found that Juror No. 5 said, "I know more went on, more went on than we were shown" in the context of abuse. When asked to give reasons for his decision, the court found that Juror No. 5 responded by saying that the other jurors were not Black and would not understand. Also, when asked for proof by the other jurors, Juror No. 5 said "Because I know; this is a Black thing." (ORT 3523.)

The court was satisfied that Juror No. 5 understood that the death penalty was worse than life in prison and was able to follow the court's instruction on that issue. Although the court found Juror No. 5 probably made statements to the contrary, it did not believe he could not follow the instructions given what he said during the court's examination. (ORT 3523.)

The court ultimately decided to dismiss Juror No. 5. The court found that his statements demonstrated that Juror No. 5 was unable to disentangle his impermissible race-based assumptions from permissible evidence. The court did not believe that Juror No. 5 recognized that he was making race-based assumptions and was not capable of separating those assumptions from his decisions. The court noted that "it's a shame, because I think he's otherwise a good juror." (ORT 3524-3525.)

The court noted that jurors are required to exercise their discretion based on the evidence guided by their instructions. Nowhere, even under the broad factor (k), may a juror "base his decision on previously undisclosed prejudgments, preconceptions about human behavior, which further are classified by racial category, particularly in a trial where race has not been an issue in any way, shape or form." The court also found that Juror No. 5 concealed his racial bias and fundamental belief in racial stereotypes on voir dire and although he said he would not base his decision on or consider race, the court found that he was unable to do so. (ORT 3524.) Ultimately, the court came to the "inescapable conclusion" that Juror No. 5 had exhibited a fundamental racial bias and improperly considered race in contravention of his instructions and statements on voir dire. (ORT 3525.) Based on that conclusion the court found that Juror No. 5 committed misconduct, failed to follow his oath as a juror, failed to disclose his race-based bias during voir dire, failed to follow instructions that the death penalty is worse than life in prison, and engaged in speculation that there was more evidence than the jury was shown. Juror No. 5 also committed misconduct by utilizing race-based biases, by prejudging after only hearing the first witness of the guilt phase and by using "sweeping generalizations and stereotypes about human behavior that are based on racial assumptions and not the evidence." (ORT 3526.)

The court concluded by stating that it was unconstitutional to permit jurors to base their decision as to whether a person should live or die on biases and prejudices based on race, reasoning that such actions violate the equal protection clause of both the state and federal constitutions and the due process clause. In other words, "if jurors were permitted to vote for life or death based on racial stereotyping not found in the evidence presented to them, imposition of life or death would depend on the racial composition of the jury and the race of the defendant, and it would therefore, be arbitrary and capricious." (ORT 3526.)

B. Facts Related to the Dismissal of Juror No. 17

The trial court replaced Juror No. 5 with Juror No. 17. (ORT 3536.) Shortly after deliberations began, the court received a note from Juror No. 12 informing the court that the alternate juror was unable to impose the death penalty. (ORT 3540-3541.) The court explained to counsel that it needed to know whether the juror could not return a judgment of death under any circumstance or just as to this particular defendant. (ORT 3541.) After receiving input from counsel, the court spoke with Juror No. 17. (ORT 3542-3543.)

The court reminded Juror No. 17 that during voir dire that he stated that he could exercise his guided discretion and impose the death penalty on someone based on the facts and circumstances of the evidence presented to him. (ORT 3544.) Juror No. 17 answered that he had changed his mind. He had every intention of being able to follow the court's admonition, but as the trial went on, he became more introspective of his position on the death penalty. (ORT 3544.) It had hit him that morning that he had a conflict of conscience and law. He had a problem in applying his conclusions to the death penalty. (ORT 3545.)

Juror No. 17 stated that he would have "great difficulty" and it would "be impossible" for him to apply the death penalty. He felt that if he could

not do it in this case, then it would be pretty near impossible for him to impose it in any case. (ORT 3545.) He would arrive at the same position in any case. His opposition to the death penalty stemmed from his strongly held religious beliefs. Ultimately, he did not believe he could impose the death penalty on any defendant, regardless of the facts and circumstances, based on his religious beliefs and conscience. (ORT 3546.)

Juror No. 17 further explained that he began to change his mind toward the end of the trial, when he started to weigh everything. He discussed his convictions with his wife and realized "this thing was just too big" for him and he realized it was a serious matter. (ORT 3552.) He felt it was easy to look at the list of factors, but did not feel that he could take the next step. He found a "tremendous resistance of conscience" that rendered him uncomfortable. (ORT 3554.) He made a decision about what was appropriate, but could not vote the appropriate way because of his religious background and his doubts about the propriety of the death penalty. In any capital case, he thought he would automatically vote for life in prison without the possibility of parole. (ORT 3555.) The court found him to be substantially impaired and unable to perform his function as a juror in this case. (ORT 3557.) The court excused Juror No. 17 and replaced him with another alternate. (ORT 3558.)

C. This Court's Decision Reversing the Penalty Phase

This Court reversed the death judgment rendered in the 2000 trial in *People v. Wilson*, *supra*, 44 Cal.4th at p. 758. In doing so, the Court found that the trial court had misapplied Penal Code section 1089, which permitted the trial court to discharge a juror upon good cause and substitute an alternate. The Court concluded that it was not shown to a demonstrable reality that Juror No. 5 was unable to perform his duties as a juror. (*Id.* at p. 814.) The Court rendered its decision on state law alone. (*Ibid.*)

Specifically, the court found that the record did not support a finding that Juror No. 5 intentionally concealed any bias. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 823.) To the extent that he may have unintentionally concealed of bias, the record did not establish as a demonstrable reality that the concealment rendered him unable to perform his duties as a juror. (*Id.* at p. 824-825.) The Court also found that Juror No. 5 did not rely on facts not in evidence, rather, he merely relied on his life experience to evaluate the evidence presented, particularly because a penalty phase decision is inherently moral and normative, not factual. (*Id.* at p. 825, 830, 831-832.) The Court also declined to find that Juror No. 5 committed misconduct when he considered that life without possibility of parole rising to the level of a demonstrable reality that he could not continue as a juror on that ground. (*Id.* at p. 832, 836.) Finally, the court found that Juror No. 5 was not properly excused for having prejudged the penalty based on comments he made to another juror during the guilt phase. (*Id.* at p. 840.)

