No. S087560

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GILES ALBERT NADEY, JR.,

Defendant and Appellant.

Automatic Appeal from a Judgment of Death
of the Superior Court of the State of California
County of Alameda
Case No. 129807
Honorable Alfred A. Delucchi

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in his opening brief. The absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (*see People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

I. THE JUDGMENT MUST BE REVERSED DUE TO *BATSON/WHEELER* ERROR

Appellant Nadey in his opening brief has raised *Batson/Wheeler* error predicated on a comparative juror analysis (AOB 123-160).[1] The Attorney General (AG) in Respondent's Brief acknowledges that "in the main" appellant "asserts a comparative analysis by this Court of the challenged panelists . . . demonstrates purposeful discrimination." (RB 66.)[2] This Reply Brief will respond to the facts and authorities germane to appellant's asserted *Batson/Wheeler* error predicated on a comparative juror analysis.

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[1] All references to "AOB" are to Appellant's Opening Brief.

[2] All references to "RB" are references to Respondent's Brief.

A. The Trial Court Rulings on The *Batson/Wheeler* Motions.

At the conclusion of the first *Batson/Wheeler* motion involving four (4) black female jurors, Judge Delucchi denied the *Wheeler* motion as follows:

> [A]fter hearing the district attorney's reasons, I think that these . . . excuses are facially and racially neutral. I don't believe that any of these jurors are excused because of their race, and there is justification and cause for the excuse of each juror.
>
> In the Court's opinion, there is no showing of any exclusion of these jurors because they were black females.

(RT 3723:9-17.)

The trial court's ruling reflects a simple syllogism as follows:

MAJOR PREMISE - - Prospective jurors who are peremptorily challenged for "facially and racially neutral" reasons are not discriminated against in jury selection on the basis of race.

MINOR PREMISE - - The prosecutor's stated reasons for excusing each of the black female jurors were "facially and racially neutral."

CONCLUSION - - None of the black female jurors were excused on the basis of race.

The flaw in the trial court's reasoning lies in the Minor Premise – that the prosecutor's stated reasons were, in fact, the actual reasons for excusing each of the four black female jurors. Neither the trial court's ruling nor the record reflect any analysis by the trial court to ascertain whether the prosecutor's stated reasons for peremptorily challenging each of the black female jurors were, in fact, the prosecutor's actual reasons for

doing so. The trial court simply concluded that the prosecutor's stated reasons for excusing "each juror" were "facially and racially neutral," and hence, then concluded that there was "justification and cause for the excuse of each juror," i.e., the facially and racially neutral reasons. However, there is no inquiry or analysis by the trial court on the question of whether the prosecutor's stated reasons, albeit facially and racially neutral, were, in fact, the prosecutor's actual reasons for challenging each of the black female jurors.

At the conclusion of the second *Batson/Wheeler* motion involving another black female juror, Judge Delucchi again ruled:

> [W]ith respect to the last juror, Ms. Cornist, the Court finds that the excuses as put forth by . . . the prosecution . . . are genuine and facially neutral.
>
> I will consider that as a *Wheeler* motion, and that will also [be] denied for the reasons stated . . ..

(RT 3753:23-2754:1.)

Again, the flaw in the trial court's reasoning lies in the Minor Premise - - that the prosecutor's stated reasons were, in fact, the actual reasons for excusing prospective juror Cornist. Neither the trial court's ruling nor the record reflect any analysis by the trial court to ascertain whether the prosecutor's stated reasons for peremptorily challenging prospective juror Cornist were, in fact, the prosecutor's actual reasons for doing so. The trial court simply concluded that the prosecutor's stated reasons for excusing prospective juror Cornist were "genuine and facially neutral," and denied the motion on that basis.

In sum, there was no inquiry or analysis by the trial court on the question of whether the prosecutor's stated reasons were, in fact, the prosecutor's actual reasons for challenging each of the five African-

American female jurors. Moreover, a comparative juror analysis demonstrates that the prosecutor's stated reasons for challenging each of the five African-American female jurors were not the actual reasons and, in fact, the prosecutor's actual reasons were predicated on race.

B. Independent Review.

No deference should be given to the trial court's denial of appellant's *Batson/Wheeler* motions. The Attorney General (AG) argues at length that review of the trial court's denial of the *Batson/Wheeler* motion should be deferential, relying on *People v. Williams* (2013) 56 Cal. 4th 630, 649-650. (RB 68-69.) This includes, according to the AG, a comparative juror analysis raised for the first time on appeal, citing to *People v. Lenix* (2008) 44 Cal.4th 602, 623-624. (RB 70.)

The problem here is that appellate deference at the *Batson* third step is predicated on the trial court performing an appropriate on-the-record analysis of the prosecutor's stated reasons for the strike or strikes, as contemplated by the Supreme Court of the United States in *Snyder v. Louisiana* (2008) 552 U.S. 472 (*Snyder)*, and *Miller-El v. Dretke* (2005) 545 U.S. 231 (*Miller-El).* As outlined above, no such on-the-record analysis was performed by the trial court in this instance.

In his recent concurring opinion in *People v. Mai* (2013) 57 Cal.4th 986, 1058-1078, Justice Liu discussed at length the import of the requirement that the trial court perform an on-the-record analysis and that deference is unwarranted when the trial court fails to do so. Justice Liu analyzed the issue as follows:

> [D]eference is unwarranted "when a trial court fails to make explicit findings or to provide any on-the-record analysis of the prosecution's stated reasons for a strike." (*People v. Williams* (2013) 56 Cal.4th 630, 717

> (*Williams*) (dis. opn. of Liu, J.).) In such circumstances, "a reviewing court has no assurance that the trial court has properly examined 'all of the circumstances that bear upon the issue' of purposeful discrimination." (*Ibid.*, quoting *Snyder, supra*, 552 U.S. at p. 478; see *United States v. Rutledge* (7th Cir. 2011) 648 F.3d 555, 559 ["if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer"].) In this case, the trial court's statement that "no discriminatory intent is inherent in the explanations, and the reasons appear to be race neutral" does not indicate that it conducted the thorough and careful inquiry at *Batson*'s third step exemplified by the high court's decisions in *Snyder* and *Miller-El v. Dretke* (2005) 545 U.S. 231 (*Miller-El*). By erroneously deferring to the trial court's ruling, this court has once again effectuated "the denial of [a] defendant's *Batson* claim despite the fact that no court, trial or appellate, has ever conducted a proper *Batson* analysis." (*Williams*, at p. 700 (dis. opn. of Liu, J.).) [57 Cal.4th 1060]

(People v. Mai, supra, 57 Cal.4th at 1059 (conc. opn. of Liu, J.)).

Justice Liu also referenced his explanation in *People v. Williams* regarding the split of authority on the correct approach to appellate review of *Batson*'s third step, noting that this Court was on the wrong end of the split, as follows:

> [D]eference to *Batson* rulings unaccompanied by explicit findings or analysis falls on the wrong side of a split of authority on the correct approach to appellate review at *Batson*'s third step. (See *Williams, supra*, 56 Cal.4th at pp. 709-715 (dis. opn. of Liu, J.) [reviewing state and federal case law refusing to accord deference to unexplained *Batson* rulings, including *United States v. McAllister* (6th Cir. 2012) 693 F.3d 572, 581-582, *Rutledge, supra*, 648 F.3d at page 559, *Coombs v. Diguglielmo* (3d Cir. 2010) 616 F.3d 255, 261-265,

> and *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1031].)

(*People v. Mai*, *supra*, 57 Cal.4th at 1060 (Liu, J., concurring)). Justice Liu then sought to demonstrate how "unwarranted deference results in judicial inquiry that falls short of what is required in a proper *Batson* analysis." (*Id.* at 1060; *see generally, id.* at 1060-1078.)

Justice Liu then analyzes the majority opinion, noting that it properly concludes that deference is appropriate in those circumstances where the trial court makes "a sincere and reasoned effort" to evaluate the prosecutor's stated reasons for striking a majority juror, but takes issue with what constitutes "a sincere and reasoned effort." (*Id.* at 1060.)

Justice Liu analyzed further the requirement that the trial court make "a reasoned effort to analyze the prosecutor's explanation for the strikes." (*Id.*) Where there is "no reasoning" with regard to "the trial court's statement that 'no discriminatory intent is inherent in the explanations, and the reasons appear to be race neutral,' " (*Id.* (italicized emphasis omitted)), evidence of the requisite inquiry is inadequate:

> Taken at face value, the trial court's mere observation that "no discriminatory intent is *inherent* in the explanations, and the reasons *appear* to be race neutral" (italics added) does not address whether the race-neutral reasons given by the prosecutor were the *actual* reasons motivating the strikes. The inquiry at *Batson*'s third stage requires more than a determination of inherent or apparent plausibility; it "requires the judge to assess the plausibility of [the prosecutor's stated] reason in light of all evidence with a bearing on it." (*Miller-El, supra*, 545 U.S. at p. 252.) Nothing in the record shows that the trial court conducted the requisite inquiry.

(*Id.* at 1061 (italics in original).) It is submitted that this Court should change direction for the reasons set forth by Justice Liu in his concurring opinion in *People v. Mai* (2013) 57 Cal.4th 986, 1058-1078, and his dissenting opinion in *People v. Williams* (2013) 56 Cal. 4th 630, 649-650, and adopt the view finding deference unwarranted as to *Batson* rulings unaccompanied by explicit findings and analysis.

Here, even under the majority's analysis, the trial court's denial of the *Batson* motions are not entitled to deference because the record fails to reflect that the trial court made the required "sincere and reasoned effort" to evaluate the prosecutor's stated reasons for striking the five African-American female jurors. As noted, the trial court simply concluded that the prosecutor's stated reasons were "facially and racially neutral" as to four black female jurors, and "genuinely and facially neutral" as to the fifth black female juror. Judge Delucchi failed to make the requisite inquiry. Of note, the findings by Judge Delucchi do not "address whether the race-neutral reasons given by the prosecutor were the actual reasons motivating the strikes." (*People v. Mai, supra,* 57 Cal.4th at 1061 (Liu, J., concurring).) Consequently, the record fails to demonstrate that Judge Delucchi made the requisite inquiry with regard to whether the "race-neutral reasons given by the prosecutor were the actual reasons motivating the strikes." (*Id.*)

In *People v. Williams* (2013) 56 Cal.4th 630, 698-699, Justice Werdegar, in her dissenting opinion, concluded that under the circumstances presented in *Williams*,"no appellate deference" is due the trial court's determination that "the prosecutor's peremptory challenges were exercised on nondiscriminatory grounds." (*Id.* at 698.) Justice Werdegar concluded that "the trial court failed to make the 'sincere and

reasoned attempt to evaluate each stated reason' required for appellate deference under *People v. Silva* (2001) 25 Cal.4th 345, 386." (*Id.* at 699.) Here, the inquiry and findings by the trial court are similar to those in *People v. Silva*, and hence, the trial court failed to make the requisite "sincere and reasoned attempt to evaluate each stated reason" provided by the prosecutor to warrant appellate deference.

In *People v Silva*, 25 Cal.4th 345, as to the first *Batson/Wheeler* motion, the defense challenged the prosecutor's peremptory challenge against three prospective jurors of Hispanic ancestry. The trial court asked the prosecutor to explain the reasons for the challenges and, based on the prosecutor's request, the reasons were provided *ex parte* out of the presence of the defendant and defense counsel. When the proceedings resumed in the presence of the defendant and defense counsel, the trial court denied the first *Batson/Wheeler* motion. The trial court said only that the prosecutor "did provide an explanation with regard to" the three peremptory challenges and that "I think there was a good excuse with regard to all of these people." (*Id.* at 376, and 382.) There was a second *Batson/Wheeler* motion regarding two more prospective jurors, both of Hispanic ancestry or surnames, which again was held *ex parte*, in which the prosecutor gave reasons for the challenges. (*Id.* at 382.) When the proceedings were resumed in the presence of the defendant and defense counsel, the trial court said "I did hear the explanations presented by the prosecutor with regard to peremptory challenges exercised" as to the new prospective jurors. The trial court noted "they appear to be very valid reasons for those excuses." (*Id.* at 383.) As a consequence, no Hispanic served on the jury that returned the verdict selecting the penalty of death. (*Id.*) After the jury returned the death verdict, the trial court sealed the transcripts of the *ex*

parte hearings in which the prosecutor had stated his reasons for the peremptory challenges of the five Hispanic prospective jurors. The defendant moved for a new trial on the ground, among others, that the prosecutor had failed to give valid and sufficient reasons for exercising the five peremptory challenges. In denying the new trial motion, the trial court explained as follows: " 'Well, the Court held an in camera hearing with regard to the exclusion of several jurors, and the Court felt that there was sufficient reason for the exclusion of those witnesses–I mean those jurors. So your motion is denied for a new penalty phase trial.' " (*Id.* at 384.)

In *Silva*, what we have is the trial court simply concluding that there was "a good excuse," "very valid reasons," and "sufficient reason" for the exclusion of the prospective jurors. These reasons are similar to those noted by the trial court in the instant case with regard to the prosecutor's stated reasons for exclusion being "facially and racially neutral" and "genuine and facially neutral" without more. Neither the trial court in *Silva* nor the trial court in the instant case made the requisite "sincere and reasoned attempt to evaluate each stated reason" provided by the prosecutor for excusing the prospective jurors. In *Silva*, this Court held as follows:

> Although we generally "accord great deference to the trial court's ruling that a particular reason is genuine," we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror."

(*Id.* at 385-386 (citations omitted).) Here, the trial court failed to make the requisite inquiry contemplated by the Supreme Court of the United States in *Snyder* and *Miller-El*, or by this Court in *Silva*. Consequently, under the circumstances of this case, no appellate deference is due the trial court's denial of the *Batson/Wheeler* motions.

C. The Prosecutor's Death-Penalty Scale.

The prosecutor employed a death-penalty scale in evaluating each prospective juror during jury selection. The prosecutor asked each prospective juror where they stood philosophically on the death penalty based on a scale of one (1) to ten (10), with one (1) representing Mother Teresa and ten (10) representing Rambo or the Terminator (*see*, e.g., RT 1414-1415) (AOB 129), and obtained a numerical ranking as to each prospective juror. (AOB 130-132.) The court endorsed both the prosecutor's question and scale on a number of occasions by clarifying the question or adding to the question; for example, as to: Juror No. 10 (RT 1276), Alternate Juror No. 5 (RT 1730), and prospective juror Cornist (RT 2091) (*see* discussion, AOB 129-130). The prosecutor was seeking jurors who were predisposed to "impos[e] the death penalty." (RT 3751-3752) (AOB 128). Hence, the death-penalty scale was the cornerstone of the prosecutor's voir dire examination and evaluation of prospective jurors. However, a comparative juror analysis, predicated on the prosecutor's death-penalty scale, reflects that the exclusion of the five African-American jurors was pretextual. (*See* AOB 126-133.)

The A.G. seeks to undermine the import and utility of the death-penalty scale employed by the prosecutor during the jury selection process (RB 79-82). The A.G. acknowledges that the "prosecutor was the one who asked most of the prospective jurors to rate themselves" regarding the death penalty (RB 79). Moreover, a review of the record confirms that it was the prosecutor, Jim Anderson, who employed the death-penalty scale of 1 to 10, and posed the lengthy question regarding the death penalty, comprising on average 25 lines of text, to each juror (AOB 129-131), each alternate juror (AOB 131), and to each of the challenged prospective jurors who were the

subject of the *Batson/Wheeler* motions (AOB 132-133). Further, the prosecutor repeatedly referred to the death-penalty scale as "my scale." (*Id.*)

The A.G. also asserts that the prospective jurors "self-reported score" did not provide a "primary basis" as to any of the prosecutor's challenges. (RB 79) This statement is belied by the record and a comparative juror analysis. (*See* AOB 126-133, discussing "comparative juror analysis – macro view.") In fact, the score provided by each prospective juror was in direct response to the lengthy death penalty question posed by the prosecutor. For example, the question posed by the prosecutor to Juror No. 12 is illustrative of the questions posed by the prosecutor to all prospective jurors regarding the death-penalty scale as follows:

> Q. [MR. ANDERSON] Let me ask you another question that has nothing to do with this case. This just has to do with your feelings philosophically about how you feel about the death penalty as a punishment for murder.
>
> So assume a scale of one to ten.
>
> A one on the scale, the low end, is going to be somebody who is never, ever going to impose a death penalty on anybody. Doesn't matter if you have Ted Bundy; it doesn't matter if you have Timothy McVeigh, some mass murderer. A one on my scale is going to look for the good in everybody no matter. Every time they are going to look to excuse his conduct. There has to be a reason for it. And they are just a kind, charitable person, somebody like Mother Teresa.
>
> A. [JUROR NO. 12] (Nods head.)
>
> Q. A ten, on the other hand, is somebody who believes that if you kill somebody, you murder them in a criminal way -- you know, not accident or not justifiable or even, you know, somebody is beating you up or robbing you and you

> kill them in self-defense, nothing like that. You commit a murder, there is only one appropriate penalty for a ten on my scale, and that's the death penalty, eye for an eye. You kill, you be killed.
>
> And we've been using Rambo or the Terminator or somebody out of those Hollywood movies to show what we mean by a ten.
>
> So if you had to choose a number between one and ten which shows us philosophically, mentally, how you feel about the death penalty as a punishment for murder, what number do you think you'd take, JN. 12?
>
> A. I guess I would be six.

(RT 2324:26-2325:27) (emphasis added). (For further illustration, *see* question posed to Juror No. 8, RT 3648:22-3649:26.)

The lengthy, detailed, and graphic nature of the question demonstrates the import placed by the prosecutor on the prospective jurors' numerical ranking on the death-penalty scale, which the prosecutor referred to as "my scale." As noted, the prosecutor was seeking jurors who were predisposed to "impos[e] the death penalty." (RT 3751-3752) (AOB 128). The prospective jurors' numerical ranking on the prosecutor's death-penalty scale were elicited in each incidence to achieve that goal, i.e., a juror who is predisposed to impose the death penalty. However, when the excluded African-American female jurors have higher numerical rankings and/or equivalent numerical rankings to the seated jurors and alternates on the prosecutor's death-penalty scale, this comparison reflects that the exclusion of the five African-American female jurors was pretextual. (*See* AOB 126-133.)

D. The Submitted *Batson* Motion.

The A.G., citing to *People v. Jones* (2011) 51 Cal. 4th 346, 361, asserts that the submittal of the first *Batson* motion as to Alice Faye Soard, Victoria Esoimeme, Harriett Davis, and Lorraine Dokes by defense counsel, Mr. Giller, suggests that Mr. Giller found the prosecutor's stated reasons for excusal to be "reasonable." (RB 86, 95, 106, and 113.) This argument is without merit and is contradicted by the record.

In *People v. Jones*, *supra*, the defendant challenged the denial of his *Batson* motion, relying on *People v. Silva* (2001) 25 Cal. 4th 345, and contended that the trial court did not make the required sincere and reasoned attempt to evaluate the prosecutor's credibility. This Court disagreed and concluded as follows:

> "Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty." Here, the court asked the prosecutor one question during his explanation. Additionally, it invited defense counsel to comment on the prosecutor's explanation. Defense counsel declined to comment, thus suggesting he found the prosecutor credible. Under the circumstances, the court was not required to do more than what it did.

(*Jones*, 51 Cal. 4th at 361, citing *People v. Lewis* (2008) 43 Cal.4th 415, 471.)

The declination by defense counsel in *Jones* to comment on the prosecutor's explanation does not equate to the matter being "[s]ubmitted" by defense counsel, Mr. Giller, in this case. (RT 3723.) Defense counsel had already raised the *Batson* motion which Judge Delucchi found established a prima facie case of discrimination. Judge Delucchi noted that

the prosecutor, Mr. Anderson, had excused "four out of eight black females I think makes a prima facie case, so I'm going to put the burden on you now to justify the reasons for these excuses," referring to Ms. Soard, Ms. Esoimeme, Ms. Davis and Ms. Dokes. (RT 3720.) Moreover, prior to the prosecutor stating his reasons for the excusals, defense counsel, Mr. Horowitz, noted that Harriett Davis was a "ten" and Ms. Dokes an "eight" on the prosecutor's death-penalty scale (i.e., "one-to-ten scale," that is, the "famous scale"). (RT 3720-3721.) Hence, not only did defense counsel bring the *Batson* motion, but Mr. Giller noted the "basis of our motion, that it's four blacks" (RT 3720), with the court deeming the defense to have made a "prima facie case" based on the prosecution's excusal of four black female prospective jurors and "put the burden" on the prosecution "to justify the reasons for these excuses." (RT 3720.) The prosecutor then stated his reasons for excusing the four black female jurors. (RT 3721-3723.) The court did inquire of defense counsel, Mr. Giller, whether he wished "to be heard," to which he responded "[s]ubmitted." (RT 3723.) The court denied the motion. (*Id.*)

When the prosecution excused Doris Cornist, defense counsel, Mr. Horowitz, brought a second *Batson* motion. (RT 3725.) The court heard the second *Batson* motion in which defense counsel, Mr. Horowitz, noted that there were no African-Americans on the jury. Defense counsel Horowitz, in making his record, stated as follows:

> MR. HOROWITZ: I was indicating that the fact that we have not one African-American doesn't speak anything except that that was a clear-cut personal choice.
>
> What is clear is that five out of 11 of the

> prosecution's challenges are African-Americans, and that is very telling. . . . Five out of six [African-American prospective jurors] were challenged by the prosecution.
>
> You know, he [the prosecutor] almost had a perfect record. If he was Mark McGwire, he would have hit 80 home runs that same way.
>
> And I think at that some point - - an intelligent prosecutor can make up reasons, but I think that's just an intelligence test. The record speaks for itself that there is an . . . exclusion of African-Americans.

(RT 3749-3750.) Thus, following the first *Batson* motion and in connection with the second *Batson* motion, defense counsel, Mr. Horowitz, further challenged the credibility of the prosecutor with respect to his excusal of the five African-American jurors and noted that "an intelligent prosecutor can make up reasons," i.e., for the excusal of jurors, thereby indicating that the prosecutor, Mr. Anderson, was making up reasons for his excusal of the five African-American jurors. (RT 3749-3750.) As discussed below, no African-American jurors served on the guilt phase and first penalty phase jury. (*See* discussion, *post* at pp.16-21.)

The court noted during the second *Batson* motion that the court had previously determined that a "prima facie case" had been made and inquired of the prosecutor "what are the grounds for excusing Ms. Cornist?"[3] The prosecutor, in response to the court's inquiry, then stated the basis for excusing Ms. Cornist. (RT 3750-3753.) In doing so, the prosecutor noted that the defense had excused Ms. Cheryl Wells, who was an African-

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3 The court reconfirmed that the defense motion was brought under both state and federal grounds, to wit, *Wheeler* and *Batson*. (RT 3750.)

American female who worked as a dispatcher for the Berkeley Police Department and had leanings towards law enforcement. (RT 3751.) Once the prosecutor had stated his reasons for excusing Ms. Cornist, the court noted: "I'm not going to invite any more comments from the defense" (RT 3753), apparently concluding that the record reflected the defense position. That is, the prosecutor had challenged five out of the six African-American jurors, reflecting an exclusion of African-Americans, two of the African-Americans – Harriett Davis and Lorraine Dokes – ranked as a 10 and 8, respectively, on the prosecutor's death-penalty scale, and that Mr. Anderson, as an intelligent prosecutor, was making up reasons for excusing the five African-American jurors. The court denied the second *Batson* motion, concluding that the reasons proffered by the prosecution were "genuine and facially neutral." (RT 3753.)

Under these circumstances, the record does not support the A.G.'s assertion that the submittal of the first *Batson* motion for decision, absent further comment, "suggests" that the defense found the prosecutor's stated reasons for excusing the four African-American female jurors, i.e., Soard, Esoimeme, Davis and Dokes, to be reasonable.

E. There Were No African-American Jurors on the Guilt Phase and First Penalty Phase Jury.

On January 20, 1999, the court concluded the *Hovey* voir dire and determined that it had 78 qualified jurors for the jury panel venire. (RT 3682-3683.) The court noted that it could only "accommodate 78 people in the court because that's all the seats we have." (RT 3683.) At the request of the defense, the court agreed to identify for the record each prospective juror who was African-American that was excused for hardship. (RT 774; *see e.g.,* 780-781.) The practice was continued throughout the *Hovey* voir

dire. (RT 1021-3684.) Of the 78 prospective jurors who were found qualified by the court during the *Hovey* voir dire and placed on the jury panel venire, the record reflects that the court identified eight as being African-American: (1) Doris Cornist (RT 2094); (2) Loretta Chandler (RT 2536); (3) Harriett Davis (RT 3428; see also 3720); (4) Lorraine Dokes (RT 2693; see also 3720); (5) Victoria Esoimeme (RT 3428; see also 3720); (6) Alice Faye Soard (RT 3623; see also 3720); (7) Kenneth Taylor (RT 1485); and (8) Cheryl T. Wells (RT 3116).[4]

Thus, the record reflects that the court identified only eight African-American jurors who were placed on the 78-member jury panel venire at the time the peremptory challenges commenced.

1. The First *Batson* Motion.

The A.G. asserts that "neither party identified how many African-

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The Attorney General seeks to add a ninth African-American prospective juror to the 78-member jury panel venire, asserting that the "court also noted a prospective juror who worked at the Alameda County Family Support Division was African-American," citing to 14RT 2963. (RB 73, fn. 21) However, a review of reporter's transcript at page 2963, lines 9-11, reflects that it was the prosecutor who noted that "the lady from the Alameda County Family Support Division . . . was African-American, also." (RT 2963) A review of the jury questionnaires reflects that the prosecutor was apparently referring to prospective juror Doris Cornist, who listed her employer as the "Alameda County Welfare To Work Dept. Social Service Agency." (SCT 002-020 at 005).

Of note, "SCT" refers to the Supplemental Clerk's Transcript On Appeal, Volume 1. At page 128 of Appellant's Opening Brief, the questionnaires of the challenged jurors are noted: Doris Cornist – 002-020; Harriett Davis – 021-039; Lorraine Dokes – 040-058; Victoria Esoimeme – 059-077; and Alice Faye Soard – 078-096, with reference to "CT", but this reference ("CT"), in fact, is to the Supplemental Clerk's Transcript On Appeal, Volume 1.

Americans remained in the jury panel at the time of appellant's *Batson* motions." (RB 72.) However, as noted above, a review of the record reveals that only eight African-American prospective jurors were part of the jury panel venire; that is, eight out of seventy-eight. On January 25, 1999, the first twelve prospective jurors from the 78-member panel venire were placed in the jury box for the purpose of peremptory challenges. (RT 3713.) As a juror was excused, another prospective juror would be called from the panel venire and seated in the jury box. (RT 3713.) The clerk called the first twelve prospective jurors who were seated, which included Alice Soard as number 11. (RT 3714-3716.) The prosecutor exercised eight peremptory challenges at which time the defense made its first *Batson* motion. (RT 3716-3719.) The defense had exercised four peremptory challenges. (RT 3717-3719.) During the exercise of these peremptory challenges, Cheryl Wells (RT 3717), Victoria Esoimeme (RT 3717), Harriett Davis (RT 3718), and Lorraine Dokes (RT 3719) had been seated in the jury box.

The prosecutor exercised four out of his eight peremptory challenges on prospective jurors Soard (RT 3716), Esoimeme (RT 3718), Davis (RT 3718), and Dokes (RT 3719) – all African-American female jurors, which the court concluded made a "prime facia case" and required the prosecutor to state his reasons for said challenges. (RT 3720.) The prosecutor stated his reasons for the excusal of each of the four African-American female jurors. (RT 3721-3723.) The court then denied the *Batson/Wheeler* motion. (RT 3723.)

2. The Second *Batson* Motion.

The process of peremptory challenges resumed. The prosecutor exercised three more peremptory challenges (RT 3725-3727), which included Doris Cornist, an African-American female (RT 2094) who had

been seated but was excused by the prosecutor. (RT 3725.) When the prosecution excused Doris Cornist, defense counsel, Mr. Horowitz, reserved his *Batson* motion ("all motions") and the court noted that they would review the matter after the jury had been selected. (RT 3725-3726.) The prosecutor concluded his peremptory challenges with a total of eleven challenges. (RT 3746, *see* RT 3716-3728.) The defense concluded their peremptory challenges with a total of thirteen challenges. (RT 3727, *see* RT 3717-3728.) The court noted that the twelve seated jurors would try the case. (RT 3728.)[5]

After seating alternate jurors commenced, as well as the initiation of peremptory challenges (RT 3728-3745), but before the alternate juror selection process had been completed, the court heard the second *Batson* motion. (RT 3745-3746.) The court confirmed that the prosecutor had challenged five African-Americans out of his eleven challenges, noting in response to Mr. Horowitz's inquiry: "That's correct." (RT 3746). Defense counsel, Mr. Horowitz, then pointed out that they ended up with a panel of twelve in which "none of the 12 are African-Americans." (RT 3746.) The court responded that the defense had "excused Ms. Wells, number 12, a female African-American," to which Mr. Horowitz noted "that's irrelevant." (RT 3746.) The court acknowledged: "[t]hat may be." (RT 3746.) Defense counsel Horowitz reiterated that "five out of 11 of the prosecution's challenges are African-American." That is, "[f]ive out of six [African-Americans] were challenged by the prosecution." (RT 3749.) Mr.

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Neither prospective juror Kenneth Taylor, an African-American male (RT 1485), nor Loretta Chandler, an African-American female (RT 2536) were, and/or had been, seated in the jury box. (RT 3714-3728.)

Horowitz concluded that there is an "exclusion of African-Americans." (RT 3750.) The court then inquired of the prosecutor: "[W]hat is the basis for excusing Ms. Cornist?" (RT 3750.) The prosecutor stated his reasons for excusing Ms. Cornist. (RT 3752-3753.) The court denied the second *Batson/Wheeler* motion. (RT 3753-3754.) Hence, the record is clear that none of the twelve seated jurors were African-American.

3. Alternate Jurors.

The court determined that there would be five alternate jurors and that both the prosecution and defense would have five challenges each. Five alternate jurors were seated. The prosecution exercised three peremptory challenges while the defense exercised four peremptory challenges before both the prosecution and defense passed on further challenges. (RT 3728-3730.) The court determined that Ms. Kenon, alternate juror no. 2, would have to be excused because she felt that "she cannot be a fair and impartial juror in this case." (RT 3741-3742, *see also* 3744.) Of note, after further discussion, counsel stipulated that she could be excused. (RT 3746-3749.) Defense counsel, Mr. Giller, requested that they "reopen" the challenges to the alternate jurors. (RT 3742.) The court instructed his clerk to call the next five prospective jurors to be there the next morning to complete the selection of alternate jurors. (RT 3743.) The court identified Cabral, Breunig, Ogden, Castillo, and AJ. 02X as the next five jurors. (*Id.*) The court also noted that the prosecutor had two challenges left and that the defense had one challenge left. (RT 3744.)

The next day, January 26, 1999, the alternate juror selection resumed. (RT 3759.) The prosecution excused Maribel Cabral and Mary Breunig, which exhausted his five peremptory challenges for the alternate jurors. (RT 3759-3760.) The defense excused David Ogden, which

exhausted the defense's five peremptory challenges. (RT 3760.) The court noted that Teresa Castillo would then serve as the alternate juror no. 2 (RT 3761); however, Ms. Castillo was excused by stipulation. (RT 3762.) The court then noted that AJ. 02XXXXX would be seated as Alternate Juror No. 2 (RT 3762-3763). The court also confirmed that AJ. 03XXXXXX would remain seated as Alternate Juror No. 3, finding no "reason to excuse AJ. 03XXXXXX." (RT 3763-3766). The court then advised the rest of the prospective alternates that they would not be needed. (RT 3768.) The jury was then sworn. (RT 3768-3769.) Again, neither prospective juror Kenneth Taylor, an African-American male (RT 1485), nor Loretta Chandler, an African-American female (RT 2536) were called or seated as alternate jurors (RT 3728, 3730, 3740-3745, and 3759-3766). Hence, the record is clear that none of the five seated alternate jurors were African-American.

As to the 78-member jury panel venire, the twelve seated jurors, five alternate jurors, the thirty-four peremptory challenges by the prosecution and defense, and the two alternate jurors excused by stipulation, account for 53 of the 78-member jury panel venire. Consequently, this left 25 prospective jurors of the 78-member jury panel venire who were not called upon to sit in the jury box, which included Kenneth Taylor, an African-American male, and Loretta Chandler, an African-American female.

F. Defense Challenges Irrelevant to the Propriety of Prosecutor's Challenges.

The A.G. asserts that the defense challenge of Ms. Wells, who is African-American, is a factor tending to show that the prosecutor's challenge of five of six African-American females, who had been seated in the jury box, was not pretextual in light of the fact that the prosecutor had

passed on challenging Ms. Wells. (RB 77, fn. 23.) Moreover, the A.G. also apparently relies on the fact that two "remaining" prospective jurors in the panel venire were African-American (i.e., Kenneth Taylor and Loretta Chandler) to support the assertion that the challenges were not pretextual. (*Id.*) This argument is unfounded based on the record and this Court's decisional authority. First, the trial court acknowledged that with regard to the *Batson* motion, the fact that the defense had challenged one African-American female juror "may be" irrelevant to the *Batson* analysis. (RT 3746.) Second, the prosecutor acknowledged that Cheryl Wells, an African-American female, "was a dispatcher for the Berkeley Police Department and as such had some leanings towards law enforcement." (RT 3751.)

However, the rationale or justification for any defense peremptory challenge is "irrelevant" in determining the propriety of the prosecutor's peremptory challenge or challenges, and this Court has so held. In *People v. Snow* (1987) 44 Cal. 3d 216, 225, this Court concluded as follows:

> As the People now concede, the propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges. [Citations omitted.]

Consequently, the fact that the defense excused Cheryl Wells, an African-American female, is irrelevant to the propriety of the prosecutor's challenges as to the five African-American female jurors.

The A.G. also argues that but for the defense challenge to Ms. Wells, she would have served on the jury, and hence, this is a factor tending to show that the other five challenges were not pretextual. Further, the A.G. also seeks to rely on the fact that there were two other panelists remaining

in the panel venire who were African-American, (i.e., Kenneth Taylor and Loretta Chandler) as somehow supporting the proposition that the passing of Ms. Wells is a factor demonstrating that the challenges to the five other African-American jurors were not pretextual. (RB 77, fn. 23.) In *Snow*, this Court made clear that the passing of certain jurors may be "an appropriate factor" for the trial judge to consider, but said factor is not "conclusive." This Court analyzed the issue as follows:

> Nor does the fact that the prosecutor "passed" or accepted a jury containing two Black persons end our inquiry, for to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion. (See *People v. Motton* (1985) 39 Cal.3d 596, 607-608 [217 Cal.Rptr. 416, 704 P.2d 176].) Although the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection, it is not a conclusive factor.
>
> As we stated in *Motton*, *supra*, 39 Cal.3d 596, quoting with approval an earlier Court of Appeal opinion, "The Attorney General argues that the prosecution's acceptance of the jury on three occasions, when there were one or two Blacks on the panel, rebuts defendant's prima facie showing.. . . 'If the presence on the jury of members of the cognizable group in question is evidence of intent not to discriminate, then any attorney can avoid the appearance of systematic exclusion by simply passing the jury while a member of the cognizable group that he wants to exclude is still on the panel. This ignores the fact that other members of the group may have been excluded for improper, racially motivated

reasons.' " (*Id.* at pp.607-608.)

(44 Cal. 3d at 225.)

What is important here is that the trial court did not rely on the passing of Ms. Wells as a factor tending to show the prosecutor's challenges to the other five African-Americans were not pretextual. As noted, defense counsel, Mr. Horowitz, asserted that it was irrelevant that the defense had challenged Ms. Wells, a female African-American juror, with regard to the fact that the prosecutor had challenged five African-American jurors out of his eleven challenges, to which the court responded "[t]hat may be." (RT 3746.) The record simply does not reflect that the court gave any weight to the prosecutor's passing of Cheryl Wells, an African-American female juror, as tending to show that the prosecutor's challenges to the other five African-American jurors were not pretextual, and this Court should not do so either based on the record.

Here, we have a record in which eight prospective jurors out of the 78-member jury panel venire were African-American. That is, 10.24% of the jury panel venire. Of the 78-member jury panel, six prospective jurors, who were African-American, were seated in the jury box; that is 7.68% of the jury panel venire. However, five of the six African-Americans who were seated were excluded by the prosecution; that is, 83% of the seated African-American jurors were excluded by the prosecution. The fact that there were two members of the panel venire, Kenneth Taylor and Loretta Chandler, who were never seated in the jury box, and hence, remained a part of the panel venire who were never seated (i.e., 25 prospective jurors) adds nothing to the analysis. Moreover, the fact that the defense exercised one challenge as to a seated African-American juror, i.e., Cheryl Wells, is

of no moment when evaluating the propriety of the prosecutor's challenges of five African-American jurors who constituted 83% of the seated African-American jurors. The exclusion of five out of six of the seated African-American jurors is simply disproportionate to the prosecutor's challenges and vitiates any so-called appropriate factor with regard to the prosecutor's passing on Cheryl Wells, an African-American female juror, concerning the challenges asserted. Hence, the passing on Cheryl Wells is not a factor tending to show that the prosecutor's challenges as to the five African-American jurors were not pretextual.

In his dissenting opinion in *People v. Willliams* (2013) 56 Cal. 4th 630, 718, Justice Liu in analyzing the Supreme Court decision of *Miller-El v. Dretke* (2005) 545 U.S. 231, concluded that the prosecutor's allowing a single black woman to remain on the jury, after striking five of the six black women seated in the jury box, "does little to negate the inference that the prosecutor's prior strikes were discriminatory. (*Williams*, 45 Cal. 4th at 718.) Justice Liu analyzed the situation as follows:

> As the prosecutor explained after having struck the fifth black woman in the venire (R.J.), he was worried about "making a Wheeler motion" and "offending the blacks on the jury." The prosecutor's failure to strike a *sixth* black female juror is therefore hardly surprising and not especially probative of his motivations in striking the prior five. As the high court observed when considering a comparable situation in *Miller-El*: "This late-stage decision to accept a Black panel member ... does not ... neutralize the early-stage decision to challenge a comparable venireman ... . In fact, if the prosecutors were going to accept any Black juror to obscure the otherwise consistent pattern of opposition to seating one, the time to do so

> was getting late." (*Miller-El, supra,* 545 U.S. at p. 250.)

Id. (emphasis in original).

The facts of this case are strikingly similar to those analyzed by Justice Liu in *People v. Williams*. The fact that the prosecutor in this instance "passed" on Cheryl Wells adds nothing to the analysis with regard to whether the prosecutor's striking of the other five African-American female jurors was discriminatory. Thus, the prosecutor's failure to challenge Ms. Wells is a non-factor as to the question of whether his challenges to the five African-American jurors were pretextual. Hence, this Court should independently evaluate whether the prosecutor's challenges to the five African-American jurors were pretextual, applying a comparative juror analysis without deference to the trial court's rulings. Excepting the one challenge to an African-American female juror (i.e., Cheryl Wells) by the defense, the consequences of the prosecutor's challenges to the five African-American female jurors resulted in no African-American jurors serving on the guilt phase and first penalty phase jury.

G. <u>Comparative Juror Analysis.</u>

In *People v. Jones* (2011) 51 Cal.4th 346, 365, this Court properly concluded, citing to *Miller-El v. Dretke* (2005) 545 U.S. 231, 252, that in determining the propriety of a prosecutor's challenge, "only the reasons actually given" are considered:

> "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (*Miller-El v. Dretke, supra*, 545 U.S. at p. 252.)

The A.G. asserts that when a comparative juror analysis is performed for the first time on appeal, the reviewing court "may consider dissimilarities between the allegedly similarly-situated panelists, not mentioned by the prosecutor in justifying his challenges. ([citing to] *Jones, supra*, 51 Cal.4th at 365-366.)" (RB 72.) In other words, the A.G. may rely on other reasons, not stated or asserted by the prosecutor, to justify the challenge.

In *Jones*, this Court, again citing to *Miller-El v. Dretke, supra*, 545 U.S. at 252, clearly noted that when a prima facie case has been established of improper use of peremptory challenges, "the prosecutor must state the reasons for those challenges 'and stand or fall on the plausibility of the reasons he gives.' [citing to *Miller-El*, 545 U.S. at 252]." *Jones*, 51 Cal.4th at 365. However, this Court concluded that when a comparative juror analysis is employed for the first time on appeal, generally the prosecutor has not been afforded an opportunity to explain "why *other* jurors were *not* challenged." (*Id.* (emphasis in original).) This Court concluded that when performing a comparative juror analysis for the first time on appeal, the reviewing court may consider reasons not stated by the prosecutor in determining the propriety of the prosecutor's challenges:

> When asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors.

(*Id.* at 365-366.)

The Court's "blind eye" analysis is incompatible with *Miller-El v. Dretke*, 545 U.S. 231, and *Snyder v. Louisiana* (2008) 552 U.S. 472, which

require that the comparative juror analysis focus on the prosecutor's stated reasons, not imagined reasons, for the particular challenge. This Court's "blind eye to reasons the record discloses for not challenging other jurors" has been stretched to include any reason that can be imagined to support the prosecutor's challenge. (*See Jones*, 51 Cal.4th at 365-366.)