D. The Trial Court's Decision Denying Wilson's Motion that Retrial is Barred by Double Jeopardy Prior To the Commencement of the Retrial

The defense filed a pre-trial motion asserting that Double Jeopardy protection precluded the prosecution from retrying the penalty phase. (CT 223-233.) The court denied the defense's motion. It stated that it had reviewed *People v. Hernandez* (2003) 30 Cal.4th 1, and based upon that decision it would deny the motion. The prosecution also pointed out that this Court ordered the case remanded to the trial court to retry the penalty phase and the court should follow that order. (RT 149.)

E. General Principles Regarding Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment of the federal constitution provides that no person shall "be subject to the same offense to be twice put in jeopardy of life or limb." Article I, section 15 of the

California Constitution similarly provides that, "Persons may not twice be put in jeopardy for the same offense..."[2] Jeopardy applies upon a jury's acquittal of the charged offense, a determination that the prosecution has failed to prove an element of an offense, or when a mistrial is granted without "manifest necessity." (*People v. Carbajal* (2013) 56 Cal.4th 521, 539.) Retrial is not barred, on the other hand, when the defendant consents to the jury's discharge prior to a verdict or when the discharge is required by legal necessity. (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712–713.) Legal necessity permits a retrial when a jury deadlocks or when a conviction is successfully appealed by the defendant, unless the appeal is based on sufficiency of evidence. (*United States v. Scott* (1978) 437 U.S 82, 90-91 [98 S.Ct. 2187, 57 L.Ed.2d 65].)

F. Double Jeopardy Protection Only Attaches to a Penalty Retrial if the Jury Acquitted the Defendant of the Death Penalty

Here, the reversal of the first jury's death sentence was not tantamount to an acquittal, thus jeopardy does not attach. The decision in *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101 [123 S.Ct. 732, 154 L.Ed.2d 588] is instructive. In that case, the state charged the defendant with capital murder based on felony murder. The jury convicted the

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[2] Double jeopardy protection is also codified in Penal Code section 687 which provides, "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." Penal Code section 1023 similarly states, "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal or jeopardy is a bar to another prosecution for the offense charged in such an accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under the accusatory pleading."

defendant of first degree murder, but could not reach a verdict on the aggravating circumstance allegation. The trial court imposed a life sentence as required by Pennsylvania law when a jury cannot reach a decision on penalty. (*Id.* at p. 104-105.)

The state appellate court later reversed the murder conviction due to prejudicial instructional error. (*Sattazahn v. Pennsylvania*, *supra*, 537 U.S. at p. 105.) On remand, the prosecution sought to retry the murder charge, adding an additional aggravating circumstance allegation. Following retrial, the jury convicted the defendant of murder and, based on the existence of aggravating circumstances, returned a penalty verdict of death. (*Ibid.*) The United States Supreme Court rejected the defendant's contention that the retrial put him twice in jeopardy on the issue of penalty. The Court found that double jeopardy was not implicated because at the first murder trial neither the jury's failure to reach a verdict on the aggravating circumstance nor the trial court's imposition of a life sentence operated as an acquittal of capital murder. (*Id.* at pp. 109–110.) The Court ultimately found, "[t]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" (*Id.* at p. 109.)

This Court has interpreted the *Sattazahn* decision to mean that, "double jeopardy principles do not bar retrial of an aggravated sentencing allegation when the first trial did not produce an express or implied acquittal on the allegation." (*People v. Anderson* (2009) 47 Cal.4th 92, 97.) These principles squarely apply to this case. Here, the first jury to consider penalty arrived at a death verdict. The matter was overturned on appeal due to the erroneous dismissal of one juror. Had the juror not been dismissed, the matter would have ended in a mistrial. There would be no question under those circumstances whether the prosecution could attempt to seek a death verdict again. Because there was no express or implied acquittal

during the first penalty trial, double jeopardy protections do not attach and retrial was permissible.

G. Retrial is Not Barred By Double Jeopardy Protections Following the Reversal of a Conviction Involving the Erroneous Removal of a Juror Under *People v. Hernandez*

In spite of the decision in *Sattazahn*, Wilson nevertheless implies that this case is different because it involved the erroneous dismissal of a juror or jurors. Even though retrial would be permissible under the standard enunciated by this Court in *People v. Hernandez*, *supra*, 30 Cal.4th at 1, he nevertheless attempts to distinguish that case and offer policy reasons as to why it should not apply. A fair reading of *Hernandez* demonstrates that retrial is permissible under these circumstances.

In *Hernandez*, the trial court dismissed a juror after she informed the court that she was troubled by the tone of the prosecutor's cross-examination of a defense witness and her perception that the prosecutor and the judge were smirking and making faces during the testimony. The juror denied that she would be unfair but was disappointed with certain aspects of the trial. (*Id.* at p. 4.) Over the defense's objection, the court elected to excuse the juror based on her remarks and body language, finding that the juror was unable to be fair and impartial. (*Ibid.*)

The Court of Appeal reversed the trial court's decision and held that double jeopardy barred retrial. (*People v. Hernandez, supra,* 30 Cal.4th at pp. 4-5.) The appellate court reasoned that the erroneous dismissal of the juror was comparable to declaring a mistrial without legal necessity because the court reconstituted the jury by substituting a new juror without proper justification. In other words, discharging a juror without good cause was legally the equivalent to an unnecessary mistrial. (*Id.* at p. 5.) The Court of Appeal also justified the bar to retrial because double jeopardy was meant to protect the interest of the defendant in retaining his chosen

jury, assure a fair and impartial jury as opposed to one picked by the prosecution, and avoid trials that unduly favored the prosecution. (*Id.* at p. 6.)

This Court reversed the appellate court's decision. In doing so, this Court emphasized that double jeopardy imposes no limitations on the ability to retry a defendant whose conviction has been set aside on appeal on grounds other than sufficiency of evidence. (*People v. Hernandez, supra,* 30 Cal. 4th at pp. 6-7.) This Court also recognized it would be a "'high price for society to pay' if reversible trial errors resulted in immunity from punishment." (*Id.* at p. 8, quoting *United States v. Tateo* (1964) 377 U.S. 463, 466 [84 S.Ct. 1587, 12 L. Ed. 2d 448].) The Court also found that the policies underlying double jeopardy did not justify the "ultimate sanction from prosecution under the circumstances...." Finally, this Court found no danger that jurors would routinely be discharged in violation of the law without double jeopardy protections. (*People v. Hernandez, supra,* 30 Cal. 4th at p. 8.)