A number of federal circuit courts who have addressed the issue of a comparative juror analysis for the first time on appeal have concluded that the focus of the comparative analysis is on the reasons stated or asserted by the prosecutor, not imagined reasons predicated on what the prosecutor could have considered. In *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 375-76, the Fifth Circuit in a habeas corpus case applied, for the first time, a comparative juror analysis relying on *Miller-El* and set forth several principles which guide the comparative juror analysis, including consideration of "only the State's asserted reasons" for the challenge:

> The [Supreme] Court's treatment of Miller–El's comparative analysis also reveals several principles to guide us. First, we do not need to compare jurors that exhibit all of the exact same characteristics. *[Miller-El II]* at 247 n. 6. If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects. *Id.* at 241. Second, if the State asserts that it was concerned about a particular characteristic but did not engage in meaningful voir dire examination on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination. *Id.* at 246. Third, we must consider only the State's asserted reasons

> for striking the black jurors and compare those reasons with its treatment of the nonblack jurors. *Id.* at 252.

(*Reed*, 555 F.3d at 376.) The Sixth, Seventh, and Ninth Circuits have come to the same conclusion. *See United States v. Odeneal* (6th Cir. 2008) 517 F.3d 406, 420 (addressing a comparative juror analysis for the first time on appeal, noting that a comparative juror analysis involves "consideration of the prosecutor's stated reasons . . .."); *United States v. Taylor* (7th Cir. 2010) 636 F.3d 901, 905 (on appeal following a second remand, the court concluded that "*Miller-El II* instructs that when ruling on a *Batson* challenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact."); *Ali v. Hickman* (9th Cir. 2008) 584 F.3d 1174, 1182 (concluding that a "review of the record convinces us that each of the prosecutor's justifications is logically implausible, undermined by a comparative juror analysis, and otherwise unsupported by the record.").

This Court's blind eye analysis is not in keeping with the decisions of the Supreme Court of the United States in *Miller-El v. Dretke* (2005) 545 U.S. 231, and *Snyder v. Louisiana* (2008) 552 U.S. 472. Justice Liu makes this very point in his dissenting opinion in *People v. Williams* (2013) 56 Cal. 4th 630, 699-728 (dis. opn. of Liu, J.).

First, Justice Liu discussed the "detailed comparative juror analysis" engaged in by the Supreme Court in *Miller-El*, which resulted in the Supreme Court concluding that the "state court's conclusion that the prosecutors' strikes" of two black jurors were not racially determined were both "unreasonable" and "erroneous," citing to *Miller-El* at 266. *Williams, supra,* 56 Cal.4th at 706-707.

> The high court first observed that the sheer number of strikes the prosecution had used against black panelists provided grounds to believe that the prosecution had discriminated on the basis of race. (*Miller-El, supra*, 545 U.S. at pp. 240–241.) Then, in order to determine whether the facially neutral reasons given by the prosecutor were false or pretextual, the high court engaged in a detailed comparative juror analysis. "If a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Id.* at p. 241.)
>
> . . .
>
> Focusing on two black jurors whom the prosecution claimed to have struck because of their statements regarding the death penalty, the high court in *Miller-El* found that the statements of the two jurors were comparable to those of a number of venire members whom the prosecution did not strike, including some who ultimately served on the jury and others who were accepted by the prosecution but struck by the defense. (See *Miller-El, supra*, 545 U.S. at pp. 244–245, 248–249.) . . . *Miller-El* held: "The state court's conclusion that the prosecutors' strikes of [these two jurors] were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous." (*Id.* at p. 266.)

(*Williams*, 56 Cal.4th at 706-707 (dis. opn. of Liu, J.).) Justice Liu's analysis of *Miller-El* regarding the "comparative juror analysis" makes clear that said comparative analysis focuses on the prosecutor's stated reason for

striking a black juror and a comparison as to whether the stated reason applies to an otherwise similar non-black juror who was permitted to serve.

Justice Liu also addresses the "careful inquiry" mandated by the Supreme Court in *Snyder, supra*, with regard to evaluating the prosecutor's stated reasons for striking black prospective jurors.

> The Supreme Court conducted a similarly careful inquiry in *Snyder*, a capital case where the prosecution had used peremptory challenges to strike all five black prospective jurors who could have served on the jury. (*Snyder, supra*, 552 U.S. at p. 476.) The high court focused on the prosecution's proffered reasons for striking one of these five jurors, Mr. Brooks. . . . The prosecution had given two reasons for striking Mr. Brooks: first, he appeared to be nervous during voir dire, and second, he might vote to convict the defendant of a lesser crime in order "'to go home quickly'" and attend to his obligations as a student teacher. (*Snyder*, at p. 478.) The trial court had allowed the prosecutor's challenge to Mr. Brooks without explanation. (*Ibid.*)
>
> Snyder concluded that the trial court committed clear error in rejecting the defendant's *Batson* objection to the strike of Mr. Brooks. (*Snyder, supra*, 552 U.S. at p. 474.) As to the prosecutor's first reason for the strike, the high court acknowledged that "'nervousness cannot be shown from a cold transcript . . .'" and that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike." (*Id.* at p. 479.) But the high court emphasized that "[h]ere ... the record does not show that the trial judge actually made a determination concerning Mr. Brooks'

> demeanor." (*Ibid.*) . . . [W]e cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous." (*Ibid.*)
>
> As to the prosecutor's second proffered reason, the high court observed that the possibility that Mr. Brooks would have been willing or able to tailor the jury's verdict in order to shorten the duration of trial was "highly speculative" and that the same concerns could have been raised with respect to jurors accepted by the prosecution who had "disclosed conflicting obligations that appear to have been at least as serious" as those of Mr. Brooks. (*Snyder, supra*, 552 U.S. at pp. 482–483.) The high court concluded that the "prosecution's proffer of this pretextual explanation naturally [gave] rise to an inference of discriminatory intent." (*Id.* at p. 485.) Because the trial court had made no finding on the record as to the prosecution's demeanor-based reason, and because there was no indication that the prosecution would have challenged Mr. Brooks "based on his nervousness alone" or that this "subtle question of causation could be profitably explored further on remand ... more than a decade after petitioner's trial," the high court reversed the conviction. (*Id.* at pp. 485–486.)

(*Williams*, 56 Cal.4th at 707-708 (dis. opn. of Liu, J.).)

Thus, Justice Liu in his analysis of the Supreme Court decision in *Snyder* reflects on the careful analysis employed by the Supreme Court in evaluating the prosecutor's proffered reasons for exercising peremptory challenges of black jurors. Justice Liu then employed the comparative juror analysis reflected in *Miller-El* and the careful inquiry reflected in *Snyder* in analyzing the prosecutor's strikes of R.P. and R.J. in the *Williams* case,

concluding that the prosecutor's explanation "masked an improper discriminatory purpose." *Id.* at 721.

Moreover, Justice Liu rejected the majority opinion, which concluded that the record supported the prosecutor's stated reasons because the majority had failed to perform the careful analysis mandated by *Snyder* and *Miller-El,* stating:

> [T]he court does not perform the careful analysis required by and demonstrated in *Snyder* and *Miller-El.* Instead of thoroughly examining the record to determine whether it was more likely than not that the prosecutor struck one or more of the five black female jurors based on purposeful discrimination, the court merely scours the record for statements by the struck jurors that might support the prosecutor's explanations (even though the prosecutor did not specifically rely on any of the statements that the court cites) and dismisses in a footnote the comparable statements made by other jurors. (See maj. opn., *ante*, at pp. 654–661, 661–663 & fn. 22.)

(*Id.*) It follows that this Court's blind eye analysis noted in *Jones, supra,* 51 Cal.4th 346, does not square with the Supreme Court's careful inquiry in *Snyder* nor the detailed comparative juror analysis in *Miller-El.*

This Court's blind eye analysis has resulted in the application of what Justice Liu, in his concurring opinion in *People v. Mai* (2013) 57 Cal.4th 986, 1058-1078 (conc. opin. of Liu, J.) has termed "speculative inference" and "gap-filling presumptions" with regard to this Court's *Batson* jurisprudence. (*Id.* at 1066-1067.) Justice Liu noted that the prosecutor's stated reason or reasons for the challenge must stand or fall on their own as follows:

> [N]either the Attorney General nor this court may shore up a reason that the prosecutor actually gave with a reason he did not give. (See *Miller-El, supra*, 545 U.S. at p. 252) ["[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives . . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."].)

(*Id.* at 1064-1065.)

Based on *Miller-El*, 545 U.S. 231, and *Snyder*, 552 U.S. 472, the appropriate analysis at the *Batson* third step is whether the reasons stated by the prosecutor are plausible, supported by the record, and can withstand scrutiny based on the comparative juror analysis. This involves a thorough and careful scrutiny of all relevant circumstances at the *Batson* third step, as recognized in *Miller-El, supra*, 545 U.S. at 238-240, and the application of careful scrutiny to vitiate speculative reasons proffered by the prosecutor, as recognized in *Snyder, supra,* 552 U.S. at 482-485. (*See generally, People v. Williams*, 56 Cal.4th at 705-709 (dis. opn. of Liu, J.).)

Here, the relevant circumstances which provide context for the comparative juror analysis includes the following: out of the 78-member jury panel venire, eight were African-American. Six of the eight African-American prospective jurors were seated in the jury box (all female) and the prosecutor exercised peremptory challenges as to five of the six seated African-American female jurors, while the defense exercised one challenge to an African-American female juror. As a consequence, no African-American served on the guilt phase and first penalty phase jury. (*See generally* discussion, *ante* at pp. 16-21; *see also*, *People v. Jones* (2011) 51

Cal.4th 346, 363 (noting that the Court must "keep[] in mind the overall picture before us" when examining the defendant's challenges to the prosecutor's explanation for the strikes of prospective jurors).) It is in this context that the comparative juror analysis must be employed to determine if any one of the prosecutor's five challenges was predicated on race.

1. Harriett Davis.

The A.G. has misrepresented the record to this Court in an effort to expand the stated justification by the prosecutor for the challenge of Harriett Davis, and further obfuscates the comparison of Ms. Davis as to Juror No. 2 and Juror No. 12. (RB 82-92.) The prosecutor gave only one reason for excusing Ms. Davis, which was her response in the questionnaire as to her general feelings regarding the death penalty being "[a]s the last resort" (SCT 000021 at 000036). According to the A.G., the prosecutor interpreted this response to mean that his burden of proof would be substantially increased to beyond "any possible shadow of a doubt" (RT 3722). (RB 85.) The A.G. acknowledges that Ms. Davis was a ten on the prosecutor's death-penalty scale. (RB 86.) The A.G. then seeks to elicit support from inquiries by defense counsel, Mr. Giller, and the court to justify the prosecutor's unstated "general concerns" about keeping Ms. Davis on the jury. (RB 86.)

First, the A.G. seeks to undermine the ranking of Ms. Davis as a ten on the prosecutor's death-penalty scale by suggesting, based on responses to defense counsel, Mr. Giller, that she is really "in the middle," i.e., a five, not a ten. (RB 86.) However, a review of the record reflects that Ms. Davis was responding in the context of the court's instructions in voir dire that she consider both the aggravating and mitigating factors to determine whether either substantially outweighs the other relative to the imposition of life or

death. In fact, during voir dire, Ms. Davis in responding to the court's further inquiry confirmed her ranking as a ten, but also acknowledged that this did not mean that she felt the death penalty was the only appropriate penalty which, of course, would have resulted in a disqualification. After the prosecutor completed his voir dire, the court followed up on the ranking of Ms. Davis as a ten on the prosecutor's death-penalty scale as follows:

> THE COURT: Ms. Davis, I just have one question before the defense lawyers start.
>
> If philosophically on the scale of one to ten you're a ten as far as the death penalty goes - -
>
> I'm not trying to put the words in your mouth.
>
> PROSPECTIVE JUROR: Sure.
>
> THE COURT: Are you telling us that in every murder case you feel that the death penalty is the only appropriate penalty?
>
> PROSPECTIVE JUROR: No, not in every case.
>
> THE COURT: You want to find out the details first?
>
> PROSPECTIVE JUROR: Right.
>
> THE COURT: I just wanted to make sure.
>
> PROSPECTIVE JUROR: Yes.
>
> THE COURT: Because when you tell the defense lawyers you're a ten, boy, that red

flag goes up.

PROSPECTIVE JUROR: Yes.

THE COURT: And they think this lady is going to pick death every time.

PROSPECTIVE JUROR: No, no, no.

(RT 3346-3347.) Thus, this colloquy clearly reflects the ranking of Ms. Davis as a ten on the prosecutor's death-penalty scale as well as confirms that she would follow her obligation as a juror and consider life; that is, the death penalty would not be automatic.

The court hypothetically asked Ms. Davis to assume that Mr. Nadey had been found guilty of first degree murder plus the special circumstances and that they were in the penalty phase. (RT 3329.) The court then reviewed with Ms. Davis the factors that she would consider in assessing whether the death penalty should be imposed, including the circumstances of the crime, aggravating factors, and mitigating factors. (RT 3329-3331.) The court also noted the consideration of "sympathy" as to "the defendant in selecting the penalty." (RT 3331.) The court confirmed that Ms. Davis did not have "any feelings about either the death penalty or life without the possibility of parole as penalties" that would prevent her "from picking either one in this case," to which she responded: "[n]o, I don't." As the court noted: "[s]o they are both on the table for you?" to which Ms. Davis responded: "[y]es." (RT 3332.) Further, the court covered the issue of weighing the aggravating and mitigating factors to determine whether the factors in aggravation "are so substantial when compared to the factors in mitigation" for the jury to conclude "that death is warranted in this case and not life without parole." (RT 3334.) Hence, the A.G.'s representation that

Ms. Davis said she was "really . . . in the middle . . ." is misleading. (RB 86.) A review of the cited transcript (RT 3347-3348) reflects that the referenced words "really" and "in the middle" are Mr. Giller's words. (RT 3348.) Ms. Davis had already confirmed that she would not automatically impose the death penalty in every case where someone is found guilty of murder with special circumstances, nor would she impose life without parole in every case, as reflected in the following:

> Q. [MR. GILLER]: . . . As I understand what you're saying, you're not saying I'd do it in every murder case or every case where a guy -- a woman or somebody is found guilty of murder with special circumstance.
>
> You wouldn't do that automatically in every case?
>
> A. [PROSPECTIVE JUROR]: No.
>
> Q. Nor would you find -- give life without parole in every case.
>
> A. Definitely not.
>
> Q. Correct?
>
> A. No. I would - - I want to be sure I know what is going on, what the circumstances are, how they occurred, and what motivated the person.

(RT 3347-3348.) Hence, the reference to being "in the middle" with regard to imposing the death penalty or life in prison simply reflects the stated intention of Ms. Davis to follow the court's instructions with regard to evaluating the aggravating and mitigating factors to determine if one set of

factors substantially outweighs the other, not her support for the death penalty.[6]

Second, the A.G. further seeks to bolster the prosecutor's challenge of Ms. Davis by alluding to the court's purported concerns about her written remarks, i.e., the "prosecutor honed in on the court's concern" (RB 83), and "it was Ms. D's written remarks that caused the court to start its examination with the question whether she could ever personally impose the death penalty." (RB 86.) This assertion that Ms. Davis's written remarks caused the court to inquire as to whether she could ever personally

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The colloquy between defense counsel, Mr. Giller, and Ms. Davis reflects the "in the middle" query by Mr. Giller as follows:

> Q. [MR. GILLER} Would it be fair to say that -- that your position really is you're in the middle; it really could be death or life? You don't really favor –
>
> If you get to a penalty phase, you are not starting out favoring death - -
>
> A. [MS. DAVIS] No.
>
> Q. -- any more than you're favoring life? You're really more in the middle waiting to see what it's all about?
>
> A. Exactly.

(RT 3348.) Here, the context of the so-called "in the middle" query results in Ms. Davis confirming that "[n]o," she is not starting out favoring death, and that she is waiting to see what it is all about, to wit, "[e]xactly." Hence, the query by defense counsel does not transmute the numerical ranking of ten on the prosecutor's death-penalty scale into a five, as suggested by the A.G.

impose the death penalty is not correct. It is true that the court inquired of Ms. Davis whether she could impose the death penalty, as reflected in the following inquiry: "[A]re you the type of person that could ever vote to execute another human being? Could you do something like that?" (RT 3327). The A.G. asserts that the court started "it's examination" with this question regarding whether Ms. Davis could ever impose the death penalty, and then seeks to relate the inquiry to the written response of Ms. Davis in her questionnaire regarding the "last resort." (RB 86.) This is simply not the case, as borne out by the record. The question of whether Ms. Davis was "the type of person" who could "vote to execute another human being" was a standard question employed by the court at the beginning of the court's voir dire examination of each juror, alternate juror, and each of the five challenged jurors.[7] Hence, there is no basis for the A.G. to assert that somehow the court had concerns about Ms. Davis as it relates to her juror questionnaire. In fact, at the conclusion of the voir dire examination by both the court and counsel, the court concluded that Ms. Davis was qualified to serve as a trial juror as follows: "Ms. Davis, based on your

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[7] Each of the seated jurors, alternate jurors, and aforementioned challenged jurors were asked this type of question at the beginning of the court's *Hovey* voir dire examination: Juror No. 1 (RT 3130-3131); Juror No. 2 (RT 3011-3012); Juror No. 3 (RT 1092); Juror No. 4 (RT 1152-1153); Juror No. 5 (RT 1023); Juror No. 6 (RT 3197-3198); Juror No. 7 (RT 1404); Juror No. 8 (RT 3633); Juror No. 9 (RT 1048); Juror No. 10 (RT 1262); Juror No. 11 (RT 2387); Juror No. 12 (RT 2312); Alt. Juror No. 1 (RT 1534); Alt. Juror No. 2 (RT 1738); Alt. Juror No. 3 (RT 1382); Alt. Juror No. 4 (RT 1490); Alt. Juror No. 5 (RT 1714-1715); Challenged Juror Ms. Dokes (RT 2664-2665); Challenged Juror Mrs. Esoimeme (RT 3278-3280); Challenged Juror Ms. Cornist (RT 2078); Challenged Juror Ms. Soard (RT 3606-3607); and moreover, the female African-American juror challenged by the defense, Ms. Wells, was also asked the question (RT 3094).

answers, I'm satisfied that you're qualified to be a trial juror in this case. Not everybody makes it through this process, but you have." (RT 3351.) Consequently, the responses provided by Ms. Davis during voir dire caused the court to conclude that Ms. Davis was qualified to serve as a juror in this death penalty case.

The A.G. further obfuscates the response provided by Ms. Davis to the prosecutor's inquiry asking her to expand on her answer regarding her general feelings as to the death penalty, to which she had responded "[a]s the last resort." (RB 86-87.) The entire response simply reflects on the serious consideration that Ms. Davis believes should be employed in weighing a life or death sentence as follows:

> A. [MS. DAVIS] . . . Even though a life had been taken, we are still speaking of another life that still exists, and to be in the position to have to make a judgment as to whether a person will live or die, you want to try to be absolute as far as your decision without any remorse or any -- you can't have second thoughts, because once a person -- if they've been sentenced to death, once they die, you cannot bring them back. You cannot change your mind on that issue. So, therefore, a person must seriously take into consideration the consequences of the response of yes or no, death penalty or life sentence.

(RT 3335 (emphasis added).) Here, the last sentence of the response to the prosecutor's query requesting that Ms. Davis expand on her answer "[a]s the last resort," reflects the seriousness that Ms. Davis attaches to the task at hand in weighing the consideration of imposing the death penalty or a life sentence, which she notes must be taken "seriously" in considering that question.

The A.G. also seizes on Ms. Davis's written response to the "concluding question," but obfuscates the significance of the response and, moreover, does not reference the question itself or the actual yes or no answer. (RB 87.) The "concluding question" is found at SCT 38, and provides as follows:

> Is there any matter that **has not** been covered by this questionnaire that you feel that you should mention at this time that might affect your ability to be a fair and impartial juror in this case?

(emphasis in original). The question was to be answered by a yes or no answer, with an explanation if the answer was yes. However, Ms. Davis checked "No" and hence, her answer to the question is no, there is nothing not covered by the questionnaire that "might affect [her] ability to be a fair and impartial juror in this case." However, Ms. Davis did provide an additional comment in her answer to the "concluding question," to wit, "I don't like to see anyone die needlessly, but have had to deal with life and death situations from working at the hospital for almost 19 yrs." (SCT 38.) Here, Ms. Davis is referencing her work at the hospital, which involves "life and death situations." Hence, this simply reflects back on her prior answer to the prosecutor's inquiry in voir dire as to her questionnaire response on the death penalty being "the last resort." As noted above, this reflects both on the finality and the seriousness that she attaches to the task at hand; to wit, serving on a death penalty jury.

Thus, the A.G. seeks to expand the justification for the challenge beyond the one reason stated by the prosecutor; to wit, that he translated her response in the questionnaire, "[a]s the last resort," to mean that his burden of proof would be substantially increased to beyond "any possible shadow

of a doubt." (RT 3722.) The A.G. speculates that based on the so-called "last resort" response, that the prosecutor "could well believe" that the responses of Ms. Davis indicated that she could be "more hesitant than some others" remaining in the jury pool with regard to imposing the death penalty, notwithstanding the fact that Ms. Davis ranked a ten on the prosecutor's death-penalty scale. (RB 87.) This assertion by the A.G. is nothing more than speculation.

a. Juror No. 2 – Comparison.

The A.G. argues that the written and oral responses of Ms. Davis and Juror No. 2 were not "substantially the same," and asserts that the "record shows Juror No. 2 was hypothetically more disposed to vote for the death penalty than Ms. D[avis]." (RB 87-88) Again, the A.G. misstates the record. First, the A.G. notes that Ms. Davis wrote that the death penalty should be reserved as a "last resort" (citing to SCT 36) and that Juror No. 2 wrote that "she [believe[d] in the death penalty but I would have to be certain that the guilty verdict was without question'" (citing to CT 16366). (RB 87-88.) Second, the A.G. argues that Ms. Davis was uncertain if she would vote to retain the death penalty (citing to SCT 37), while Juror No. 2 hypothetically would vote to retain the death penalty (citing to CT 16367). (RB 87-88.)

The problem with this comparison is that it does not include the follow up oral explanation of these responses, as reflected in the voir dire. A review of both the juror questionnaires and voir dire examinations reflects that the responses by Ms. Davis and Juror No. 2 are, in fact, substantially the same concerning the death penalty. (AOB 133-137.) For example, the A.G. cites to Ms. Davis's juror questionnaire for the proposition that she was "uncertain" if she would vote to retain the death

penalty. (RB 87.) However, a review of her questionnaire reflects that she marked the box "not sure," but provided the explanation that she "[h]ad accident, could not vote." (SCT 37.) Hence, what Ms. Davis was communicating was that she could not answer the question, in effect, how she voted when the death penalty was on the ballot in the prior election because she had an accident. However, when the prosecutor followed up in voir dire, acknowledging her notation that she had previously been in an accident and was not able to vote in the prior election, and inquired further with respect to a hypothetical upcoming election, Ms. Davis affirmed her belief in the death penalty as follows:

> MR. ANDERSON: Q. Ms. Davis, on the questionnaire, also, the question was asked if the issue of whether California should retain the death penalty were on the ballot in this next election coming up, just flat out, should California have the death penalty, keep it, or should we dump it, how would you vote on that, and you put down you had an accident and therefore couldn't get to the polls.
>
> Supposing, hypothetically, the issue was just coming up, say in June –
>
> [MS. DAVIS] A. I believe in it.

(RT 3339.) Here, before the prosecutor had even completed the question, Ms. Davis responded with "I believe in it," that is, the death penalty, and obviously she would vote to retain it. Based on the follow up voir dire examination by the prosecutor, there is no doubt that she would vote to retain the death penalty, and hence, her vote to retain the death penalty would be the same as Juror No. 2.

The A.G. again seeks to make much of the referenced "last resort"

by Ms. Davis and asserts that Juror No. 2 believed in the death penalty, but would have to "be certain that the guilty verdict was without question." (RB 87-88.) The response by Juror No. 2 reflects on the seriousness that she attaches to the death penalty, just as Ms. Davis does, as reflected in her answer to the prosecutor's inquiry regarding her "last resort" response, in which Ms. Davis states in pertinent part as follows:

> You cannot change your mind on that issue. So, therefore, a person must seriously take into consideration the consequences of the response of yes or no, death penalty or life sentence.

(RT 3335.) Here, Ms. Davis was addressing the seriousness and finality that she attaches to the imposition of the death penalty, just as Juror No. 2 does when she notes that she would have to be certain as to the guilty verdict being "without question." Hence, these responses are substantially the same.

The A.G. also argues that Juror No. 2 expressed a belief in "capital punishment" and noted that the death penalty is "a just punishment" (citing to RT 3026-3027). (RB 88.) Ms. Davis also expressed a belief in capital punishment, responding to the prosecutor's inquiry as to whether she would vote to retain the death penalty with an emphatic "I believe in it" (RT 3339). As to imposition of the death penalty because the crime was terrible or serious, Ms. Davis noted that she had "no problem with having to make that decision," i.e., having to impose the death penalty. (RT 3338.) In fact, in response to the prosecutor's inquiry of whether she could "return a death verdict" based on the circumstances outlined by the prosecutor in this case, she responded "yes" (RT 3345). Ms. Davis ranked as a ten on the prosecutor's death-penalty scale (RT 3345-3346), while Juror No. 2 ranked

a five (RT 3022-3023). Hence, the A.G.'s assertion that Juror No. 2 was hypothetically more disposed to vote for the death penalty than Ms. Davis is untenable.

The A.G. seeks to further bolster the prosecutor's lone reason for excusing Ms. Davis relative to her comment regarding the death penalty being a "last resort," thereby increasing his burden of proof to include other comments regarding the criminal justice system, DNA evidence, and law enforcement connections to support the challenge of Ms. Davis. (RB 88-89.) However, none of these factors relative to the criminal justice system, DNA evidence, and connections to law enforcement were cited as justifications or reasons to excuse Ms. Davis. (RB 88-89.) Moreover, the A.G. also argues that Juror No. 2 had more knowledge concerning the murder and crime scene than Ms. Davis and, hence, seeks to rely on this as justification to excuse Ms. Davis and retain Juror No. 2. In fact, the A.G. argues that Juror No. 2 "thought it was a horrible crime," and was familiar with the location where Terena was murdered. (RB 89.) However, as in any trial, the court instructed the jury that they were to base their decision solely on the evidence presented in trial and not to conduct their own investigation or to consider any other knowledge that they might have. (RT 5180 at 5183; CT 907 at 912.) However, the A.G. apparently seeks to justify the excusal of Ms. Davis, predicated on the anticipated failure of Juror No. 2 to follow the court's instructions. (RB 89.)

Finally, the A.G. seeks to rely on Juror No. 2's close relationship to law enforcement, thereby giving law enforcement testimony more credibility, as well as the DNA evidence and, further, that Ms. Davis apparently was gullible and "more likely to buy into any possible specious defense challenge to that evidence." (RB 89) Again, these justifications

were not cited by the prosecutor. The additional justifications offered by the A.G. are without merit as they contravene the juror's sworn oath to base their decision on the evidence presented and the court's instructions to set aside any preconceived notion that they may have about the case or the guilt or innocence of the defendant. (RT 3768-3769 and RT 3769-3779.)

b. Juror No. 12 – Comparison.

The A.G. asserts that the prosecutor could reasonably believe that Juror No. 12 would be more inclined to vote to impose the death penalty than Ms. Davis. (RB 91) The record does not support this assertion. (See comparative analysis as to Juror No. 12, AOB 137-139)

The A.G. relies on the statement by Juror No. 12 in his questionnaire as to his general feelings regarding the death penalty, that is: "I believe DEATH PENALTY is warranted," as reflecting that Juror No. 12 was more inclined to impose the death penalty than Ms. Davis. (RB 90-91.) However, Ms. Davis made precisely the same statement regarding her belief in the death penalty in response to the prosecutor's inquiry following up on the questionnaire as to "whether California should retain the death penalty" if it were placed on the ballot in the next election, to which Ms. Davis responded "I believe in it." (RT 3339.) Hence, with regard to the death penalty, both Juror No. 12 and Ms. Davis provided nearly identical responses regarding their view of the death penalty.

The A.G. also relies on Juror No. 12's response to the court reflecting his agreement that the death penalty "serves a purpose in our society" by responding "[r]ight" (citing to RT 2327). (RB 90.) However, the response by Ms. Davis to the court's inquiry regarding whether she could vote to execute another human being also reflects that Ms. Davis believed that the death penalty serves a societal purpose, as reflected in the

following response:

> Q. . . . are you the type of person that could ever vote to execute another human being? Could you do something like that?
>
> A. I believe like this: If justice is set up or, you know, the system is set up and they have their reasons for doing whatever they have to do, just like getting parking tickets or anything else, you may not like it, but we're part of the society, and that's the way it's set up.
>
> Q. Then you could do it?
>
> So I guess you're telling me that in the right case you could pick it as a penalty?
>
> A. Yes.

(RT 3327.) Of note, the expression by Ms. Davis, that this is the way "justice is set up," that is, "the system is set up," and her acknowledgment "but we're part of the society," and hence, "that's the way it's set up," thereby indicates her belief not only that the death penalty serves a societal purpose, but also her willingness to impose the death penalty (i.e., "pick it as a penalty?" - - "[y]es"). (RT 3327.)

The A.G. also relies on Juror No. 12's generalized statements regarding rehabilitation and his statement that the "[d]eath penalty should be retained as an option," citing to Juror No. 12's questionnaire (CT 16558). (RB 90.) However, Ms. Davis also noted that the death penalty would be an option for her in this case, as reflected in the voir dire examination as follows:

> Q. [PROSECUTOR] But is the fact situation as you now know it serious enough so that if you convicted the defendant of those

crimes that we just mentioned to you, the death penalty would be an option for you because this crime is so terrible, so serious?

A. [MS. DAVIS] I have no problem with having to make that decision. . . .

[THE COURT]: . . . Without telling us how you would vote on it, if he gets found guilty of, you know, assaulting this complete stranger, sodomizing her, cutting her throat and killing her, without telling us how you would vote, is this case serious enough that it lives up to your expectations as to the kind of case where the death penalty might be appropriate?

[MS. DAVIS]: Yes.

(RT 3338-3339.)

Moreover, the A.G. misquotes the record, attributing Juror No. 12's response regarding imposition of the death penalty and rehabilitation not being a consideration, when the actual question was whether the death penalty should be imposed only for serious types of murders (citing to RT 2320). (RB 90.) The actual question and answer regarding imposition of the death penalty relative to serious types of murders is as follows:

Q. [PROSECUTOR]: Okay. Do you think that the death penalty should be used every time somebody is convicted of murder, or should it be for just for serious types of murders?

A. [JUROR NO. 12]: Well, I think again if it's a first-degree murder where you have planned and carried out a heinous act and there is some special circumstances, then - - then the death penalty is - - I think it should be done.

(RT 2319-2320.) This response by Juror No. 12 is no different than the response by Ms. Davis, who expressed her belief that the death penalty should be employed in serious cases, including potentially this case, as reflected in the following:

> THE COURT: . . . [I]s this case serious enough that it lives up to your expectations as to the kind of case where the death penalty might be appropriate?
>
> PROSPECTIVE JUROR [MS. DAVIS]: Yes.

(RT 3338-3339.) That is, she was not seeking to employ the death penalty in every murder case, just as Juror No. 12 was not willing to employ the death penalty in every murder case, as reflected in Ms. Davis's response to the court during voir dire examination as follows:

> THE COURT: Are you telling us that in every murder case you feel that the death penalty is the only appropriate penalty?
>
> PROSPECTIVE JUROR [MS. DAVIS]: No, not in every case.
>
> THE COURT: You want to find out the details first?
>
> PROSPECTIVE JUROR: Right.

(RT 3347.) Hence, again Juror No. 12 and Ms. Davis are expressing the same view that the death penalty should not be employed in every murder case, but only the serious murder case, as reflected in their responses.

Finally, the A.G. relies on Juror No. 12's statement that he would not

"have a problem" entering a death verdict (citing to RT 2323). (RB 90-91.) However, Juror No. 12 conditioned his response on the decision being unanimous and after having looked at all the evidence; in such a situation Juror No. 12 would not have a "problem" with imposing the death verdict. (RT 2323.) Ms. Davis gave a similar response. (*See* RT 3345 (responding to the prosecutor's inquiry as to whether she could return "a death verdict," with the answer "yes."); *see also* RT 3338 (noting that she would have "no problem" in making a decision to impose the death penalty); RT 3347 (further acknowledging that she would want to know "the details" in order to determine whether the death penalty was the appropriate penalty).) Again, Ms. Davis ranked a ten on the prosecutor's death-penalty scale (RT 3345-3346), while Juror No. 12 ranked as a six (RT 2324-2325). Thus, the A.G.'s assertion that the prosecutor "could reasonably believe" Juror No. 12 would be more "inclined to vote to impose the death penalty" than Ms. Davis (RB 91) is not supported by the record and, moreover, is predicated on speculation.

The A.G. also seeks to demonstrate that Juror No. 12 was not similarly situated with Ms. Davis "in other respects," that is, on grounds not asserted by the prosecutor, and in doing so engages in speculation, as reflected in the conclusionary analysis of "possibly suggesting to the prosecutor" and "would be reasonable for the prosecutor." (RB 91-92.) Here, the A.G. relies on Juror No. 12 having a scientific background, owning a shotgun, and being married to a microbiologist to support various claims that Juror No. 12 would have a "conservative mind-set" and would be more receptive to the prosecutor's DNA evidence. (RB 91-92.) This is all speculation, but moreover, these other factors bear no relationship to the prosecutor's stated goal of selecting a jury that was predisposed to impose

the death penalty.

2. Lorraine Dokes.

The A.G. acknowledges that Lorraine Dokes ranked as an eight on the prosecutor's death-penalty scale. (RB 95.) However, the A.G. asserts that the written responses as to her "general feelings" on the death penalty caused the court to comment that she may possibly not "qualify" as a prospective juror, citing to RT 2663. (RB 95.) Moreover, the A.G. asserts that this caused the court to deviate "from its normal pattern of examination" by inquiring as to whether she could ever vote to execute another human being. (RB 92.) Again, the A.G. misrepresents the record. First, the court did not deviate from its normal pattern of examination by inquiring of Ms. Dokes whether she was the type of person who could ever vote to execute another human being, because this was a standard question that was asked of each juror, alternate juror, and each of the challenged jurors at issue, as outlined, *ante* at p. 40, fn. 7. Thus, there was nothing about her questionnaire responses that caused the court to alter its normal pattern of examination. The court noted that "Lorraine Dokes is a maybe." (RT 2663.) However, after conducting its own voir dire examination, and listening to the voir dire examination conducted by both the prosecutor and defense, the trial judge concluded that Ms. Dokes "qualified" to serve as a trial juror, as reflected in the following:

> THE COURT: All right. Ms. Dokes, based on your answers, I'm satisfied you're qualified to serve as a trial juror in this kind of a case. Not everybody makes it through, but you have.

(RT 2685.) Hence, based on the court's finding, Ms. Dokes was deemed to be qualified as a trial juror, notwithstanding her prior "maybe" status.

Moreover, the A.G. references the "Mm-hm" answer by Ms. Dokes, in her response to the court's inquiry regarding whether she could "select that [*i.e., execution*] as a penalty," if she came to the conclusion that somebody deserved to be executed for what they did, citing to RT 2665 (RB 93), as Ms. Dokes being "weak" on the death penalty. (RB 95.) However, a review of the record reflects that after the "Mm-hm" answer, the court noted: "[o]kay. Fair enough," clearly reflecting the court's understanding that the "Mm-hm" answer meant an affirmative response, i.e. yes, to the proposition that if she came to the conclusion somebody deserved to be executed for what they did, Ms. Dokes could select the death penalty. (RT 2665.)

The A.G. also asserts that the prosecutor could "properly conclude" that Ms. Dokes was "weak" on the death penalty, since she did not believe that taking another's life was necessarily appropriate. (RB 95.) However, this is not what Ms. Dokes said, either in the juror questionnaire or in the voir dire examination. What Ms. Dokes stated was that it "depends on the circumstances," which is precisely what the court explained in the voir dire examination regarding the weighing of aggravating and mitigating factors. In her juror questionnaire regarding the inquiry as to her general feelings concerning the death penalty, Ms. Dokes responded as follows:

> I do not believe taking ones life is the answer, but each situation is diffrent [*sic*] depends on the circumstances.

(SCT 55.) Here, the reference to depending "on the circumstances" is consistent with the court's instructions during voir dire that Ms. Dokes, and the other jurors, would be required to consider the circumstances of the

crime, aggravating factors, mitigating factors, and sympathy in deciding which penalty to impose, i.e., death or life in prison. (RT 2665-2671.) Hence, Ms. Dokes did not state, as the A.G. asserts, that she did not believe that taking another's life was necessarily appropriate. (RB 95.) What she did state was that it would depend on the "circumstances," the very circumstances the court advised her in voir dire that she would be required to consider when making a decision on the sentence to be imposed (i.e., death or life in prison), that is, the circumstances of the crime, aggravating factors, mitigating factors, and sympathy.

Ms. Dokes made clear in her response to the prosecutor that she could impose the death penalty if she believed that it was appropriate. The prosecutor inquired as follows:

> [PROSECUTOR] So knowing now what I mean by coming down to an open courtroom and it's going to be the courtroom which I've just described, are you the person that's got the stomach, or, you know, the wherewithal to come down in that situation and announce in front of the very man you'll be condemning to die that you, you know, Lorraine Dokes, are voting for the death penalty?
>
> Could you do that?
>
> A. [LORRAINE DOKES]: If that's what I believe, I could.

(RT 2677.) Hence, the record does not support the conclusion of the prosecutor that Ms. Dokes was "weak" on the death penalty. (RB 95.)

The A.G. also seeks to rely on the profession of Ms. Dokes' husband, as the executive director of a homeless shelter, as a basis to conclude she is "weak" on the death penalty. (RB 95-96.) The

questionnaire of Ms. Dokes reflects that she is a "Payroll Manager" who took accounting in college and is a "Certified Payroll Professional" with the American Payroll Association. (SCT 43-44.) Although she volunteered on certain holidays at the homeless shelter that her husband ran, Ms. Dokes worked in the accounting field. While the A.G. seeks to make much of the fact that her husband did not have an opinion about the death penalty, different from her opinion (SCT 55) (RB 96), this is of no moment since she was of the opinion that whether the death penalty should be employed would depend on the "circumstances," just as she would be instructed by the court; to wit, circumstances of the crime, aggravating factors, mitigating factors, and sympathy. (RT 2666-2669.) In fact, Ms. Dokes reiterated in the voir dire examination conducted by the court that she did not have any feelings about either the death penalty or life without parole that would prevent her from making a choice between those two penalties in this case. (RT 2669.)

The A.G. also cites to the drug use by Ms. Dokes' sister as not having a "big" impact on her and that familiarity might impact her reaction to testimony concerning drug abuse. (RB 96.) The position asserted by the A.G. is nonsensical and not supported by the record. The A.G. states that Ms. Dokes' "oral answers" about her sister "could suggest to the prosecutor in assessing her demeanor" that her sister's drug use and related death had not greatly impacted her. (RB 96.) The problem with this analysis is that Ms. Dokes gave no "oral answers" about her sister or drug use, because none were asked of her. The information provided about her sister and drug use is only reflected in her written questionnaire. (*See* RT 2671-2679 for prosecution voir dire; RT 2679-2685 for defense voir dire; and RT 2664-2671 for the court voir dire.) There were no questions in voir dire by the

prosecutor, defense, or the court that resulted in "oral answers about her sister" which could possibly give rise to the prosecutor's assessment of "her demeanor" regarding her sister's drug use.

A review of her questionnaire reflects that, in fact, her sister's drug use did have an impact on her, as reflected in question no. 1(b) regarding "ATTITUDES REGARDING DRUGS," which inquired as follows: "What impact has this abuse had on yourself, family or friends?" Ms. Dokes responded: "trying, ups and downs." (SCT 53.) Thus, based on her written questionnaire response, it did have an impact on her. Moreover, her response to question no. 2 regarding "ATTITUDES REGARDING DRUGS" reflects that it did have a "big" impact on her with respect to the question: "What are your general feelings about the use of illegal drugs?" Ms. Dokes responded: "It's stupid." (SCT 53.) Moreover, in response to question no. 4 under "ATTITUDES REGARDING DRUGS," Ms. Dokes was asked: "What is your opinion about people who use methamphetamines or other illegal drugs?" Ms. Dokes again responded: "STUPID." (SCT 54.) Thus, the use of drugs clearly had a big impact on her as reflected in her written responses. Since there were no "oral answers," there was no basis for the prosecutor to make any conclusion as to Ms. Dokes' demeanor regarding drug use other than the written responses in her questionnaire.

The A.G. also argues that "familiarity" concerning drug use may impact Ms. Dokes' reaction to testimony concerning drug abuse, particularly footnoting the use by appellant Nadey and Mr. Ritchey in connection with the sexual assault of Sarah S. (RB 96.) However, Ms. Dokes' response that the use of illegal drugs is "stupid," and her opinion that people who use methamphetamine and other illegal drugs are "stupid," belies this consideration. Since Ms. Dokes concludes that drug use was

"stupid," her reaction to any form of drug abuse testimony would be negative toward appellant Nadey. Hence, the record does not support the assertions made by the A.G., and further, the A.G. is simply speculating in this regard.

a. Juror No. 3 – Comparison.

The A.G. asserts that the prosecutor "could properly believe" that Juror No. 3 would be "more inclined" to vote for the death penalty than Ms. Dokes. (RB 97-98.) However, the record does not support this assertion. (*See* AOB 139-141.)