In reaching these conclusions, this Court explained that the double jeopardy bar seeks to protect a defendant's right to retain his chosen jury. It also aims to prevent a jury being discharged until it completes its task of rendering a verdict. As applied to that case, the Court pointed out that the jury was not discharged. Rather, a juror was substituted with a preselected alternate juror. An alternate juror, even if improperly seated, is part of the same jury selected by the defendant. Under those circumstances, the defendant was not subjected to two different juries in the course of one trial and double jeopardy did not attach. (*People v. Hernandez, supra,* 30 Cal.4th at p. 9, citing *People v. Burns* (1948) 84 Cal.App.2d 18, 32.)

This Court also found the appellate court's concern that jurors would be routinely discharged to be "unrealistic and unfair." (*People v. Hernandez, supra,* 30 Cal.4th at p. 10.) On the other hand, by barring

retrial, this Court noted that reviewing courts might be less inclined to scrutinize the record for prejudicial errors or trial courts might prefer to await deadlock than to remove a juror who has committed misconduct. (*Id.* at pp. 10-11.)

Ultimately, this Court concluded by stating that an "error in discharging a juror should be treated no differently from any other trial error leading to reversal on appeal, such as prejudicial instructional or evidentiary error or ordinary prosecutorial misconduct." (*People v. Hernandez, supra,* 30 Cal.4th at p. 10.)

The decision in *Hernandez* shows that no heightened level of double jeopardy protection must be applied when a matter is reversed following the erroneous dismissal of a juror. This Court reversed the first penalty phase on the grounds that the trial court had not properly applied Penal Code section 1089 when it dismissed Juror No. 5. This matter was reversed due to a trial error not related to the sufficiency of evidence. As this Court found in *Hernandez*, the substitution of an alternate juror who was a member of the original panel did not trigger double jeopardy protection and retrial was permissible. Such is the case here.

H. Wilson Cannot Meaningfully Distinguish Hernandez

Wilson attempts to distinguish *Hernandez* on several grounds. First, Wilson argues that one of the policies underlying *Hernandez*, i.e., not permitting a defendant a "free pass" is not implicated by the retrial of a penalty phase. (AOB 44.) While Wilson would not be wholly absolved of culpability had retrial been barred, his penalty would have nevertheless been lessened. To bar a penalty retrial, would in essence grant the defendant immunity from the most severe punishment granted by law. "Death is different" is a term that has often been used to symbolize the difference between that penalty and any other form of punishment imposed by law. (*Gregg v. Georgia* (1976) 428 U.S. 153, 188 [96 S.Ct. 2909, 49

L.Ed.2d 859].) Wilson should not be immune from this punishment, particularly in light the depravity he demonstrated in torturing and murdering one victim and raping another twice in the course of a single day merely because this Court deemed the trial court to have made an error based on state statutory authority.

Wilson also tries to distinguish *Hernandez* based on the fact that just one juror was excused in that case whereas two jurors were excused here. (AOB 48-51.) It is true that one juror was removed in *Hernandez*. However, the opinion in *Hernandez* did nothing to limit its decision to the dismissal of one juror, particularly in an instance here where there has only been a finding that one of the two jurors was improperly dismissed. Although the dismissal of Juror No. 5 was found to be error in Wilson's previous automatic appeal, no finding regarding the dismissal of his replacement, Juror No. 17 was made because the removal of Juror No. 5 necessitated reversal, rendering the issue regarding Juror No. 5 inconsequential in resolving Wilson's appeal, and of no value in guiding the trial court regarding the penalty retrial. (*People v. Wilson*, *supra*, 30 Cal.4th at p. 841, fn. 19.)

Juror No. 17's dismissal was clearly justified. In the death penalty context, a juror may be disqualified for bias, and thus discharged, from a capital case if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985)469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Lomax* (2010) 49 Cal.4th 530, 589.) Here, Juror No. 17 revealed to the court soon after deliberations resumed, that in spite of the evidence, it would be impossible for him to impose the death penalty based on strongly held religious beliefs. (ORT 3545-3546.) He could not vote for the appropriate penalty due to his doubts about the propriety of the death penalty and in any case would

automatically vote for life in prison without the possibility of parole. (ORT 3554-3555.) The trial court had no choice but to excuse the juror at that point. That dismissal does not render *Hernandez* meaningfully distinguishable to this case on the basis that *Hernandez* dealt with one juror who was erroneously dismissed. That is no different than the situation here.

Wilson relies on Justice Werdegar's concurring opinion wherein she indicated the outcome depended on the specific facts of that case. (AOB 43, citing *People v. Hernandez, supra*, 30 Cal.4th at p. 11.) Wilson argues that Justice Werdegar's observation means that *Hernandez* does not control the analysis of his claim because more than one juror was dismissed. But Justice Werdegar's opinion that *Hernandez* is limited to the facts of that case is not binding precedent of this Court. (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383.) In any event, whether binding precedent in cases where more than one juror was excused or not, *Hernandez* clearly informed the trial court's analysis of Wilson's double jeopardy claim, and informs this Court's consideration of that same claim on appeal.

Wilson unpersuasively endeavors to differentiate between Juror No. 5 in his initial trial and the juror at issue in *Hernandez* in arguing that a different result should occur. Specifically, Wilson states that the discharged juror in *Hernandez* did not favor the defendant, whereas Juror No. 5 was the lone hold out juror. (AOB 48.) In a related vein, Wilson notes that the juror's bias in *Hernandez* was "borderline" where as Juror No. 5 was not at all biased and was the only juror who could bring his cultural background to the jury. (AOB 50-51.) However, in both cases the trial court removed the juror in question because it believed the juror could not be fair and impartial towards the People's position. (*Hernandez, supra*, 30 Cal.4th at 4.) And just like in this case, the *Hernandez* Court assumed that the juror was discharged without good cause and found that the

removal of the juror constituted prejudicial error. (*Id.* at p. 4, 5.) In both cases the dismissal was deemed to be prejudicial. Both cases were reversed due to the error. Wilson seems to argue that one dismissal was more prejudicial than the other. In doing so, Wilson fails to appreciate that once the threshold for prejudice is reached – the remedy remains the same. He provides no authority to support the proposition that there are different levels of prejudice that should be considered when deciding on the appropriate remedy. The rule set forth in *Hernandez* still remains applicable to this case in spite of any differences between the jurors at issue. Double jeopardy protections do not bar retrial following a successful appeal involving the erroneous dismissal of a juror when the jury ultimately was still comprised of the individuals of the defendant's choosing. (*People v. Hernandez, supra,* 30 Cal.4th at p. 9.)