In deciding whether the death penalty should be employed, both Ms. Dokes and Juror No. 3 focused on the nature of the crime and the circumstances presented. (*See* Dokes nature of the crime and circumstances presented (RT 2672, SCT 55) and compare with Juror No. 3, the application of the death penalty should be "based on individual circumstances" (RT 1099-1100) and depends on the "severity" of the crime (RT 1111-1112). The A.G. places great emphasis on Ms. Dokes being "[n]ot sure" whether California should retain the death penalty (SCT 56), while Juror No. 3 would vote for retaining the death penalty, noting "sometimes it needs to be used" (CT 16386). (RB 97-98.) However, this point is moot because both Dokes and Juror No. 3 agree that the death penalty should be considered, depending on the "circumstances" in an appropriate case. *See* Dokes voir dire (RT 2680 and 2683), application of the death penalty "depends on the circumstances," and "[b]oth penalties are an option"; and *compare* with Juror No. 3's voir dire (RT 1111-1112), no problem imposing the death penalty in an "appropriate case" but must be "pretty severe," and depends on the "severity."

The A.G. asserts that Ms. Dokes "appeared to be more inclined to

vote for LWOP." (RB 98.) However, this assertion is belied by the record in which Ms. Dokes made clear that whether the death penalty or LWOP should be employed, "depends on the circumstances," and that "[b]oth penalties are an option." (RT 2680-2681 and 2683.) In the voir dire by defense counsel, Mr. Giller, Ms. Dokes consistently responded that the imposition of either penalty would depend on the "circumstances," as reflected in the following:

> Q. [MR. GILLER]: So what you're saying is that if somebody commits a murder, you tend to lean more towards giving them the death penalty than you would life without possibility of parole.
>
> Is that - -
>
> A. [MS. DOKES]: It depends on the circumstances, too.
>
> . . .
>
> Q. Well, we don't know the facts, but the Judge is giving you that hypothetical, that a man comes in - - with a woman - - and he kills her. First he sodomized her and then he slits her throat and leaves her there for dead.
>
> Now, do you think that, knowing those circumstances, that in and of itself was so bad to you as a woman yourself that you might just in every instance vote for the death penalty?
>
> A. Not in every instance, but I do think that's a very heavy type of situation there.
>
> Q. So it would take a great deal to get you to go the other way for life without

possibility of parole?

A. It depends on the circumstances.

(RT 2680.)

By the same token, Juror No. 3 noted that she would "take all things into consideration" in determining whether to impose a LWOP verdict. (RT 111.) In the voir dire by defense counsel, Mr. Giller, Juror No. 3 responded regarding the imposition of a LWOP verdict as follows:

> Q. [MR. GILLER] And if you felt that -- having listened to all the evidence, that even though the prosecutor is going to ask you for the death penalty, if you feel that in this case life without the possibility of parole would be an appropriate penalty, would you have any problem in a verdict of life without possibility of parole?
>
> A. [JUROR NO. 3] I'd take all things into consideration.
>
> Q. After you've done that, if you feel that life without the possibility of parole is appropriate, would there be any difficulty in you saying that's my verdict?
>
> A. No.

(RT 1112.)

Ms. Dokes ranked an eight on the prosecutor's death-penalty scale (RT 2678-2679), while Juror No. 3 ranked "between a six and a seven" (RT 1105-1106). The A.G.'s assertion that the prosecutor "could properly believe Juror No. 3 would be more inclined to vote for the death penalty" than Ms. Dokes is not supported by the record. (RB 98.)

The A.G. also asserts that Juror No. 3 did not have "a possible liberal

attitude," similar to Ms. Dokes, which would be more conducive to voting LWOP than death. (RB 98.) However, Juror No. 3 did have a possible liberal attitude. Contrary to the A.G.'s assertion that Juror No. 3 graduated with a psychology "minor" (RB 98), Juror No. 3 graduated from Cal State Hayward with a major in psychology (CT 16374). (*See* CT 16381-16382.) Moreover, in the *Hovey* voir dire by defense counsel, Juror No. 3 confirmed that he was a psychology major and that he obtained a degree in psychology. (RT 1112.)

The A.G. further seeks to undermine Juror No. 3's psychology background, by noting that he has no "professional psychological training" (CT 16373-16374). (RB 98.) However, when asked if any family member or close friend was involved in the mental health field or profession in any manner, Juror No. 3 stated "Yes" and referenced his "schooling" which is "psychology." (CT 16382.) The A.G. further asserts that Juror No. 3 was "[n]ot sure" regarding his opinion regarding the use of an "alienist" in criminal proceedings, but the question references "psychologist" or "psychiatrist" in a criminal trial (CT 16382). (RB 98.) By the same token, the reference to consultation by a family member or close friend with a "psychiatrist, psychologist, or therapist" is what is referenced in question 6 of the juror questionnaire, not an alienist as noted by the A.G. (CT 16382) (RB 98).[8] It is unclear why the A.G. uses the term "alienist," which is not employed in the juror questionnaire (CT 16382) or utilized in the voir dire examination of Juror No. 3. (RT 1091-1114.)

8

According to WEBSTER'S II NEW COLLEGE DICTIONARY, p. 28 (Houghton Mifflin Company) (1995), an alienist is "[a] psychiatrist who has been accepted by a court as an expert on the mental competence of principals or witnesses."

The A.G. fails to address the other indicia in the record that reflects a so-called "liberal" attitude by way of Juror No. 3 reading *Rolling Stone Magazine* on a regular basis (CT 16380), viewing television programs such as *60 Minutes*, *20/20*, *Discovery Channel*, and *M*A*S*H** (CT 16380), that he acknowledged personal experience with the use of illicit drugs, to wit: "smoked pot in Amsterdam. When in Rome . . ." (CT 16383). However, his mother was a teacher's assistant (CT 16372), his sister was a teacher (RT 1106), while his father was a mail carrier (CT 16372). All of this reflects on a liberal bent, the same liberal bent that the prosecutor noted as a basis for excusing Ms. Dokes.

Finally, the A.G. asserts that Juror No. 3 was not similarly situated to Ms. Dokes relative to having a possible "liberal attitude" being more conducive to voting for LWOP rather than death. (RB 98.) However, the record does not support this assertion with regard to the inclination to vote for LWOP, because both Ms. Dokes and Juror No. 3, during the voir dire examinations, made clear that they would consider all the circumstances when making a determination as to whether to vote for LWOP. Juror No. 3 made clear in his response to the inquiry by defense counsel, Mr. Giller, that he would take "all things into consideration" regarding the appropriate penalty and the imposition of LWOP as follows:

> Q. [MR. GILLER] All right. Now, do you feel that life without possibility of parole which means you go to prison, you never, ever, ever get out -- you feel that that is a severe penalty?
>
> A. [JUROR NO. 3] I think it's a very severe penalty.

> Q. And if you felt that -- having listened to all the evidence, that even though the prosecutor is going to ask you for the death penalty, if you feel that in this case life without the possibility of parole would be an appropriate penalty, would you have any problem in a verdict of life without possibility of parole?
>
> A. I'd take all things into consideration.

(RT 1112.) This is nearly the identical answer provided by Ms. Dokes, who stated in response to a similar question that "[i]t depends on the circumstances." (RT 2680.) Hence, the assertion by the A.G. that Juror No. 3 and Ms. Dokes were not similarly situated and that Ms. Dokes had a possible "liberal attitude" which was more conducive to voting for LWOP than death is without merit. (RB 98.)

The A.G. also seeks to draw an artificial distinction between Ms. Dokes and Juror No. 3 regarding drug use. (RB 98-99.) The A.G. concedes that both Ms. Dokes and Juror No. 3 "had past limited experience with marijuana." (RB 98.) The A.G. seeks to draw a distinction between Juror No. 3's brother who had "smoked pot for a short time" and Ms. Dokes' sister who had been both a heroin and crack addict. (RB 98-99.) However, the A.G. fails to come to grips with their respective opinions regarding the use of methamphetamine or other illegal drugs, which is nearly identical, with Juror No. 3 noting "there must be something wrong," while Ms. Dokes opines that it is "stupid" (CT 16384 and SCT 54, respectively).

The A.G. also asserts a distinction between Ms. Dokes and Juror No. 3, based on a knowledge of DNA evidence, notwithstanding the fact that the prosecutor did not mention a lack of knowledge regarding the DNA evidence as a basis for excluding Ms. Dokes. (RB 99.) (*See* AOB 139.)

Thus, the A.G. seeks to speculate regarding the DNA evidence, noting that Ms. Dokes had no opinion regarding DNA evidence in light of her limited knowledge of it. (RB 99.) The speculative nature of the A.G.'s conclusion that the "prosecutor could reasonably suspicion [*sic*]" that Juror No. 3 would be more likely to understand and accept the prosecution's DNA evidence is predicated in large part on the fact that Juror No. 3 took "statistics courses" which included "'population studies.'" (RB 99.) This is the height of speculation. The distinction that the A.G. seeks to draw based on Juror No. 3's taking college statistics courses is simply without merit.

b. Juror No. 4 – Comparison.

The A.G. concedes that Juror No. 4 worked as a substitute teacher, but notes that she had taught for only a short time and hence her prior managerial experience reflected a "less of a 'liberal bent' than certain social work-related vocations." (RB 99.) This contention is without merit.

A review of the questionnaire of Juror No. 4 reflects that she was 28 years old and graduated from San Jose State College with a major in biology and had recently secured a position as a substitute teacher with the Pleasanton School District. (CT 16390-16393.) She notes that she did have prior employment in which she supervised others "as a restaurant manager supervising a small wait staff." (CT 16393.) This, in and of itself, does not reflect less of a "liberal bent" as asserted by the A.G. (RB 99.) The questionnaire reflects a history of going to college, working as a restaurant manager, and then finally securing a teaching position as a substitute teacher. (CT 16392-16393.) Under "Hobbies and Other Activities" in the questionnaire (CT 16398-16399), Juror No. 4 noted that she volunteers "for a children's center," and also used to "volunteer at the American Cancer Society." Moreover, as to her opinion regarding psychologists or

psychiatrists in criminal trials, Juror No. 4 noted "I think they are useful in determining whether or not the accused has any psychological problems and if so that may affect the decision made." (CT 16401.) Further, as to the question regarding her beliefs about whether the manner in which a child is raised or treated has an impact on who they turn out to be as adults, Juror No. 4 responded affirmatively as follows: "Yes, I believe that children treated wrongful or unfairly may be prone to act differently than those who were not in that type of situation, i.e., learned examples." (CT 16401.) The fact that Juror No. 4 worked as a supervisor in a restaurant as she apparently worked her way through college does not vitiate her apparent "liberal bent." The job as a substitute teacher, volunteering for a children's center, a positive opinion regarding the employment of psychologists or psychiatrists in a criminal trial, and the belief that "children treated wrongful or unfairly" may act different than those who do not experience that type of situation, all point to a "liberal bent."

Again, the A.G. seeks to get mileage out of the court's purported uncertainty as to whether Ms. Dokes would qualify as a juror (RB 99), notwithstanding the fact that the court, after voir dire, was "satisfied" that she was "qualified to serve as a trial juror in this kind of a case." (RT 2685.) By the same token, the court, after the voir dire, was "satisfied" that Juror No. 4 "was qualified to sit in this kind of a case," and so noted on the record. (RT 1179.) That is, the court's conclusion after voir dire was the same as to both Ms. Dokes and Juror No. 4, i.e., both were qualified to serve as jurors in this kind of a case. The court also noted in both instances that "[n]ot everybody makes it through . . . but you have." (RT 1179 and RT 2685.)

The A.G. concedes that both Ms. Dokes and Juror No. 4 believed

that whether the death penalty should be employed as a punishment depends on the "circumstances," citing to SCT 55 for Ms. Dokes and CT 16404 for Juror No. 4. (RB 99.) Their answers in this regard are substantially the same. The A.G. seeks to draw a distinction (RB 99-100), because Ms. Dokes makes the notation "I do not believe taking one life is the answer," then states further that "each situation is diffrent [*sic*] depends on the circumstances." (SCT 55.) However, Juror No. 4 gave substantially the same answer, noting" "I think in certain circumstances, I believe in it [*death penalty*] - - depends on the case." (CT 16404.) These answers are virtually indistinguishable. Both are cautionary and both depend on the circumstances of the case. The A.G. seeks to draw a distinction which, in reality, is a distinction without a difference.

The A.G. again concedes that both Ms. Dokes and Juror No. 4 were "unsure" if they would vote to retain the death penalty, citing to SCT 56 as to Ms. Dokes and CT 16405 as to Juror No. 4. (RB 100.) However, the A.G. seeks to rely on Juror No. 4's stated belief in the death penalty in certain cases, provided she was "'convinced that was the best option'," citing to CT 16405. (RB 100.) However, Ms. Dokes also stated that the death penalty was an "option" for her, depending on the circumstances. (RT 2683 and 2680.) Of note, Juror No. 4 had previously done a college paper on the death penalty where she met with and interviewed the warden and other people at San Quentin, including inmates, noting that the paper did not express a conclusion, but weighed both sides, comparing the death penalty with life in prison. (RT 1170-1171.)

The A.G. concedes that both Ms. Dokes and Juror No. 4 smoked marijuana in high school. (RB 100.) However, the A.G. again focuses on the drug abuse and consequential death of Ms. Dokes' sister and the

prosecutor's stated perception that it did not appear to make a "big" impact on her. (RT 3722-3723.) (RB 100). However, the prosecutor's stated concern was that "drug abuse" might have some application "in this particular case" because there was a "possibility of drug use." (RT 3722-3723.) While it is true that Juror No. 4 did not have a family member who had experienced drug abuse like Ms. Dokes did, they both had similar experiences in using marijuana in high school (CT 16402 as to Juror No. 4 and SCT 53 as to Ms. Dokes), and both had a similar attitude towards the use of methamphetamine or other illegal drugs, with Juror No. 4 noting: "I don't prefer to use drugs, so I don't" (CT 16403), and Ms. Dokes simply concluding that it is "stupid." (SCT 54.) While Ms. Dokes may be a little more emphatic regarding her attitude concerning the use of methamphetamine or other illegal drugs, i.e., "stupid," the result is the same as to both in which they have made the decision not to use drugs, notwithstanding their prior use of marijuana in high school.

The A.G. also focuses on their respective understanding of DNA testing, again noting that Ms. Dokes had no opinion as to the viability of DNA evidence because of her "limited" "knowledge" (SCT 51) while Juror No. 4 was of the belief that DNA evidence was "pretty accurate" (CT 16400). (RB 100.) Of note, the prosecutor did not state that the "limited" knowledge of Ms. Dokes as to DNA was a basis for her exclusion. (RT 3722-3723.) Moreover, Juror No. 4 acknowledged that she would follow the court's instructions regarding expert testimony as it pertained to the DNA evidence. (RT 1165-1166.) Hence, her belief that DNA evidence was "pretty accurate" would be subsumed under the court's instruction regarding expert testimony as to DNA evidence.

The A.G. places great emphasis on Juror No. 4's father being a

captain in the Mountain View Police Department, and notes their discussions regarding his work while she was growing up and her belief she had a greater insight into the criminal justice system than did the "average citizen." (RB 100) Hence, the A.G. concludes that it was "reasonable for the prosecutor," given Juror No. 4's belief "that the criminal justice system is fair and very effective," to conclude that she would be "more inclined to accept the prosecutor's DNA evidence, credit the law enforcement testimony . . . and be more receptive to the aggravating factors' evidence." (RB 100-101.) However, the stated goal of the prosecutor was to obtain a jury that would be predisposed toward the death penalty, while the DNA evidence and crediting law enforcement testimony, for the most part, goes to guilt phase evidence.

Moreover, a comparison of their feelings about the effectiveness of the criminal justice system, as reflected in their responses to question no. 7 under "Criminal Justice System," reflects that Ms. Dokes and Juror No. 4 expressed similar attitudes regarding the criminal justice system. Ms. Dokes responded to the question regarding the effectiveness of the criminal justice system as follows: "I feel the criminal justice system serves its purpose of making sure criminals are punished for crimes they are convicted of comm[*itting*]" (SCT 48), while Juror No. 4 responded as follows: "I believe the criminal justice system is fair and very effective" (CT 16397). Both statements are similar, noting that the criminal justice system serves its purpose of punishment for crimes committed. Ms. Dokes expressly references the punishment aspect of the criminal justice system while implicitly indicating the fairness of the process. Juror No. 4 expressly notes the fairness of the process but implicitly the purpose of punishment. The similarities in their responses in connection with the criminal justice

system becomes even clearer with regard to their responses to question nos. 8 and 9 on the questionnaire regarding the "Criminal Justice System," which are virtually identical. (*Cf.* SCT 48 [Ms. Dokes] and CT 16397 [Juror No. 4].) As to question no. 8, whether they had any experience with crime or the police that had affected their view of the criminal justice system, both responded "no." As to the question of whether, in today's society, any particular group of people are more likely to commit violent crimes, again, both responded "no." Ms. Dokes did elaborate further, noting as follows: "[a]ny human being no matter what group they are involved in commit crimes." (SCT 48.) Thus, what is important here is the attitude toward the criminal justice system, with both Ms. Dokes and Juror No. 4 having the same and/or substantially similar responses. Hence, the A.G.'s argument that Juror No. 4 would be more inclined to credit law enforcement testimony in the guilt phase of the case fails.

Again, we are dealing with speculative inferences asserted by the A.G. As noted, the prosecutor's stated goal focused on the penalty phase, i.e., obtaining a jury predisposed to impose the death penalty, not the guilt phase portion of the trial. Moreover, implicit in the A.G.'s argument is that the jurors should disregard the court's instructions as to the evidence and expert testimony as well as decide the case based on their own experience, as opposed to the evidence presented at trial. This, of course, would be improper.

Finally, Ms. Dokes ranked as an eight on the prosecutor's death-penalty scale (RT 2678-2679), while Juror No. 4 ranked as a six (RT 1165).

c. Juror No. 7 – Comparison.

As with the comparisons of Juror Nos. 3 and 4, the A.G. seeks to make much of the court's initial notation that Ms. Dokes was "a maybe"

with regard to qualifying as a juror (RT 2663). (RB 101.) However, after the voir dire examination, the court was satisfied that Ms. Dokes was "qualified to serve as a trial juror in this kind of a case." (RT 2685.) The A.G. has conceded that both Ms. Dokes and Juror No. 7 indicated on their questionnaires that they were "[n]ot sure" whether they would vote to retain the death penalty. (SCT 56 and CT 16462.) (RB 101.) Juror No. 7 did note that she "would probably vote in favor, however would read both sides carefully." Based on this notation, the A.G. asserts that Juror No. 7 and Ms. Dokes do not appear to be similarly situated in regard to their attitudes towards the death penalty. (RB 101.) However, in her juror questionnaire, Juror No. 7 noted that her general feelings regarding the death penalty are that "[i]t is justified in some cases." (CT 16461.) This is similar to the response of Ms. Dokes, who notes that while she did "not believe taking ones life is the answer," she noted further "each situation is diffrent [*sic*] depends on the circumstances." (SCT 55.) Hence, the response by Juror No. 7 regarding the death penalty being "justified in some cases" is substantially similar to Ms. Dokes' response of "each situation is diffrent [*sic*] depends on the circumstances."

In her voir dire examination, Juror No. 7 noted that imposing the death penalty would be "extremely difficult," but qualified her assent to the imposition of the death penalty with "the proper circumstances." (RT 1404.) The full text of the court's inquiry as to whether Juror No. 7 could impose the death penalty reflects on her qualified assent to the imposition of the death penalty as follows:

> Q. [THE COURT] Do you think that you could ever vote to execute another human being? Could you do something like that?

A. [JUROR NO. 7] I have pondered this question since I was in here before.

Q. Right.

A. And I think with the proper circumstances, I could. There will - -

Q. It's not easy?

A. No, no. Oh, I realize it would be extremely difficult.

Q. Yeah.

A. However - -

Q. But you can?

A. - - I feel there are times when it's justified, yes.

(RT 1404.) Here, Juror No. 7's response to the question of whether she could impose the death penalty is qualified by the "proper circumstances" being "extremely difficult" and the notation that "there are times when it's justified." This cautionary assent to the imposition of the death penalty is also reflected in Juror No. 7's ranking as a five on the prosecutor's death-penalty scale.

Ms. Dokes, on the other hand, who ranked as an eight on the death-penalty scale, was more emphatic in her response to the imposition of the death penalty, without qualification, responding to the same question posed by the court, as follows:

THE COURT: Q. . . . Are you the type of person that could ever vote to execute another human being? Could you do something

like that?

A. [MS. DOKES]: I could.

Q. You think you can?

A. Yeah.

(RT 2664-2665.) Here, the response by Ms. Dokes to the question is unqualified, that is, "I could," and "[y]eah" to the question. Thus, Ms. Dokes' attitude toward the death penalty is undoubtedly stronger in favor of imposition of the death penalty than Juror No. 7's, which is borne out by their numerical ranking on the prosecutor's death-penalty scale, with Ms. Dokes being an eight and Juror No. 7 being a five. (RT 2678-2679 and RT 1414-1415.)

The A.G. also argues that Juror No. 7's vocation and activities do not reflect a "liberal" bias. (RB 101.) However, Juror No. 7's educational background certainly reflects a liberal bias by way of a doctorate degree in education from U.S.C., a master's degree in teaching math from the University of Santa Clara, and a bachelor's degree in child development from UC Berkeley. (CT 16449-16450.) In fact, in response to the inquiry regarding training in medicine or psychology, Juror No. 7 noted that she had a "child development major in college; took psych courses;" and worked 1 - 1 with students in schools as an administrator. (CT 16457.) Further, as to the inquiry regarding being involved with the mental health field or professions in any manner, Juror No. 7 responded "yes" and noted that "I had opportunity to work with children in trouble." (CT 16458.) Further, as to the question of whether she had ever consulted a psychiatrist, psychologist, or therapist, she responded again "yes," stating "I consulted a

therapist and feel it helped me focus on certain aspects of my life." (CT 16458.) Hence, both her vocation and activities do reflect a "social worker" type involvement rather than simply being the "educational administrator" as noted by the A.G. (RB 101) In fact, as a part of her twenty-five year career as an educator, Juror No. 7 served as a "principal of a junior high." (CT 16450; see also CT 16449.) Contrary to the assertion by the A.G., both Juror No. 7's vocation and activities do reflect on a "liberal" bent.

The A.G. acknowledges that Juror No. 7 had tried marijuana "'years ago,'" and that her sons had been detained by the police for marijuana offenses when they were teenagers and placed on juvenile probation. (RB 102.) However, the A.G. asserts this pales in comparison to the addiction of Ms. Dokes' sister. The problem here is that the A.G. has failed to address the opinions expressed by both Ms. Dokes and Juror No. 7 regarding the use of methamphetamine or other illegal drugs, which are virtually identical. According to Juror No. 7, as to people who use methamphetamines or other illegal drugs, she opines: "[t]hey are playing with fire -." (CT 16460.) Ms. Dokes opined they are simply "[s]tupid." (SCT 54) Both responses reflect on the risk associated with the use of methamphetamines or other illegal drugs and their respective disdain for the use of illegal drugs. The A.G. again misleading refers to Ms. Dokes' "demeanor during voir dire" on the issue of drug use; the problem here, as noted above, is that the prosecutor asked her no questions during voir dire regarding drugs, nor did the court or defense counsel. (RT 2664-2686.) Hence, this so-called "demeanor" analysis is predicated solely on her written responses concerning drug use as reflected in her juror questionnaire. (SCT 53-54.)

The A.G. also cites to Juror No. 7's civic duties relating to being a

member of the Alameda County Grand Jury, her experience as a school disciplinarian, and her selection to serve as a representative on the school attendance (truancy) review board, which would cause her to "accept the prosecution's evidence" as well as be "more dispassionate" in determining the penalty than would Ms. Dokes. (RB 102-103.) These assertions are without merit and are not supported by the record. In fact, Juror No. 7's responses further reflect on her liberal bent with respect to social worker-type activities, and also reflect her belief that while she respects police work, the police "make mistakes." This is reflected in a lengthy response to an inquiry by defense counsel, Mr. Giller, that she had "some connection with the Fremont Police Department," to which she responded as follows:

> Yes. I was a member of what's called the Citizen's Police Academy, and it's an effort to help the people in the community understand what the police department does. . . .
>
> I've offered to volunteer for the police department, and I've been selected as a volunteer for the school - - school attendance [truancy] review board. . . .
>
> . . .
>
> You know, one of the things that I think the kids respected me for was that I can be fair. And when I had a child in who was often in trouble - - and, again, I didn't assume that he was at fault in the case in front of me, and often he wasn't. So I really feel that I can, you know, take the issues and - - and make a judgment and - - and make some decisions based on the case at hand.
>
> And I realize that, you know, I have great

> respect for police work, and I believe I said that in - - in my summary, in my survey. However, I know that they're just human. They make mistakes. And so those - - those things happen, too. I understand that.

(RT 1418-1420.)

This rather long passage regarding her involvement in the Citizens Police Academy and volunteer activities reflects on Juror No. 7's liberal bent in light of her community service and an express acknowledgment that the police "make mistakes." Hence, rather than supporting the A.G.'s assertion that "the prosecutor could reasonably suspect Juror No. 7 would be inclined to accept the prosecution's evidence" (RB 102-103), the lengthy response by Juror No. 7 reflects precisely the opposite – that she would be even-handed in her evaluation of the evidence, recognizing that notwithstanding her respect for police work, that the police are "just human" and "[t]hey make mistakes."

3. <u>Victoria Esoimeme.</u>

The A.G. cites an extended colloquy between the court and Ms. Esoimeme regarding imposition of the death penalty from which the A.G. suggests that Ms. Esoimeme may have been reluctant to impose the death penalty. (RB 103-106.) However, a review of the colloquy reflects that Ms. Esoimeme repeatedly stated that as to both penalties, she could "keep them open." (RT 3280.) Moreover, she confirmed that she could vote to impose the death penalty, as reflected in the following:

> [THE COURT] Q. . . . Just in general - - like you and I were talking. And I said, Miss Esoimeme, do you think you're the kind of person that could execute another person - - condemn him to death?

Could you do that?

[MS. ESOIMEME] A. I think I can vote on it, yeah.

Q. You think you could?

A. Mm-hm.

Q. Okay. All right. . . .

(RT 3281.) Moreover, at the conclusion of the voir dire examination by both the court and counsel, the court concluded that Ms. Esoimeme qualified to serve as a "trial juror" as follows:

> [THE COURT] All right. Miss Esoimeme, based on your answers, we're going to order you back as a trial juror in this case, okay, because you told us you could keep both penalties open. So that means your eligible to serve as a juror in this case.

(RT 3293-3294.)

The A.G. asserts that the prosecutor "could reasonably be concerned" about the colloquy between the court and Ms. Esoimeme, and hence, the prosecutor "could reasonably suspect" that other panelists might be more disposed to return a death penalty verdict. (RB 106.) Here, the A.G. is simply reformatting the basis for the challenge asserted by the prosecutor as to Ms. Esoimeme, which included her purported vacillation between death and LWOP, that she was, in effect, "a wild card," and that he had "better qualified jurors" as far as imposing the death penalty which, in effect, reflects two stated reasons for exclusion. (RT 3721-3722.) The

A.G. has failed to come to grips with the comparative juror analysis on the primary point regarding her attitude toward the death penalty as contrasted with the other jurors in the comparison; to wit, Jurors No. 2, 5, 6, 7, 9, 10, and Alternate Jurors No. 1 and 5. Each of these jurors were ranked as a five on the prosecutor's death-penalty scale, just like Ms. Esoimeme. (*See* AOB 130-132.) Moreover, each of these jurors also expressed some reservation about whether they were inclined to impose the death penalty or LWOP. (*See* AOB 144-147.)

a. Comparative Analysis – Inclination Toward Death Penalty.

The A.G. does not address the fact that as to Ms. Esiomeme, these eight jurors, noted above, all ranked a five on the prosecutor's death-penalty scale, and that they also expressed some reservation regarding the imposition of the death penalty. The A.G. seeks to draw an artificial distinction, noting that Ms. Esoimeme indicated that she had "mixed feeling[s]" and "did not [*sic*] have an answer right now" regarding whether she could personally impose the death penalty, citing to RT 3278. (RB 109.) Further, the A.G. asserts that she would be "happier" and "would prefer" voting to impose LWOP, citing to RT 3279. (RB 109.) However, these reservations reflected in the comments regarding mixed feelings and not having an answer right now, relative to her willingness to impose the death penalty, and being happier and/or preferring to vote to impose LWOP, must be viewed in the context that Ms. Esoimeme stated in her questionnaire that she would vote "[f]or" retaining the death penalty if it was placed on the ballot in the coming election. (SCT 75.) Moreover, both in voir dire and in her questionnaire, Ms. Esoimeme stated her general feelings regarding the death penalty to be that if you kill another person

intentionally, you should also be killed because the person that he or she killed did not have a second chance. (SCT 059 at 074; RT 3287-3288.) (*See* AOB 143.)

However, a review of the comparisons set forth in appellant's opening brief reflects that each of the six jurors and two alternates expressed a similar type of reservation regarding imposition of the death penalty as follows: (a) Juror No. 2 noted how "difficult" and "draining" it would be for her to impose the death penalty (RT 3019-3020) (AOB 144); (b) Juror No. 5 noted that it would give her "great personal difficulty" to vote to impose the death penalty (RT 1023), noting that it is "one thing to say that" you are in favor of capital punishment, but it is "another thing to be the one that makes the decision to do that to another human being." (RT 1032-1033) (AOB 144); (c) Juror No. 6 acknowledged that the death penalty "can be an acceptable form of punishment," but noted that it must be "the right circumstances" (CT 16442 and RT 3201) (AOB 145); (d) Juror No. 7 noted that as far as imposing the death penalty, "[i]t would depend totally on the circumstances" (RT 1414-1415) (AOB 145); (e) Juror No. 9 noted that she would not automatically pick the death penalty every time, but acknowledged that it would depend on "the facts" (RT 1055-1056, and 1062-1063) (AOB 145); (f) Juror No. 10 stated that "you have to hear the evidence" and that the death penalty "should be used only in the most severe cases or for the very worst kind of case" (RT 1266-1267 and RT 1270) (AOB 145); (g) Alternate Juror No. 1 stated that with regard to imposition of the death penalty, "it depends on the crime," and agreed that every murder is not a death penalty case (RT 1540-1541) (AOB 106); (h) Alternate Juror No. 5 noted that he was in favor of the death penalty, but acknowledged that he understood "how people could do certain things,

commit crimes, the environment they grew up in, been beaten since they were a kid and drug use, et cetera, et cetera" (RT 1722 and 1730) (AOB 146). Hence, each of the aforementioned six jurors and two alternates expressed some reservation or qualification with regard to imposition of the death penalty, just as Ms. Esoimeme did.

The A.G. has failed to come to grips with this comparison on the critical issue regarding Ms. Esoimeme's and the other eight jurors and alternates' inclination to impose the death penalty. As noted, the prosecutor's stated objective was to obtain a jury that was predisposed to impose the death penalty. Thus, this comparison reflects that the exclusion of Ms. Esoimeme was pretextual.

b. Liberal Bias.

The prosecutor's other stated reasons for excluding Ms. Esoimeme were her status as a welfare worker and, consequently, being "liberal, and a purported "language barrier." (RT 3721-3722.) (AOB 143.) The A.G. fails to address the comparison of Ms. Esoimeme being liberal, given her employment as a welfare worker (i.e., Eligibility Technician with Alameda County) (SCT 62), and Juror No. 7, who was highly educated and worked twenty-five years as an administrator in education. (CT 16449-16550 and RT 1402-1425.) (AOB 147.) The A.G. fails to come to grips with the purported liberal status predicated on employment, but seeks to change the subject by noting that Juror No. 7 had a good working relationship with law enforcement when she served as a school disciplinarian. (RB 111-112.) The point here is that the so-called "liberal" label proffered by the prosecutor was predicated on Ms. Esoimeme's employment status as a welfare worker which would make her no more liberal than Juror No. 7, who had a doctorate in education and worked twenty-five years as an

administrator in education. (AOB 147.) *See* discussion regarding the comparison between Ms. Dokes and Juror No. 7, which reflects on the liberal bent of Juror No. 7 given her vocation and activities, *ante* at pp.71-74. The A.G. fails to address this comparison. (RB 111-112.)

c. Language Barrier.

The A.G. also seeks to transmute the prosecutor's stated concern that there might be a "language barrier" into an evaluation of demeanor. (RB 107-108.) The prosecutor's notation that there might be "a language barrier" (RT 3721-3722), which the A.G. adopts as a "communication" issue, is belied by the record. The A.G. concedes that Ms. Esoimeme in voir dire acknowledged that she went to Catholic school (RT 3287) and that she received an associate's degree following two years at the College of Alameda (SCT 63). (RB 107.) Moreover, her questionnaire reflects that she had worked ten years as an eligibility technician for Alameda County, processing applications and making eligibility determinations and, in fact, her major at the College of Alameda for her two-year associate degree was "[b]usiness." (SCT 62-63.) She was also the mother of four children who were in grades 3, 8, 10, and 12, and that she had resided in Alameda County for seventeen years. (SCT 60-61.) This does not reflect a juror who would have a potential language barrier. In fact, the court concluded that she was qualified to serve as a "trial juror in this case." (RT 3293-3294.) If the court, indeed, did have a concern regarding a potential language barrier, as asserted by the prosecutor, she would not have qualified.

As to the so-called "curiosity" question (RB 107), the court simply inquired as to how long she had been in the United States and what schools she had attended in Nigeria as follows:

Q. [THE COURT] Just one other

question. You're from Nigeria, right?

A. [MS. ESOIMEME] Yes.

Q. How old were you when you came here?

A. When I came her? 21.

Q. Yeah?

A. 21

Q. So you went to school in Nigerian British schools?

A. I went to Catholic school in Nigeria.

Q. Just curious.

(RT 3286-3287.) The A.G. seeks to make much of the court's notation of being "curious" and the fact that Ms. Esoimeme stated she went to "Catholic school" in Nigeria as opposed to the Nigerian British schools. Contrary to the assertion by the A.G., the court did not "specifically ask[] if Ms. E. attended English-speaking schools while in Nigeria" (RB 107). This was not the question. The court simply inquired as to whether she went to Nigerian British schools, which is a different question, with the response being that she went to "Catholic school." Here, the A.G. seeks to draw an inference that is not supported by the court's inquiry; to wit, that there was some sort of language barrier or communication issue. If there was, Ms. Esoimeme would not have qualified as a juror as the court so found.

d. Law Enforcement Connection.

The A.G. places great emphasis on the fact that Ms. Esoimeme was

not similarly situated to Jurors No. 2, 5, 6, 7, 9 and 10, and Alternate Jurors No. 1 and 2 with regard to knowing anyone involved in law enforcement, with the exception that her husband and brother-in-law had positions as security guards, nor did she know anyone involved in the criminal court system. (RB 110.) The assertion here by the A.G. is disingenuous. The question regarding involvement in law enforcement is found in the questionnaire at page 7, question no. 2 under "CRIMINAL JUSTICE SYSTEM," which asked the following question:

> Have you or anyone you know been involved in the law enforcement filed [*sic*] (e.g., city police, sheriff's department, security guards, retired police, FBI, etc.)?

(SCT 66.) Here, the question posed includes "security guards" as a part of law enforcement. Ms. Esoimeme checked "Yes" to this question because her husband, James Esoimeme, worked as a security guard, as did her brother-in-law, Mathias Esoimeme. (SCT 66.) Thus, the most significant relationship in her life (i.e., her husband), and her brother-in-law, based on the question, were involved in law enforcement; that is, both were employed as security guards. However, the A.G. takes the position, notwithstanding that a security guard falls within the definitional provision of law enforcement, Ms. Esoimeme is not similarly situated to the six noted jurors and two alternates, because she "did not know anyone involved in law enforcement." (RB 110.) The record reflects that she is similarly situated to Juror No. 2, whose significant other worked as a deputy sheriff, and that she had a greater connection to law enforcement than Juror No. 6, whose neighbor was a captain in the Pleasanton Police; Juror No. 7, who had past favorable involvement with the police as a school administrator;

and Alternate Juror No. 5, who had taken "multiple Administration of Justice classes," and whose roommate worked for the FBI. (RB 110.) Thus, clearly Ms. Esoimeme was similarly situated with respect to the law enforcement connection since, by virtue of the question asked, both her husband and brother-in-law were involved in law enforcement based on their employment as security guards.

e. DNA Evidence.

The A.G. further seeks to draw a distinction between Ms. Esoimeme and the six jurors and two alternates on the question of DNA evidence. (RB 111.) However, the prosecutor did not include knowledge or opinions regarding DNA evidence as a reason to exclude Ms. Esoimeme. Again, for the most part, this pertains to the guilt phase, not the penalty phase. In the juror questionnaire, there were four questions regarding DNA evidence under "Expert Testimony" (page 11 of the Juror Questionnaire) as follows:

> 1. Have you heard or read anything about the scientific procedure known as DNA testing?
> Yes ___ No ___ If yes, please explain.
>
> What is the source of your information?
>
> Do you feel you have a special knowledge of the procedure known as DNA testing?
> Yes___ No___ If yes, please explain and give source.
>
> What is your opinion, if any, of DNA evidence?

(SCT 70.) Ms. Esoimeme responded to these questions as noted herein.

Yes, she had heard or read about the scientific procedure known as DNA testing: (1) explaining that this occurred during the O.J. Simpson trial, (2) that her source of information was the newspapers and TV, (3) that she did not feel she had any special knowledge of the procedure known as DNA testing; and (4) that she did not have an "opinion" about DNA evidence since she did not know much about it. (SCT 70.)

Based on the foregoing, Ms. Esoimeme was as familiar with DNA evidence as any of the other jurors, but simply had not formed an opinion on DNA evidence, noting that she did "not know much about it." (SCT 70.) As to Juror No. 2, she has also heard or read about DNA testing, with the source of her information being "just during the OJ Simpson trial" (just like Ms. Esoimeme); she did not have any special knowledge of the procedure known as DNA testing, but did have an opinion that DNA evidence was "[a]ccurate." (CT 16362.) By the same token, Juror No. 5 had similar responses to the four questions, predicated on the "OJ Simpson Trial, Clinton/Lewinsky Testimony," the source of information being "TV & Newspaper," and did not profess any special knowledge of the procedure known as DNA testing (the same responses provided by Ms. Esoimeme), with the only exception being that he had an opinion that DNA evidence "[s]eems a valid way to determine if a specific person may be involved." (CT 16419.) Again, Juror No. 6 gave similar responses regarding hearing about the scientific procedure known as DNA testing as being associated with the "O.J. Trial," the source of information being "TV news," not having any special knowledge of the procedure known as DNA evidence, but having an opinion that DNA evidence was "[v]alid if chain of evidence maintained." (CT 16438.) Juror No. 7 similarly acknowledged hearing about the scientific procedure known as DNA testing through the "Simpson

trial," noted that she read about it in the "papers," did not profess any special knowledge of the procedure known as DNA testing, but did have the opinion that "[i]t seems very reliable if one can depend upon the odds." (CT 16457.) Juror No. 9 also noted that she had heard or read about the scientific procedure known as DNA testing from the "OJ Simpson trial," that her source of knowledge was the "TV," she professed no special knowledge regarding the procedure known as DNA testing; but did state her opinion: "I believe it is the most accurate method of determining blood type and who it belongs to." (CT 16496.) Alternate Juror No. 1 did note that she had heard or read about the scientific procedure known as DNA testing, which involved "identify[*ing*] a person by checking the blood or semen or maybe other body fluids," with her source of information being "[n]ewspaper & TV," noting she had no special knowledge of the procedure known as DNA testing, but had formed the opinion DNA evidence "[s]ounds logical." (CT 16572.) Alternate Juror No. 5 had heard "bits and pieces" about DNA testing; his source of information was the "TV," professed no special knowledge of the procedure known as DNA testing, and as to an opinion on DNA evidence, he noted "[d]on't know enough to say." (CT 16647.)

Here, almost universally, each of the jurors or alternates knew of DNA testing from the O. J. Simpson trial. Generally their sources of information were either the newspaper or TV. None of the jurors or alternates professed to have a special knowledge of the procedure known as DNA, and six of the jurors and one of the alternates had various opinions regarding the viability of DNA evidence. However, Alternate Juror No. 5 had no opinion, i.e., "[d]on't know enough to say."

Ms. Esoimeme had a similar experience with DNA evidence, having

heard about it from the O. J. Simpson trial; with her source of information being the TV and newspapers, and she expressed no special knowledge of the procedure known as DNA testing. Moreover, like Alternate Juror No. 5, she did not have an opinion as to DNA evidence, while the six other jurors and one alternate did. The fact that some jurors might have an opinion on DNA testing, while another did not, is of no moment, since the focus of the prosecutor's inquiry was on the penalty phase, i.e., obtaining jurors that were predisposed to impose the death penalty, not the guilt phase. However, she was just as familiar with DNA evidence as the other jurors and alternates based on the O. J. Simpson trial, with the source of information being the TV and newspapers, and expressed no special knowledge regarding DNA, which is consistent with the responses of the other jurors. Further, she had no opinion regarding DNA evidence, similar to Alternate Juror No. 5, while the other six jurors and alternate did have an opinion.

f. Prior Jury Service.

The A.G. asserts that Jurors No. 2 and 9 had previous jury experience serving on criminal trials, while Juror No. 7 had been a past member and foreperson of the grand jury. (RB 111.) However, Jurors Nos. 5, 6, and 10, as well as Alternate Jurors No. 1 and 2 had no prior jury experience. (*See*: CT 16415 [Juror No. 5]; CT 16434 [Juror No. 6]; CT 16511 [Juror No. 10]; CT 16568 [Alternate Juror No. 1]; and CT 16643 [Alternate Juror No. 5].) That is, three jurors, i.e., Jurors 2, 7, and 9, had prior jury service, while Jurors 5, 6, 10 and Alternate Jurors 1 and 2 did not. Thus, while three jurors had prior jury service and three jurors and two alternates did not, neither did Ms. Esoimeme; but this is not really a basis for comparison. Again, the prosecutor did not state that prior jury service

was in any way connected to his decision to exclude Ms. Esoimeme.