Finally, Wilson broadly states, contrary to *Hernandez*, that the United States Supreme Court does not permit a "second bite at the apple" following the prosecutor's neglect or a court's legal error. (AOB 37-38.) However the citations Wilson offers to support this proposition both dealt with retrials following acquittals – a circumstances not present here. (*Sanabria v. United States* (1978) 437 U.S. 54, 75, 78 [98 S.Ct. 2170, 57 L.Ed.2d 43] [once a defendant is acquitted he may not be retried no matter how 'egregiously erroneous' the legal rulings against the prosecution might be]; *Ball v. United States* (1896) 163 U.S. 662, 665, 671 [16 S.Ct. 1192, 41 L.Ed.2d 300] [retrial is not permitted against an acquitted defendant even when convicted co-defendants were retried following appeal].)

Accordingly, Wilson has not shown that the erroneous dismissal of a juror equates to an acquittal to bar retrial of a penalty phase. This Court's holding in *Hernandez* stating that, "error in discharging a juror should be treated no differently from any other trial error leading to reversal on appeal, such as prejudicial instructional or evidentiary error or ordinary

prosecutorial misconduct" shows that retrial is not barred under the circumstances presented by Wilson's case. (*People v. Hernandez*, *supra*, 30 Cal.4th at p. 10.)

I. Wilson's Unsupported Claim of Judicial Basis Cannot Justify a Bar to Retrial Based on Double Jeopardy Principles

Throughout his argument, Wilson asserts that the trial court manipulated the jury to obtain a death verdict, which would justify a double jeopardy bar to retrial. (AOB 35, 47-49.) This argument, which in essence amounts to a claim of judicial bias, has long been forfeited by failing to assert it at the time this alleged manipulation occurred during the first trial. (*People v. Farley* (2009) 46 Cal.4th 1053, 403.) In addition to failing to preserve the claim in the trial court, Wilson neglected to raise the claim in his first appeal. The allegation should not be entertained to support his double jeopardy argument on appeal from a trial in which the alleged error did not even occur.

Even assuming this Court will consider Wilson's forfeited and delayed accusation of judicial bias and manipulation in connection with his double jeopardy claim, the allegation is wholly unsupported by the record in the first trial. A defendant has "a due process right to an impartial trial judge under the state and federal Constitutions." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, overruled on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Rulings adverse to a party, even when erroneous, will not support a charge of judicial bias, particularly when those rulings are subject to review. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.) In fact, "judicial rulings alone almost never constitute a valid basis for a bias or partiality" claim. (*Liteky v. United States* (1994) 510 U.S. 540, 555 [114 S.Ct. 1147, 127 L.Ed.2d 474].) Rather, bias must be clearly shown using an objective standard. In other words, would a

reasonable person entertain doubts concerning the judge's impartiality. (See *People v. Chatman* (2006) 38 Cal.4th 344, 363, 365.)

Here, the trial court displayed no objective bias towards achieving any particular outcome. The trial court was faced with a challenging situation involving allegations of juror misconduct that it thoughtfully and thoroughly considered. Although this Court ultimately resolved the issue contrary to the trial court's decision, there is nothing to suggest that the trial court acted out of anything other than good faith. Indeed, it has been recognized that the issue of jury misconduct "is a problem that has vexed courts from the inception of the jury system..." (*People v. Engelman* (2002) 28 Cal.4th 436, 450, concurring and dissenting opinion Baxter.) The issues in this case were no less vexing for a court in the middle of deliberations handling these issues in real time. When viewed objectively, the trial court acted impartially.

The fact that two jurors were removed during penalty phase deliberations does nothing to support Wilson's position. Although this Court found that Juror No. 5 was erroneously dismissed, his replacement, Juror No. 17, was not a close call. As discussed previously, Juror No. 17 unequivocally expressed his inability to impose the death penalty in any circumstance due to religious considerations. Defense counsel, although frustrated, did not object to the dismissal. The court had no choice but to dismiss this juror. Wilson's claim of judicial bias is without merit and does not justify a bar to retrial under double jeopardy principles.

J. Wilson's Arguments Against Applying Precedent to this Case Have No Legal or Equitable Support

In spite of the authority against him, Wilson offers a number of "practical reasons" which would render a retrial unfair. (AOB 45-46.) First, Wilson argues that the delay between initial trial and retrial hampered his presentation of his case due to fading memories and unavailable

witnesses. On the other hand, the prosecution would have the opportunity to strengthen its case. (AOB 46.) However, it has been long held that a defendant may be retried following a reversal in the "normal course of events." (*United States v. Ewell* (1966) 383 U.S. 116, 121 [86 S.Ct. 773, 15 L.Ed.2d 627].) Such delays are merely attributed to the appellate process. Moreover, both parties equally shoulder the burdens of dealing with fading memories and the unavailability of witnesses and the benefit of being able to reassess and improve their respective cases.[3] Such considerations do not justify invoking the double jeopardy bar to retrial and departing from well-established authority.

And although the passage of time does not make all things equal, it should be noted that Wilson would have been subject to a retrial had the trial court refused to dismiss Juror No. 5. Prior to the inquiry into misconduct, the jury had sent the court a note that it was deadlocked. (ORT 3365-3366.) If the court had declined to remove Juror No. 5, Wilson would have found himself in the same position as he did following the reversal, i.e., facing a retrial on the penalty phase. Had a mistrial been declared at that point, double jeopardy would not have attached because legal necessity plainly would have existed. (*United States v. DiFrancisco* (1980) 449 U.S. 117, 130 [101 S.Ct. 426, 66 L.Ed.2d 328].) Although retrial occurred later than it would have than if a mistrial had been declared, Wilson ultimately found himself in the same situation had the court not erred.

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[3] One example that appellant provides is Mike and Lisa's opportunity to "clean themselves up" and be better witnesses for the prosecution due to the passage of time. Appellant neglects to mention that Mike was in custody at the time of trial having been convicted of assault to commit rape in 2008. (RT 903-904.) At the retrial, Lisa admitted at the time she used methamphetamine frequently and Mike used it daily. (RT 1314.) Lisa also allowed Mike's mom to raise one of her children. (RT 1409.) It cannot be said that their credibility improved with the passage of time.

Wilson also notes that forgoing a retrial in such instances would reduce anguish to the victim's families. (AOB 47.) Wilson's reliance on consideration for the victims' anguish as a basis for affording a windfall to the person who is responsible for their pain is profoundly misplaced.

It should be noted that victim's rights are addressed by Marsy's Law, which was enacted by voters in November 2008. (*In re Vicks* (2013) 56 Cal.4th 274, 281-282.) The constitutional provisions of Marsy's Law acknowledges the "ongoing threat that the sentences of criminal wrongdoings will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated." (*Id.* at p. 282; Cal. Const., art I, § 28, subd. (a)(6).) Marcy's law also seeks to provide due process to victims by affording them an opportunity to be heard concerning punishment. (*In re Vicks*, *supra*, 56 Cal.4th at p. 309-310.) Thus, it is acknowledged in our state's constitution that the reduction of a sentence is harmful to victims.

Here, Wilson committed one of the worst crimes imaginable. The victims have and will continue facing anguish. Wilson relying on the anguish of the surviving victims from Wilson torturing Uwe Durbin to death with unfathomable cruelty and violence while terrorizing Durbin's brother and his family – including young children, and being so depraved as to rape Lisa twice (including once while her child remained next to her) in advocating for a windfall for himself would be insensitive to those victims in any context. But doing so while ignoring how much that anguish would be exacerbated from Wilson being spared facing a death sentence due to a legal technicality in his initial trial is particularly insensitive. That insensitivity serves to underscore how undeserving of a windfall it is that Wilson is urging this Court to provide him. As this case aptly illustrates, sparing surviving victims a retrial, in this or any other case, is an

insufficient justification to bar retrial of a penalty phase following reversal on appeal.

In sum, double jeopardy did not bar retrial in this case. There was no acquittal of a death judgment during the first penalty phase and the fact that the trial court erroneously dismissed a juror does not afford Wilson double jeopardy protection. His argument should be rejected.

II. RETRIAL FOLLOWING REVERSAL IN THIS CASE IS NOT A VIOLATION OF DUE PROCESS

Wilson argues that the retrial of the penalty phase violated due process because it impaired his fair opportunity to challenge the prosecution's evidence, detracted from the heightened reliability requirement, and failed to recognize the qualitative difference accompanying a death sentence. (AOB 53.) He also asserts that the due process violation was aggravated because this Court did not address his argument in his prior appeal that the court erred by dismissing Juror No. 5's replacement, Juror No. 17. (AOB 53-55.) In making these arguments, Wilson in essence reasserts his double jeopardy claim "in different clothing." (*Sattazahn v. Pennsylvania*, *supra*, 537 U.S. at p. 116.) Nevertheless, to the extent that Wilson claims he was denied a fair trial upon retrial, his argument has no merit.

Because death, in its finality, differs from other punishments, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 2991, 49 L.Ed.2d 994] (opn. of Stewart, Powell, and Stevens, JJ.) However, even in a capital case, a defendant's due process right guarantees him a fair trial, not a perfect one. (*People v. McDowell* (2012) 54 Cal.4th 395, 395.) Contrary to Wilson's argument, the fact that this case was a retrial did not "impair defendant's fair opportunity to challenge the prosecution's evidence."

Wilson had access to witnesses' prior testimony, knew the prosecutor's strategy, and had more than adequate time to present his evidence in mitigation. Wilson had the benefit of being represented by the same attorney in both trials, who was already familiar with the case and the issues presented. Wilson has not shown that he was deprived of a fair penalty retrial or that the jury's verdict was not a reliable determination that death was the appropriate punishment in this case. He also fails to establish that the manner in which the penalty phase retrial was conducted did not account for the qualitative difference between death and other penalties. (*People v. Cudjo* (1993) 6 Cal.4th 585, 623; *People v. Williams* (1988) 44 Cal.3d 1127, 1159.)

Wilson's claim that a due process violation was compounded by the fact that the dismissal of Juror No. 17 went unadjudicated by this Court is likewise without basis. (AOB 53.) This Court reversed the matter based upon the dismissal of Juror No. 5. The question of whether additional errors occurred after Juror No. 5 was dismissed in the penalty phase had no effect the disposition of the case and was not necessary to decide. The fact that an issue remained unaddressed had no bearing on the remedy nor did affect Wilson's due process rights upon retrial.

Finally, Wilson revisits his double jeopardy claim by alleging that the trial court improperly re-opened voir dire and initiated a death qualification process. (AOB 54-55.) This claim is not only factually inaccurate but again, has no bearing on Wilson's due process rights during this retrial. As discussed before, the trial court received a note from the jury alerting it of a problem. Juror No. 17 came forward and admitted he had a change of heart and could not impose the death penalty in any instance. The court simply responded to the jury's concern and ascertained whether Juror No. 17 could perform his duties, which he admitted he could not. The court did not re-open voir dire. Because the penalty phase was reversed on other grounds,

and a fair trial was conducted here, the decision regarding Juror No. 17 is not relevant to Wilson's due process rights as to this trial and his argument should be rejected.

III. THE TRIAL COURT HAD NO DUTY TO INQUIRE ABOUT A CONFLICT OF INTEREST INVOLVING WILSON'S COUNSEL, NOR SHOULD THE TRIAL COURT HAVE CONSTRUED WILSON'S COMMENTS AS A REQUEST FOR NEW COUNSEL

Wilson contends that the penalty phase should be reversed because the trial court failed to inquire into a conflict that existed with counsel in light of claims of ineffective assistance of counsel raised in his petition for writ of habeas corpus. In a related claim, Wilson claims that the trial court also failed to explore Wilson's request to replace counsel. (AOB 55-66.)