In sum, based on a comparison with the eight seated jurors and alternates, who also ranked as a five on the prosecutor's death-penalty scale, and a review of the record, the prosecutor's stated reasons for excluding Ms. Esoimeme were pretextual. The A.G. seeks to assert additional justifications for the exclusion of Ms. Esoimeme based on a comparison regarding opinions pertaining to DNA evidence, prior jury service, and law enforcement connections. As noted, Ms. Esoimeme was similarly situated to the other jurors and alternates and, in fact, had a greater connection to law enforcement since her husband and brother-in-law worked on security guards. As to DNA evidence, Ms. Esoimeme had the same background and knowledge on DNA evidence, with the exception that she had not formed an opinion, like Alternate Juror No. 5; but this comparison is of no moment as it deals with the guilt phase. As to prior jury service, three jurors had prior jury service, three did not, nor did the two alternates, hence, this is not a basis for comparison. The comparative analysis reflects that the exclusion of Ms. Esoimeme was pretextual.

4. Alice Soard.

The A.G. initially asserts that the court deviated from its normal voir dire by asking two questions; one related to the impact of drugs on Ms. Soard's family as it pertained to her brother who had been killed which was drug related, and the other concerning whether she was the type of person who could vote to impose the death penalty. (RB 112.) The A.G. seeks to make much of these two inquiries but they are of no moment. First, during the *Hovey* voir dire, the court inquired as to Ms. Soard's questionnaire response regarding drug abuse and her brother being killed in what appeared to be "drug related" as far as she knew. (RT 3605.) Ms. Soard

confirmed that her brother had been killed "five years" ago and that she was close to her brother. (*Id.*) The court's concern was whether she could separate the death of her brother from the killing in this case or whether to the two "might sort of overlap" so that she "couldn't entirely be fair in a case like this?" She responded: "I can separate them." (RT 3605.) The court reconfirmed that she could separate them, to which Ms. Soard responded "[y]es." Here, the import of the inquiry regarding the killing of her brother, which appeared to be drug related, was properly raised by the court to ensure that the proceedings could be fair, with Ms. Soard being able to separate the drug related killing of her brother and the killing of Terena Fermenick, which may also in some sense be drug related.

As to the court's second inquiry, the court again employed the standard voir dire question as to whether Ms. Soard was "the type of person that could ever vote to execute another human being? Could you do something like that?" Ms. Soard responded: "I'm not certain. . . . I'm not absolutely, positively sure." (RT 3606.) The court followed up regarding her feelings as to imposing the death penalty, with Ms. Soard responding that "the circumstances" and the "condition would influence me greatly." (RT 3606.) The court inquired further as follows:

> Q. [THE COURT] Okay. So are you telling me that you can execute somebody if you felt that someone deserved it?
>
> A. [MS. SOARD] Yes.
>
> Q. You think you could?
>
> A. Yeah.

(RT 3607.) In follow up, Ms. Soard reiterated that "I still say I could"

impose the death penalty. (RT 3607.) In further follow up, she reiterated she could impose either the death penalty or life without possibility of parole (RT 3611), and that she would consider "mitigating factors." (RT 3612.) In response to the prosecutor's inquiry regarding whether she could return a death verdict, she responded "[y]es." (RT 3617.) Moreover, in response to the prosecutor's inquiry whether she had the "stomach" in "an open courtroom" to impose the death penalty in front of the man who is convicted, she responded affirmatively, i.e., "[i]f I believe that, yes." (RT 3618.)

The court found that based on her "answers," the court was satisfied that Ms. Soard was "qualified to be a juror in this kind of a case," and noted further that "[n]ot everybody makes it all the way through, but you have." (RT 3622.) Thus, there is no doubt that Ms. Soard was qualified to serve as a death penalty juror and that, depending on the "circumstances," she could impose the death penalty if she believed it was warranted. In her questionnaire, Ms. Soard confirmed that she would vote for retaining the death penalty if it was placed on the ballot in the coming election. (SCT 94.) She noted: "I believe it may be needed in some cases." (*Id.*) Both her written responses in the questionnaire and oral responses in the voir dire buttress her ranking as a seven (RT 3618-3619) on the prosecutor's death-penalty scale. The A.G. has failed to adequately rebut the implication that the challenge of Ms. Soard was a pretext in light of her ranking as a seven on the prosecutor's death-penalty scale, while eleven other jurors (nine sitting juror and two alternate jurors) who ranked five and six on the prosecutor's scale were not excluded. (*See* AOB 130-132 and 148.)

a. Prosecutor's Stated Reasons.

As to the first stated basis for the exclusion of Ms. Soard, the

prosecutor expressed "doubts whether she could personally impose the death penalty" and relies on a "15-second pause" before she gave her answer. (RT 3721.) (RB 113-114.) The A.G. seeks to rely on the so-called "hesitation" with regard to the 15-second pause as reflecting that Ms. Soard "was unsure if she could personally impose the death penalty." (RB 115.) This conclusion is belied by the other responses by Ms. Soard, not only in her response in the juror questionnaire, but also to other questions posed by both the court and the prosecutor as noted above, and as set forth in appellant's opening brief. (*See* AOB 148-149.) The A.G. cites to *People v. Lomax* (2010) 49 Cal.4th 530, 572, for the proposition that if other statements or attitudes of the juror suggest reservations about imposing the death penalty, said reluctance is a race-neutral reason that can justify a peremptory challenge. Here, any reservations or concerns that the prosecutor surmised Ms. Soard may have expressed regarding the imposition of the death penalty were no different than those expressed by the other eight jurors who ranked themselves as a five on the prosecutor's scale, as discussed at AOB 144-148. Hence, the purported "doubts" expressed by the prosecutor regarding whether Soard could personally impose the death penalty reflect on the pretextual nature of the challenge.

As to the second stated reason for the challenge to Ms. Soard, the A.G. notes that the prosecutor cited her employment as a "social worker" who worked with "special education children." (RT 3721.) (RB 115.) The problem here for the A.G. is that the record reflects that Ms. Soard is a self-employed administrator who has been educated and trained as a teacher in special education, not social work. (SCT 81-82 and 96.) Moreover, in voir dire testimony, she confirmed her work as a teacher. (RT 3620-3622.) There is no reference to Ms. Soard working as a social worker, either in her

questionnaire or voir dire. (AOB 149-150.) The A.G. fails to address the mischaracterization by the prosecutor of Ms. Soard's employment as a "social worker" when she is, in fact, an administrator-teacher.

The A.G. asserts that a prosecutor can challenge a potential juror based on their occupation and that the challenge of Ms. Soard was similar to the challenge of three other panelists; i.e., Ms. Esoimeme, Ms. Dokes, and Ms. Cornist. (RB 115.) The problem here is that the prosecutor did not correctly cite the occupation of Ms. Soard, who he characterized as a social worker and hence had a liberal bent. Thus, based on her occupation as an administrator-teacher, Ms. Soard was no more "liberal" than Juror No. 4, the substitute teacher (*see* AOB 141), or Juror No. 7, the retired educational administrator (AOB 141-142 and 145), both of whom ranked as a five on the prosecutor's death-penalty scale and served on the jury, while Ms. Soard ranked as a seven and was excused by the prosecutor. (*See also* discussion regarding Ms. Dokes, as to Juror No. 4 and Juror No. 7 addressing their so-called liberal bent, *ante* at pp. 63-64 and 71-74.) This reflects on the pretextual nature of the challenge by the prosecutor who did not properly characterize the occupation of Ms. Soard and, in fact, retained two jurors, Juror No. 4 and Juror No. 7, who shared similar occupations.

The A.G. addresses the third reason stated by the prosecutor for excusing Ms. Soard being her demeanor predicated on her responses regarding her brother's death that, according to the prosecutor, did not "seem to phase her." (RT 3721.) (RB 116.) While the A.G. concedes that the cold record does not clearly reflect Ms. Soard's demeanor while answering questions by both the court and the prosecutor regarding her brother, the A.G. asserts that the record does reflect that her answers were rather cursory, and hence, supports the prosecutor's impression of her

demeanor. The record does not support this assertion. (*See* AOB 150-151.) Of note, the court's inquiry was whether she could separate the death of her brother from this case, which she noted: "I can separate them." (RT 3605.) Here, Ms. Soard simply responded to the court's inquiry regarding whether she could separate the death of her brother from the death in this case, to which she responded affirmatively. While the A.G. asserts that Ms. Soard's "answers were rather cursory," the record does not support this. The record reflects that Ms. Soard clearly responded to the questions posed by the prosecutor and provided detailed answers to the extent necessary, and there is nothing cursory about her responses, as reflected in the following dialog between the prosecutor and Ms. Soard:

> Q. [PROSECUTOR] When your brother was killed, you said it was somewhat drug related.
> Was anybody ever caught because of that?
>
> A. [MS. SOARD] No.
>
> Q. Was that local here in Oakland or in Alameda County?
>
> A. No, North Carolina.
>
> Q. And how long ago was that?
>
> A. About five years.
>
> Q. Do you feel that somehow the police back in Carolina, whoever it was, didn't do a very good job in trying to apprehend the person who murdered a family member?
>
> A. I never was able to get any kind of evidence of really what happened, so I can't say they

didn't do a good job because I don't know what they did.

Q. Okay.

A. All the information I received was from my brother that lives there and his interpretation of it, and so I didn't personally get to talk to the police.

Q. Were you close to the brother who was murdered?

A. We'd been separated as grown people a long time.

Q. Right.

A. Yeah, we were a pretty close family.

Q. You still feel kind of a loss for having lost a family member under those circumstances?

A. Sure.

(RT 3619-3620.) Based on the reporters transcript with regard to the inquiry by the prosecutor regarding the death of Ms. Soard's brother, there is nothing "cursory" about her responses. Hence, the prosecutor's stated demeanor reason, i.e., that her brother's death did not "phase" her, is pretextual.

The A.G. addresses the fourth reason cited by the prosecutor that Ms. Soard "had never married," and references her status as a single and childless person as a factor in jury selection, citing to a prosecutor's text, BUGLIOSI, THE ART OF PROSECUTION (2004). (RB 116-117.) To support this conclusion, the A.G. asserts that Ms. Soard "had not kept in close

contact with her family." Again, this is belied by the record. In response to the prosecutor's inquiry regarding her brother who had been killed, she noted that the murder took place in North Carolina, she learned of the murder from her other brother who lived there, she acknowledges that at age 53, they had been "separated as grown people a long time" (i.e., he lived in North Carolina), but acknowledged that they "were a pretty close family" and that "[s]ure," she still felt the loss. (RT 3619-3620.) There is nothing in these responses that reflects Ms. Soard did not keep in close contact with her family, especially given that she had two brothers in North Carolina – the one who was murdered and the other who provided her the information about his death. This simply reflects speculation regarding the viability of Ms. Soard's status as a single person, i.e., no family values as asserted by the prosecutor (RT 3721), constituting an appropriate race-neutral reason for her challenge.

The A.G. asserts that the fact that Terena had been a minister's wife meant nothing to Ms. Soard was again a reason for excusal, based on the prosecutor's "assessment of Ms. S[*oard*]'s demeanor." (RB 117.) However, the problem here is that the prosecutor did not reference Ms. Soard's demeanor in conjunction with the stated reason that a minister's wife being murdered meant nothing to her as the basis for the challenge. (RB 117.) The prosecutor stated as follows:

> And I asked her if a minister's wife being murdered meant anything. She says it meant nothing to her, which would once again reflect upon my victim impact.

(RT 3721.) Here, there is no reference to the demeanor of Ms. Soard being germane to this answer. Further, the prosecutor states that he "asked her if a minister's wife being murdered meant anything." A review of the voir

dire (RT 3604-3622), specifically the voir dire examination conducted by the prosecutor (RT 3613-3620), reveals that the prosecutor did not query and/or ask Ms. Soard whether a "minister's wife being murdered meant anything" to her. (*See* AOB 152-154.) Hence, there is no basis for the A.G. to assert that the prosecutor excused Ms. Soard based on her "demeanor" in this regard. The question was asked by the defense, Mr. Horowitz, whether the fact that a minister's wife had been killed and sodomized would affect her differently than if she was the wife of somebody with a different occupation, to which she responded "[n]o." (RT 3621.) (*See* AOB 153-154.)

Moreover, in her response to the questionnaire, Ms. Soard checked "No" that she had neither seen, heard, nor read anything regarding the killing of the minister's wife. Further, she checked "No" with regard to whether she was familiar with the "Church of Christ" on Santa Clara Avenue in Alameda. (SCT 094.) (AOB 152-153.) The A.G. and prosecutor seek to transmute Ms. Soard's lack of knowledge as a basis to exclude her. This, of course, is contrary to the jury instruction she would receive as a juror. (RT 5180 at 5181 and 5183; CT 907 at 908 and 912.) Further, as to the question concerning the killing of a minister's wife, employed by the defense, the inquiry pertained to whether the killing and sodomization of a minister's wife, as opposed to the wife of somebody with a different occupation, would have an effect on her decision, to which she responded "[n]o." (RT 3621.) The A.G. speculates that it is "reasonable for a prosecutor to believe" that "strict neutrality" would make Ms. Soard less sympathetic to voting for the death penalty than other panelists. (RB 117.) This is specious reasoning in light of the court's instruction to base their verdict on the evidence presented at trial. (RT 5180 at 5181 and 5183;

CT 907 at 908 and 912.) Of note, six of the twelve sitting jurors and two of the alternate jurors had neither seen, heard, nor read anything about the killing of the minister's wife and, moreover, were not familiar with the "Church of Christ" on Santa Clara Avenue in Alameda. (CT 16348, 16405, 16424, 16443, 16520, 16558, 16595, 16662.) (*See* AOB 153.) Hence, the fact that Ms. Soard had no knowledge regarding the killing of the minister's wife or the location has absolutely nothing to do with the prosecutor's purported "assessment of Ms. S[*oard*]'s demeanor" (RB 17). This further reflects on the pretextual nature of the exclusion of Ms. Soard.

b. Comparative Analysis.

The A.G. seeks to make light of Ms. Soard's ranking as a seven on the prosecutor's death-penalty scale, noting that the "scale was not the be-all and end-all of the prosecutor's decision." (RB 117.) However, as reflected above, *ante* at pp. 10-12, the prosecutor's death-penalty scale was the cornerstone of the prosecutor's analysis with regard to assessing the predisposition of each juror to impose the death penalty. Hence, a seven ranking by Ms. Soard reflects on the pretextual nature of her exclusion since she ranked higher than eleven other jurors noted above (nine sitting and two alternate jurors) who ranked five and six on the prosecutor's scale, but they were not excluded. (*See* AOB 130-131 and 148.)

The A.G. asserts that Ms. Soard's ranking as a seven on the prosecutor's death-penalty scale does not square with either her demeanor or her other responses concerning imposition of the death penalty. However, a review of her questionnaire answers, as well as her responses to the voir dire inquiry, buttress her ranking as a seven on the prosecutor's death-penalty scale. (*See* discussion above and at AOB 148-149.) Moreover, as noted, any reservations or concerns that the prosecutor

surmised Ms. Soard may have expressed regarding the imposition of the death penalty were no different than those expressed by eight jurors who ranked themselves as a five on the prosecutor's death-penalty scale. (*See* AOB 144-148 and 149.)

The A.G. also asserts that Ms. Soard was a "liberal" who was not inclined to vote for the death penalty as some of the other panelists. Moreover, the A.G. asserts that the prosecutor's stated reason that Ms. Soard worked "as a social worker for special education" is supported by the record. (RB 113 and RB 115-116.) As noted above, the record does not support the assertion that Ms. Soard worked as a "social worker," but it is abundantly clear that she worked as an administrator-teacher, contrary to the assertion by the prosecutor. Further, Ms. Soard was no more liberal than Juror No. 4, the substitute teacher (*see* AOB 141), or Juror No. 7, the retired educational administrator (*see* AOB 141-142 and 145), both of whom ranked as a five on the prosecutor's scale and served on the jury. (*See* AOB 150.)

i. Juror No. 4.

The A.G. asserts that Juror No. 4 was not similarly situated as to Ms. Soard because Juror No. 4 had previously worked as a restaurant manager, making her less liberal; had some knowledge of DNA testing; her father was a police captain, and she believed the criminal justice system was "fair and very effective." (RB 118-119.)

As discussed above in conjunction with prospective juror Dokes, *ante* at pages 63-64, Juror No. 4 was no more liberal than Ms. Soard as they both worked in the field of education. As to Juror No. 4's knowledge and attitude toward DNA evidence, a review of the juror questionnaire as to Ms. Soard reflects that she had the same positive attitude toward DNA evidence.

While Ms. Soard acknowledges that she did not have "any expert knowledge about DNA," she noted further that "I do think it is interesting reading." She acknowledged her source of information to be "printed materials." Moreover, as to her opinion, if any, regarding DNA evidence, Ms. Soard that "[i]t is a good tool." (SCT 89.) The opinion expressed by Ms. Soard is substantially similar to the opinion expressed by Juror No. 4, that DNA evidence was "pretty accurate." (CT 16400.) Further, Ms. Soard expressed virtually the same opinion regarding the effectiveness of the criminal justice system, noting that "[i]t is a fair and just system" (SCT 86), which is almost identical to the response provided by Juror No. 4, that the system was "fair and very effective" (CT 16397). Ms. Soard and Juror No. 4 shared the same occupational field, i.e., education; expressed a similar opinion regarding DNA evidence; as well as a similar opinion regarding the effectiveness of the criminal justice system. Thus, Ms. Soard and Juror No. 4 were similarly situated. While Juror No. 4 ranked as a six on the prosecutor's death-penalty scale (RT 1164-1165), Ms. Soard ranked as a seven (RT 3618-3619). This comparison reflects that the challenge to Ms. Soard, while the prosecutor retained Juror No. 4, was pretextual.

ii. Juror No. 7.

The A.G. also asserts that Ms. Soard was not similarly situated to Juror No. 7 (RB 119), but yet they shared the same occupational field – education – with Juror No. 7 serving as an administrator in education, including serving as a principal (*see* discussion as to Ms. Dokes, *ante* at pp. 71-74, and AOB 141-142), while, as noted, Ms. Soard served as an administrator-teacher. While Ms. Soard lacked any connection to law enforcement and/or the courts, Ms. Soard, in fact, had a more positive feeling regarding the effectiveness of the criminal justice system, noting

that "[i]t is a fair and just system." (SCT 86.) However, Juror No. 7 noted that the criminal justice system, "[i]n general, it is effective though there are ways it might be improved (as is true of any institution)". (CT 16454.) Thus, both had a positive opinion of the criminal justice system. Given that both Juror No. 7 and Ms. Soard were in a similar occupational field, i.e., administrator-teacher and administrator-principal, and had similar opinions regarding the effectiveness of the criminal justice system, they were similarly situated. Again, Juror No. 7 ranked as a five on the prosecutor's death-penalty scale (RT 1414-1415) while Ms. Soard ranked as a seven. This reflects on the pretextual nature of the challenge to Ms. Soard while the prosecutor retained Juror No. 7.

iii. Juror No. 1

The A.G. asserts that Ms. Soard was not similarly situated to Juror No. 1, a rape victim; that Juror No. 1 expressed stronger "written feelings on the death penalty" than Ms. Soard; and that she had more of a connection to law enforcement given that her husband had a friend who was a San Francisco police officer and she had a friend who was a Burlingame police officer. (RB 119-120.) The A.G. seeks to rely on "demeanor" with regard to the prosecutor's assertion that the murder of Ms. Soard's brother five years ago did not "seem to phase her." (RT 3721.) (RB 119.) However, Ms. Soard made clear that she could not obtain information regarding the murder of her brother, who was murdered in North Carolina, but acknowledged that even after five years, she still felt the loss of her brother, i.e., "[s]ure." (RT 3620.) In fact, Ms. Soard had a more positive feeling regarding the effectiveness of the criminal justice system than Juror No. 1. As noted, Ms. Soard concluded that the criminal justice system was "a fair and just system." (SCT 86.) Juror No. 1 had a more negative opinion,

noting that "I think they are not effective enough to *(sic)* many people get away w/crimes." (CT 16340.) Both Ms. Soard and Juror No. 1 acknowledged that they would vote for retaining the death penalty if it was placed on the ballot in the coming election. (SCT 94 and CT 16348.) Ms. Soard further explained in her questionnaire response regarding voting for retention of the death penalty that she "believes it may be needed in some cases." Moreover, both Ms. Soard and Juror No. 1 acknowledged that imposing a death verdict would depend on "the circumstances." (RT 3606 [as to Ms. Soard], RT 3142 [Juror No. 1].) Juror No. 1 ranked as "[a]bout an eight" on the prosecutor's death-penalty scale (RT 3145-3146), while Ms. Soard ranked as a seven (RT 3618-3619).