Wilson's arguments have no merit. The trial court did not know, nor reasonably should it have known, of the possibility of a conflict of interest involving defense counsel merely because issues alleging ineffective assistance of trial counsel in his initial trial were raised by appellate counsel in his prior appeal. Even assuming the trial court should have inquired, Wilson has not shown that an actual conflict of interest existed and that the conflict adversely affected trial counsel's performance during the retrial so as to justify reversal of the death penalty. With respect to Wilson's argument that he sought to replace counsel, he did not make a clear and unequivocal request to trigger the trial court's obligation to hold a hearing. This Court should reject Wilson's arguments.

A. Facts Relating to Counsel Michael Belter's Appointment

At the first court hearing following remand, the trial court set about appointing counsel. It explained to Wilson that Michael Belter was a "real good" defense attorney, but was uncertain if he was available to handle the retrial. If not, another attorney would be appointed. (RT 1.) The matter was continued to explore the appointment of counsel. (RT 2.)

At the next appearance, James Teixeira, appeared on behalf of Criminal Defense Lawyers (CDL), an organization that assists with appointment of counsel for indigent defendants in Riverside County. He indicated that he had spoken with Mr. Belter, who was interested in handling the penalty phase. Mr. Belter could not accept appointment immediately because funding issues needed to be resolved. Another court date was scheduled. (RT 4.)

At the next court hearing, on November 18, 2008, attorney Paul Grech appeared specially and represented that Mr. Belter was willing to accept appointment but needed to submit paperwork to the county for funding. Mr. Grech had also procured funding from the county to permit the court to appoint a second attorney. (RT 7.) Mr. Grech requested that Wilson's custody be transferred to Riverside from Murietta to facilitate the attorney client relationship as Mr. Belter was working out of Los Angeles. The court granted that request. (RT 9.)

At the next court date, Mr. Grech appeared again and confirmed that the funding paperwork had been submitted. Mr. Belter and another attorney, Christopher Harmon, had been approved by the county to represent Wilson. The parties requested a two-week continence. (RT 11.) Mr. Grech renewed the request that Wilson be transferred to make it easier for Mr. Belter to confer with Wilson because as the transfer had not been effectuated. (RT 12.) When the matter was transferred to Judge Sichel for all purposes, she granted the request that Wilson be moved, but acknowledged that the sheriff need not honor the order. (RT 17.)

On January 7, 2009, attorney Steve Harmon, also from CDL, appeared. He explained that county had approved funding for Mr. Belter and Christopher Harmon's appointment and asked that the court formally appoint them. The court asked Wilson if that was agreeable. Wilson responded, "Well, I can't really say nothing 'til they show up." The court

then responded that Wilson had been represented by Mr. Belter in his previous trial and it had the pleasure of working with Christopher Harmon on many occasions. The court assured Wilson that he would be well represented. The court then set a new court date. (RT 23.)

At the next court hearing, on January 9, 2009, CDL attorney Steve Harmon appeared again on behalf of Mr. Belter and Christopher Harmon. (RT 25.) He explained that Mr. Belter was in trial elsewhere and was requesting a trial setting conference in 30 days. Mr. Belter needed the additional time to collect his files, review transcripts, and consider what investigation needed to be conducted. Steve Harmon represented that Mr. Belter tentatively believed that a trial date would be feasible in 2010, but if pressed, it could be managed in the fall of 2009. (RT 27.) The trial court asked Wilson if he was amenable to the new date. Wilson responded that he did not really have any choice in the matter. The trial court asked Wilson if he had met with Mr. Belter and Wilson replied, "Yes, actually. I have an objection to Mr. Belter. But since he's not here, I really don't want to raise it." The court responded, "That's fine. You can take that up with counsel or wait until the next hearing." (RT 28.)

On January 20, 2009, Mr. Belter and Christopher Harmon appeared. Mr. Belter indicated that he would be meeting with appellate counsel to obtain the transcripts of the prior trial, discuss the pending habeas corpus petition before the California Supreme Court, and consider the interplay that those proceedings might have on the instant trial. (RT 35.) Counsel also informed the court that Wilson wanted the court to be aware that there were issues pending "with respect to the guilt phase of his case, competency of trial counsel in that proceeding and other issues" which were contained in the habeas petition that is pending before the California Supreme Court. (RT 36.)

At the next court date, on March 13, 2009, Mr. Belter raised concerns about scheduling a trial date when the habeas petition was still pending. Issues raised in that petition attacking the guilt and penalty phases of the previous trial were still pending. He was troubled that the decision in the habeas case could affect litigation. The court thought it best to at least set a trial date due to the difficulty of finding death qualified defense attorneys and sought to reserve counsel's time for trial even if the timing was a ways out. (RT 40-41.)

Wilson made no further comments regarding Mr. Belter's representation, himself or through Mr. Belter, throughout the duration of the proceedings.

B. The Trial Court Had No Duty to Explore Any Conflict Since None Was Apparent

Under the federal and state constitutions, a defendant has a right to counsel in criminal cases. That right includes the right to representation free of a conflict of interest which might compromise an attorney's loyalty to the client which would impair counsel's efforts on the client's behalf. (U.S. Const. 6th Amend; Cal. Constitution Article I, section 15; *Glasser v. United States* (1942) 315 U.S. 60, 69–70 [62 S.Ct. 457, 86 L.Ed. 680]; *People v. Doolin* (2009) 45 Cal.4th 390, 417.) To show a conflict of interest, a defendant is generally required to show that counsel labored under an actual conflict that affected his performance. A theoretical division of loyalties is not sufficient. (*Mickens v. Taylor* (2002) 535 U.S. 162, 171 [152 L.Ed.2d 291, 122 S.Ct. 1237].) Conflicts of interest may arise in various factual settings. Generally, they "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." (*People v. Bonin* (1989) 47 Cal.3d 808, 835.) A conflict involving an attorney's own interests may include when representation

implicates counsel's personal, professional, or financial interests. (*Mickens v. Taylor*, supra, 535 U.S. at p. 174.)

When a trial court knows, or reasonably should have known, of the possibility of a conflict of interest involving defense counsel, it is required to make an inquiry into the matter. (*Wood v. Georgia* (1981) 450 U.S. 261, 272, [67 L.Ed.2d 220, 101 S.Ct. 1097].) A court should be held to have knowledge or notice of the possibility of a conflict only when it is provided with evidence of the existence of a conflict. Otherwise, "it would effectively be burdened with undertaking an inquiry in virtually all cases since it can almost always conclude that a conflict is 'possible' as a matter of speculation. Such a burden, however, would be intolerable." (*People v. Bonin, supra*, 47 Cal .3d at p. 838.)

Wilson argues the court should have investigated a conflict because Mr. Belter was invested in the strategies used in the prior penalty phase trial in order to "improve his chances of avoiding an IAC finding." Wilson also assumes that "no lawyer wants to admit a mistake" and thus make changes from the first trial. (AOB 64-65.) These unsupported suppositions did not trigger the court's duty to inquire about a conflict because the trial court did not know, and it should not have reasonably known, that any conflict existed – because there was none. The court was aware that habeas proceedings were still ongoing. As is typical in capital cases, issues were raised questioning counsel's performance. The court was also aware that the penalty phase had been reversed, which was the very reason for the retrial, thus any claims regarding Mr. Belter's presentation of the penalty phase was moot at that point, a finding this Court made prior to the commencement of trial.[4] Thus, Wilson's supposition that Mr. Belter would reaffirm his initial penalty phase strategy in response to allegation of

[4] The Court issued the Order in case number S152074 on June 30, 2010.

ineffectiveness in the prior penalty phase is contradicted by any issue of counsel's performance being rendered moot. Finally, the court knew of Mr. Belter and that he was a "real good defense attorney." The court would not have presumed that from a concern arising from an allegation of ineffectiveness – past or present – that Mr. Belter would not have represented Wilson to the best of his ability. Moreover, it would be reasonable to infer that if Mr. Belter had any actual concerns over allegations of ineffectiveness from representing Wilson in his first trial, he would have declined to represent him on retrial. Accordingly, the court had no duty to inquire because there was no apparent conflict and it was not reasonable for the court to know one existed to mandate such an inquiry.

Should this Court find that the trial court had a duty to inquire; automatic reversal is not required as Wilson suggests.[5] (AOB 63.) To the contrary, once a reviewing court has found that the lower court should have inquired about a conflict, the defense must show that an actual conflict of interest existed and that the conflict adversely affected counsel's performance to justify reversal. (*Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-274; *People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 308-311; *People v. Bonin* (2004) 47 Cal.3d 808, 837-838.)

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[5] Appellant asserts that automatic reversal is required under *People v. Lewis* (1978) 20 Cal.3d 496, 499. However, that case involved the denial of a *Marsden* motion when the trial court refused to give the defendant the opportunity to state the reasons for his motion. (*Id.* at pp. 498-499.) Here, as will be discussed below, a *Marsden* motion was not made and the court did not prevent appellant from airing any grievance. To the contrary, when appellant expressed a concern with Mr. Belter's representation, he elected not to discuss it at that point and wait for Mr. Belter to be in court. The trial court told appellant he could take it up with Mr. Belter or bring it up again at the next court appearance. (RT 28.) The matter was never revisited by appellant. Appellant was never deprived of the chance to bring a motion relating to Mr. Belter's representation or explain any concerns to the court. Accordingly, *Lewis* is inapplicable.

Again, Wilson fails to show that a conflict existed merely by claiming that Mr. Belter may have been motivated to stick to a particular strategy to somehow protect himself from an ineffectiveness finding. As noted earlier, the mootness of the claims negates Wilson's assumption that Mr. Belter would be invested in his original strategy to avoid such a finding.

Moreover, Wilson has not shown that any conflict affected counsel's performance. Wilson merely alleges that the non-existent motivations lead Mr. Belter to forego the presentation of psychological or neurological impairment evidence in this trial, thus hampering his performance. (AOB 64-65.) A fair reading of the penalty phase record at issue here demonstrates that counsel presented very detailed evidence regarding Wilson's social history, called numerous family members to discuss everything from Wilson's father's horrible behavior, his mother's abusive relationships, the transitory nature of his childhood, and his tumultuous relationship with his step-father. With respect to the omission of any neurological and psychological evidence, the record reveals that counsel was open-minded about presenting such evidence as he twice requested that the court order the jail to permit Wilson to be seen by an expert neuropsychologist. (RT 38, 45.) There is simply nothing to establish based upon the record whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission in the presentation of evidence. (*People v. Cox* (2003) 30 Cal.4th 916, 948-949.) Consequently, Wilson has not met his burden to show that the matter should be reversed based on the trial court's failure to inquire into a conflict no conflict existed that affected Mr. Belter's performance.

C. The Trial Court Had No Duty to Interpret Wilson's Comments as a Motion for Substitution of Counsel

In a related claim, Wilson asserts that trial court failed to inquire into his request to substitute appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118. Although no formal *Marsden* motion was made, Wilson contends that the trial court should have entertained a motion to substitute counsel. He argues that the court should have considered a *Marsden* motion because Wilson objected to Mr. Belter's appointment at one court appearance and at another appearance Wilson through Mr. Belter informed the court "that he would be represented at his penalty trial by the very attorney whose ineffective assistance at the original trial he had challenged in this Court."[6] (AOB 63-64.)

In *Marsden*, this Court held that the trial court must allow a defendant who complains of inadequate representation to specify to the court the reasons for his or her dissatisfaction with counsel. (*Id.* at pp. 123–124.) In other words, if a defendant requests to substitute counsel, the trial court is obligated to give the defendant an opportunity to state any grounds for dissatisfaction with his attorney. (*People v. Sanchez* (2011) 53 Cal.4th 80, 90.) However, a trial court must conduct a *Marsden* hearing only when there is at least some clear indication by the defendant, either personally or through counsel, that defendant wants to substitute his attorney. (*Id.* at p. 84.) Requests under *Marsden* must be clear and unequivocal. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051, fn. 7.) "Although no formal motion is necessary, there must be 'at least some clear indication by

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[6] The statement appellant made to the court through Mr. Belter consisted of Mr. Belter saying that appellant wanted the court to be aware that issues were pending "with respect to the guilt phase of his case, competency of trial counsel in that proceeding and other issues..." Appellant has taken too much license in the interpretation of that isolated comment.

defendant that he wants a substitute attorney.'"(*People v. Mendoza* (2000) 24 Cal.4th 130, 157, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

Here, there was no clear indication that Wilson wished to substitute counsel. After Mr. Belter had been appointed, but was not in court, the judge asked Wilson if he had seen Mr. Belter. Wilson replied, "Yes, actually. I have an objection to Mr. Belter. But since he's not here, I really don't want to raise it." The court responded, "That's fine. You can take that up with counsel or wait until the next hearing." (RT 28.) At that point, Wilson on his own elected not to discuss any issue regarding Mr. Belter in his absence. The court invited Wilson to bring it up again with counsel or with the court at the next hearing. He did not do so. In fact there is no reference from any point forward that would have alerted the court that Wilson sought to substitute counsel.

Wilson suggests that he made another statement that put the court on notice of the desire to obtain new counsel. At the next court appearance, when Mr. Belter and Christopher Harmon were present, Mr. Belter informed the court that he was examining issues with appellate counsel dealing with the interplay between the trial proceedings and the habeas petition. (RT 35.) Counsel also informed the court that Wilson wanted the court to be aware that there were issues pending "with respect to the guilt phase of his case, competency of trial counsel in that proceeding and other issues" which were contained in the habeas petition that is pending before the California Supreme Court. (RT 36.) The statement alone, or in combination with Wilson's prior statement, was insufficient to trigger a *Marsden* inquiry by the trial court as there was no clear and unequivocal request to substitute counsel. Wilson never stated that he wanted a different attorney or had concerns regarding the adequacy of his representation.

Even if Wilson's initial statement about an "objection to" Mr. Belter could somehow be interpreted as a *Marsden* motion, he abandoned that request by not raising it again as the court invited him to do so when he elected not to pursue it at that hearing. (*People v. Vera* (2004) 122 Cal.App.4th 970, 981-982 [defendant abandoned *Marsden* request when court offered the opportunity to raise it at another hearing but he failed to take advantage of the offer.].) The court did nothing to discourage Wilson from voicing his concerns, yet not once during the many times he appeared in court did Wilson raise the issue again. As such, Wilson's argument should be rejected.

IV. WILSON'S CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY HAVE NO MERIT

Acknowledging that his constitutional claims have previously been rejected by this Court, Wilson nevertheless seeks to preserve his claims regarding the constitutionality of California's death penalty system. (AOB 66-77.) As will be discussed in further detail below, based on substantial precedent, Wilson's claims should be summarily rejected.

Wilson first asserts that California's sentencing scheme is so broad in its definitions as to who is eligible, that the death penalty is chargeable in all non-vehicular homicides in violation of the Eight Amendment proscription against cruel and unusual punishment. In so arguing, Wilson asserts that Penal Code section 190.2, which sets forth the special circumstances rendering an individual eligible for the death penalty, fails to adequately narrow the class of murderers eligible for the death penalty. (AOB 68-69.) However, this Court has previously rejected this argument on numerous occasions and should do so here as well. (E.g. *People v. Manibusan* (2013) 58 Cal.4th 40, 99; *People v. Davis* (2009) 46 Cal.4th 539, 627.)

Next Wilson argues that Penal Code section 190.3, subdivision (a)[7] violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because the death penalty is applied in a "wanton and freakish manner" by allowing juries to consider broadly consider circumstances of the crime. (AOB 70-71.) However, this section has been deemed constitutional by the United States Supreme Court in *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976 [114 S.Ct. 2630, 129 L.Ed.2d 750] and recently affirmed again by this Court in *People v. Trinh* (2014) 59 Cal.4th 216, 254.

Wilson also attacks Penal Code section 190.3 for failing to require that jurors agree unanimously regarding the presence of specific aggravating factors and find that the aggravating factors outweigh the mitigating factors contrary to the Sixth Amendment's jury trial guarantee in light of the High Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 71-77.) Wilson is incorrect. Because the imposition of a death sentence is not a determination of fact, but rather, a normative judgment which does not increase the punishment of first degree murder beyond the maximum punishment prescribed, the authority upon which Wilson relies is inapplicable. (*People v. Tully* (2012) 54 Cal.4th 952, 1067; *People v. Virgil* (2011) 51 Cal.4th 1210, 1278-1279.)

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[7] Penal Code section 190.3, subdivision (a) provides, "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1."

Wilson next argues that his Eighth Amendment rights have been violated because he is not entitled to an intercase proportionality review, which would require an examination of other cases to determine whether the death penalty is proportionate in his case. (AOB 78-79.) However, this Court has repeatedly found that neither the federal nor the state Constitutions requires intercase proportionality review. (*People v. Jackson* (2014) 58 Cal.4th 724, 774; *People v. Vines* (2011) 51 Cal.4th 830, 891.) To the extent that Wilson argues that intra-case proportionality review is unconstitutionally precluded (AOB 78), he is in fact entitled to such a determination to examine whether the death penalty is disproportionate to his culpability in this case. (*People v. Whalen* (2013) 56 Cal.4th 1, 91; *People v. Mincey* (1992) 2 Cal.4th 408, 476.) Given that Wilson's crimes in this matter were heinous, sadistic, and violent the punishment here is completely proportionate to his crime; particularly in comparison to the horrific torture he inflicted on Uwe Durbin over such a protracted period of time.

Lastly, Wilson asserts that California's death penalty scheme falls short of international norms of humanity and decency in violation of the Eighth and Fourteenth Amendments. (AOB 79-81.) This Court has rejected this claim on numerous occasions. (E.g. *People v. Jones* (2012) 54 Cal.4th 1, 87; *People v. Avila* (2009) 46 Cal.4th 680, 725.) International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Contrary to Wilson's contention, California does not employ the death penalty as a regular punishment for substantial number of crimes in violation of international law or the Constitution. (*People v. Jackson* (2014) 58 Cal.4th 724, 774.)

All the constitutional claims raised by Wilson have been previously addressed and rejected by this Court. Those claims should likewise be rejected here.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the judgment rendered in the penalty phase be affirmed.

Dated: December 12, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **13,496** words.

Dated: December 12, 2014

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Alana Butler

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Wilson**
Case No.: **S189373**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 15, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 15, 2014, at San Diego, California.

B. Romero
Declarant

B Romero
Signature

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