Given their responses and ranking, Juror No. 1 and Ms. Soard were substantially similar with regard to imposing the death penalty. Of note, while the A.G. places great emphasis on the fact that Juror No. 1 and her husband had friends who were police officers (RB 120), Juror No. 1 opined that the criminal justice system was "not effective enough" (CT 16340); however, Ms. Soard concluded that the criminal justice system was "a fair and just system" (SCT 86). The A.G. speculates that the prosecutor "could reasonably suspect that Juror No. 1 would be more inclined to positively consider the law enforcement evidence" given her interactions with two police officer friends, but this is belied by her negative opinion regarding the effectiveness of the criminal justice system, while Ms. Soard had a positive opinion. Again, the A.G. is engaging in speculation and asserts grounds to support the exclusion of Ms. Soard which were not stated by the prosecutor.

iv. Juror No. 9 and Alternate Juror No. 1.

The A.G. cites to the prosecutor's text, BUGLIOSI, *supra*, Ch. III

(Voir Dire), pp. 63-65, 72, to assert that marriage makes a good prosecution juror. (RB 120.) The problem here is that neither Juror No. 9 nor Alternate Juror No. 1 were married, and had never been married. (CT 16486 [Juror No. 9] and CT 16562 [Alternate Juror No. 1].) (*See* also AOB 151-152.) Further, both Juror No. 9 and Alternate Juror No. 1 ranked as a five on the prosecutor's death-penalty scale (RT 1060 [Juror No. 9] and RT 1545-1546 [Alternate Juror No. 1]), while Ms. Soard ranked as a seven on the prosecutor's death-penalty scale (RT 3618-3619). (*See* AOB 130-132.)

The A.G. states that the "prosecutor had already expressed his concern about Ms. S[*oard*]'s experience with her sister, and now dead brother," citing to SCT 91, i.e., her questionnaire. (RB 120.) The questionnaire reflects that both her sister and brother had been involved in drugs. (SCT 91.) However, the prosecutor did not express any concern about Ms. Soard's sister, because he asked no questions about her nor did anyone else. (*See* RT 3613-3620 for the voir dire by the prosecutor; RT 3620-3622 for the defense voir dire; and RT 3604-3613 for the court voir dire examination.) Thus, contrary to the misrepresentation by the A.G., the prosecutor expressed no concern about Ms. Soard's experience with her sister. The A.G. asserts that Ms. Soard had grown away from her family in North Carolina, but the responses she provided clearly reflected a connection to her family of origin; to wit, she had been close to her brother who had been murdered (RT 3605), although she acknowledges they had been "separated as grown people a long time;" she noted that they "were a pretty close family" and acknowledged that she still felt a loss over the death of her brother by responding to the prosecutor's inquiry in this regard as "[s]ure" (RT 3620). Of note, Ms. Soard had been born in Selma, North Carolina (SCT 79), and lived in Washington, D.C. for ten years before

moving to Alameda County twenty years ago. (*Id.*) In spite of the fact that Ms. Soard may have moved across the country from her family of origin, her responses to the prosecutor's questions reflected that they were "a pretty close family" and that she continued to feel the loss of her murdered brother. (RT 3620.) Given her single status, this does not, as the prosecutor stated, reflect a lack of family values (RT 3721) any more than Juror No. 9 and Alternate Juror No. 1, who were also single and never married.

The A.G. asserts that Juror No. 9's attitudes about imposing the death penalty were more sympathetic to the prosecution than to the defense. (RB 121.) However, both Juror No. 9 and Ms. Soard would vote to retain the death penalty if placed on the ballot in the coming election. (CT 16501 [Juror No. 9] and SCT 94 [Ms. Soard].) As to her general feelings regarding the death penalty, Ms. Soard noted "I believe that in some cases it should be needed." (SCT 93; see also SCT 94.) Juror No. 9 noted that if someone takes another life, "they don't deserve to live." (CT 16500.) Moreover, Juror No. 9 ranked as a "five" on the prosecutor's death-penalty scale, noting "I'm right in the middle." (RT 1060.) However, as noted, Ms. Soard ranked as a seven on the prosecutor's death-penalty scale. Further, Ms. Soard had a more positive attitude regarding the criminal justice system, noting that it is "a fair and just system" (SCT 86), while Juror No. 9 noted that the "justice system enforces criminals to think twice before committing a crime, therefore reducing some crimes, but not all" (CT 16493). Under these circumstances, Juror No. 9 and Ms. Soard were similarly situated with regard to imposing the death penalty, since the prosecutor's stated goal in jury selection was to find jurors that were predisposed to impose the death penalty.

As to Alternate Juror No. 1, the A.G. fails to point out that Alternate

Juror No. 1 was not sure whether she would vote to retain the death penalty if placed on the ballot in the coming election (CT 16577), while Ms. Soard would vote for retention of the death penalty (SCT 94). The A.G. places great stock on Alternate Juror No. 1 being a "bank vice president" (RB 121) and again contrasts her occupation to that of Ms. Soard who the A.G. characterizes as a "social worker" with a possible liberal inclination. However, as noted, Ms. Soard was an administrator-teacher, not a social worker. Of note, both Alternate Juror No. 1 and Ms. Soard had a positive opinion regarding the effectiveness of the criminal justice system, with Alternate Juror No. 1 noting "it is fairly effective" (CT 16569), while Ms. Soard noted that it was "a fair and just system" (SCT 86). Thus, Ms. Soard and Alternate Juror No. 1 were similarly situated given that they were both single, never married, with Alternate Juror No. 1 being a five and Ms. Soard being a seven on the prosecutor's death-penalty scale, and both were willing to impose the death penalty. Hence, the challenge to Ms. Soard, as reflected by the retention of Alternate Juror No. 1, was pretextual.

5. Doris Cornist.

The A.G. has failed to demonstrate why Ms. Cornist, who ranked as a six on the prosecutor's death-penalty scale, was challenged, when the prosecutor allowed six other jurors who ranked as a five on the prosecutor's death-penalty scale to remain seated (i.e., Jurors No. 2, 5, 6, 7, 9, and 10) as well as two alternate jurors who ranked as five (i.e., Alternate Jurors No. 1 and 5). (*See* AOB 130-131.) The prosecutor's stated goal was to select jurors who would be predisposed to impose the death penalty. It stands to reason that Ms. Cornist, based on her ranking as a six on the death-penalty scale, would be more disposed to impose the death penalty than the six jurors as well as the two alternates who ranked as a five. This certainly

reflects on the pretextual nature of the challenge of Ms. Cornist.

a. Attitude Concerning Death Penalty – Juror Questionnaire.

The A.G. asserts that Ms. Cornist's general attitude toward the death penalty differed between her questionnaire responses and her so-called tentative answers during voir dire, which the A.G. asserts reflects a score of "five or less" on the prosecutor's death-penalty scale. (RB 127-128.) A review of Ms. Cornist's written responses as contrasted with her oral responses reflects consistency and continuity in her responses. In her questionnaire under "ATTITUDES CONCERNING THE DEATH PENALTY" with respect to question no. 1 concerning her general feelings regarding the death penalty, she stated: "[i]f you do the crime – you should pay the price!" (SCT 17.) Further, she noted that if the issue of retaining the death penalty was placed on the California ballot in the coming election, she would vote for it. (SCT 18.) Contrasting the responses by the six other jurors and two alternate jurors who ranked as a five on the death-penalty scale reflects on the strength of Ms. Cornist as a pro-death-penalty juror.

A review of the questionnaires of the six seated jurors and two alternates who ranked as a five on the death-penalty scale bears this out: Juror No. 2 believed in the death penalty, noting: "I would have to be certain that the guilty verdict was without question," and would vote to retain the death penalty if placed on the upcoming ballot. (CT 16366-16367.) Juror No. 5 stated that he "believe[d] in capital punishment" and would vote for retaining the death-penalty scale. (CT 16423-16424.) Juror No. 6 noted that it would depend "on the circumstances" and that "it can be an acceptable form of punishment," but refused to answer the question regarding voting to retain the death penalty if placed on the upcoming

ballot, noting "[b]allots in the USA are secret." (CT 16442-16443.) Juror No. 7 stated that the death penalty was "justified in some cases;" she was not sure she would vote to retain the death penalty, but noted that she "would probably vote in favor, however would read both sides carefully." (CT 16461-16462.) Juror No. 9 responded "[i]f a person takes another life intentionally, they don't deserve to live," and would vote for retaining the death penalty. (CT 16500-16501.) Juror No. 10 noted that she felt "for the death penalty," and would vote for retaining the death penalty. (CT 16519-16520.) Alternate Juror No. 1stated that she was "generally pro death penalty," but was not sure if she would vote to retain the death penalty, noting "[s]ometimes I think there are extenuating circumstances, but most death penalty people go thru [*sic*] the entire legal system, so it probably is warranted." (CT 16576-16577.) Alternate Juror No. 5 noted that he was "in favor of it," and would vote for retention of the death penalty. (CT 16651-16652.)

Based on this comparison with regard to the written responses in the questionnaire regarding the death penalty and its retention, Ms. Cornist's responses were either consistent with or stronger than the six seated juror and two alternates with regard to favoring imposition of the death penalty and voting to retain the death penalty.

b. Attitude Concerning Death Penalty – Voir Dire.

Moreover, Ms. Cornist's oral responses in voir dire, contrary to the assertion by the A.G., were even stronger in support of the death penalty. In fact, Ms. Cornist was emphatic in her belief in capital punishment, stating: "I believe if you commit a crime - - I believe in capital punishment - - that you should die . . .." (RT 2083.) Further, in response to the

prosecutor's inquiry regarding her questionnaire response, Ms. Cornist stated: "I believe that if you go out and kill someone and you're found guilty, then death is a possibility for you, also." (RT 2086-2087.) Ms. Cornist did acknowledge that she had "an open mind" and that she could determine whether "death or life" should be imposed. (RT 2089.) Hence, based on her responses regarding the death penalty as reflected in her written questionnaire and her voir dire responses, Ms. Cornist clearly ranked a six on the prosecutor's death-penalty scale making her a much more desirable juror than the other six jurors and two alternates who ranked as a five. This becomes clear in reviewing the voir dire responses by the six other jurors and two alternates who ranked as a five on the prosecutor death-penalty scale, but were not challenged by the prosecution.

i. Voir Dire as to Juror No. 2.

Juror No. 2 noted that it would be emotionally "draining" on her to impose the death penalty. (RT 3019.) Morever, she stated several times that it would be "difficult" for her to impose the death penalty, but also noted that she could "do it if it was proven to [*her*]." (RT 3019-3020.) She confirmed her belief in capital punishment as follows: "I believe in capital punishment." (RT 3026.) (AOB 144.)

ii. Voir Dire as to Juror No. 5.

As to voting to impose the death penalty, Juror No. 5 noted: "I think that would give me great personal difficulty." (RT 1023.) Juror No. 5 noted further that it is "one thing to say that" you are in favor of capital punishment, but it is "another thing to be the one that makes the decision to do that to another human being," e.g., vote to impose the death penalty. (RT 1032-1033.) (AOB 144.)

iii. Voir Dire as to Juror No. 6.

During voir dire, Juror No. 6 reiterated that he was not "philosophically opposed to the death penalty," but noted that it must be "the right circumstances." (RT 3201.)

iv. Voir Dire as to Juror No. 7.

As far as imposing the death penalty, in voir dire, Juror No. 7 noted that "[i]t would depend totally on the circumstances." (RT 1414-1415.) (AOB 145.)

v. Voir Dire as to Juror No. 9.

As to Juror No. 9, she noted that she would not automatically pick the death penalty every time, but noted that life without parole would be an option, but her decision would depend on "the facts." (RT 1055-1056, and 1062-1063.) (AOB 145.)

vi. Voir Dire as to Juror No. 10.

As to Juror No. 10, he noted that "you have to hear the evidence" which may "make a difference." (RT 1266-1267.) You want to hear all the evidence in the penalty phase before making a decision between death and LWOP. (RT 1267-1268.) Juror No. 10 believed that the death penalty should be used only in the most severe cases or for the very worst kind of case. (RT 1270.) (AOB 145.)

vii. Voir Dire as to Alternate Juror No. 1.

As to the imposition of the death penalty, Alternate Juror No. 1 noted that "it depends on the crime," as well as "how bad the world is at the time." (RT 1540.) She agreed that every murder is not a death penalty case. (RT 1541.) (AOB 146.)

viii. Voir Dire as to Alternate Juror No. 5.

As to Alternate Juror No. 5, he would consider both the death

penalty and life without possibility of parole as possible penalties. (RT 1719.) The reason that he was in favor of the death penalty was due to his belief that "laws and punishment [are] to keep the world from anarchy." (RT 1722.) (AOB 146.)

A review of the voir dire responses by the aforementioned six jurors and two alternates who ranked as a five on the prosecutor's death-penalty scale reflects that Ms. Cornist was a stronger pro-death-penalty juror, as reflected in her ranking of a six, than the other eight jurors, six seated and two alternate, discussed above. (*See also* AOB 144-147 for further comparison.) The A.G. has failed to come to grips with this comparison, seeking to subvert the death penalty ranking of Ms. Cornist as a six, by asserting that she is really a score of "five or less on the prosecutor's scale." (RB 127-128.) However, a comparison of her responses as set forth in her questionnaire as well as in voir dire reflects that Ms. Cornist, in fact, was a stronger death penalty juror than Jurors No. 2, 5, 6, 7, 9, 10 and Alternate Jurors No. 1 and 5.

The prosecutor's stated reasons for the challenge of Ms. Cornist are as follows: (1) she indicated that things in childhood can cause problems later in life, e.g., penalty phase evidence; (2) she works for the welfare department and thus, she is a liberal; (3) she has animosity toward the police, as indicated on page 8 of her questionnaire; (4) she has a rich-versus-poor attitude, again reflected on page 8 of her questionnaire; (5) her questionnaire is misleading; and (6) there were better qualified jurors more willing to impose the death penalty. (RT 3752-3753.) (*See also* AOB 155-159.) The pretextual nature of the prosecutor's stated reasons has already been addressed. (AOB 155-159.) The A.G. has failed to rebut said analysis. (RB 125-128.) In addressing the comparative analysis asserted by

appellant in his opening brief (AOB 154-159), the A.G. fails to come to grips with the critical comparison which is discussed above; that is, a comparison of the six seated jurors and two alternate jurors who ranked as a five with respect to imposition of the death penalty, and Ms. Cornist, as discussed above, which reflects that she was a stronger pro-death-penalty juror with a ranking of a six on the prosecutor's death-penalty scale than the aforementioned eight jurors who ranked as a five.

The A.G. also seeks to reference other forms of comparison to justify the exclusion of Ms. Cornist. A review of her questionnaire responses reflects that she would in fact be a strong prosecution juror. First, she had lived in Alameda County since 1949 and hence, she had ties to the community. (SCT 3.) She had raised two children – one daughter aged 33 who worked as a probation officer, and a son aged 28 who worked as a group home counselor. Clearly the fact that she had a daughter who was a probation officer reflected a connection to law enforcement. She had worked as a supervising eligibility tech for nearly 28 years with the Alameda County Welfare To Work Department Social Service Agency; hence, she was a solid citizen who had been working at the same job for nearly 28 years, which certainly reflects a conservative nature. Further, she supervised seven new eligibility workers and had been a supervisor since 1992. (SCT 6.) As to contacts with the criminal justice system, she noted her daughter was a probation officer; but also noted a close personal friend who was a federal judge. (SCT 8.) Ms. Cornist had prior jury experience, both civil and criminal, with the civil case involving a claim against an insurance company and the criminal case involving the crime of murder. (SCT 9.) As to the effectiveness of the criminal justice system, she did note her belief that "at times," the system was "unfair" and that "the rich go free

and the poor are punished." (SCT 10) However, as noted in appellant's opening brief, this was similar to the feelings expressed by other jurors, such as Juror No. 5, Juror No. 12, and Alternate Juror No. 5. (*See* AOB 158) She also disclosed that her grandson's father "was killed in his home by an Oakland Policeman" and that no one had either "served time or been charged for this murder." (SCT 10.) As noted in appellant's opening brief, the prosecution asked no questions regarding this incident. (RT 2086-2091.) (AOB 157-158.) She noted that her son owned a firearm which he used for purposes of the rifle range and that she also enjoyed the rifle range. (SCT 12.) She gave a detailed explanation regarding the scientific procedure known as DNA, and expressed the opinion that DNA evidence "usually is correct." (SCT 13.) As to the opinion of a psychologist or psychiatrist in a criminal trial, she opined that they were like "any other witness." (SCT 14.) She acknowledged that she did see a psychiatrist, psychologist or therapist, which was "a good experience" for her, because it helped her "after the separation" from her husband. (SCT 14.) As to her general feelings regarding the use of illegal drugs, she was emphatic that "[d]on't get involved, it will ruin your life and those close to you." (SCT 15.) This was in part predicated on her own personal experience regarding a "close family member" who had died "of an overdose." (SCT 15.) She had the same opinion regarding people who use methamphetamine or other illegal drugs; to wit, "it will ruin your life." (SCT 16.) Thus, Ms. Cornist expressed feelings, attitudes, and opinions regarding law enforcement, the criminal justice system, employment, prior jury service, weapon ownership, DNA evidence, and drug use, all which would tend to support the conclusion that she would be a pro-prosecution juror. Those are now apparently a negative, when elsewhere throughout their brief, the A.G. has

touted them as a positive for the prosecution. The A.G. simply cannot have it both ways.

Hence, the stated reasons for challenging Ms. Cornist, which were addressed in appellant's opening brief (AOB 154-159), reflects that the stated reasons for the challenge as to Ms. Cornist were pretextual.

H. Conclusion.

The comparative juror analysis as outlined above and in appellant's opening brief (AOB 123-160), demonstrates that the prosecutor's reasons for challenging each of the five African-American prospective jurors were pretextual, and hence, the prosecutor violated the *Batson/Wheeler* doctrine. It is well settled that the purposeful discrimination in the exercise of a single peremptory challenge violates the Constitution. *See Batson*, 476 U.S. at 95; *see also United States v. Vasquez-Lopez* (9th Cir. 2006) 22 F.3d 900, 902 ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose"). Application of the comparative juror analysis to this case reflects that the prosecutor struck each of the five African-American potential jurors because of their race.

II. TRIAL COURT RULINGS AND RELATED PROSECUTORIAL MISCONDUCT RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR AND A DEPRIVATION OF DUE PROCESS OF LAW AND VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AS WELL AS HIS STATE STATUTORY RIGHTS

A. There Has Been No Forfeiture of Claims by Appellant as the Errors Were Preserved.

The Attorney General (A.G.) argues at length in his 50-page response (RB 137-187) that appellant Nadey has "forfeited" these claims because "none of these specific grounds," i.e., the state and federal constitutional grounds, were raised "in the trial court," and hence, said "arguments should be forfeited." (RB 138-140; *see also* RB 142, 155, 156, 159, 161, and 184, 185.) In fact, the A.G. asserts that as to the claims of error, "[i]n the main, appellant forfeited these claims by not raising them in the trial court." (RB 187.) These assertions of forfeiture are belied by the record and case law.

1. The Record.

Prior to trial, on October 5, 1998, defense counsel, James Giller and Daniel Horowitz, filed "Motion In Limine No. 17 (All Objections Deemed Made On State and Federal Grounds)." The motion requested that each and every objection be deemed to include both state and federal constitutional objections. Motion In Limine No. 17 provided as follows:

> Defendant asks that all objections made at trial or in pretrial motions, whether they be *(sic)* may interpose objections to the admissibility of evidence, jury selection procedures, conduct of the trial, conduct of the parties or the Court, juror conduct, jury instructions, or other matters not currently

> foreseeable. In addition to the specific grounds stated at the time the objections are made, counsel requests that all such objections also be deemed objections under Article 1, Sections 7, 13, 15, and 16, of the California Constitution, and under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
>
> Counsel makes this request to insure that defendant's rights under the State and Federal Constitutions are adequately protected, and to streamline the trial procedure in this case by obviating the necessity for appending a lengthy recitation of constitutional provisions to each and every objection.

(CT 573-574.)

In a hearing on October 29, 1998, the trial judge, The Honorable Alfred A. Delucchi, granted the motion as follows:

> On motion number 17, all objections deemed made on state and federal grounds, that's granted.

(RT 395-396.)

On January 25, 1999, during jury selection in connection with a *Batson/Wheeler* motion, the court acknowledged its prior ruling that all of defense counsel's objections were being considered "as state objections and federal objections" as reflected in the following colloquy:

> MR. HOROWITZ [DEFENSE COUNSEL]: Your Honor, could I just say one thing?
>
> Is it clear for Mr. Anderson that we are making this on both state and federal grounds?
>
> THE COURT: You already filed a motion back in the Stone Age when all your objections were being

considered by - - as state objections and federal objections. And I ruled in the affirmative to that, Mr. Horowitz. I thought maybe you wrote it down.

MR. HOROWITZ: I did, but, you see, I wanted to be clear today.

THE COURT: We'll note that for the record.

(RT 3750.)

The record is clear that, based on the granting of defense counsel's Motion In Limine No. 17, each objection by defense counsel was "deemed" by the court's granting of the motion to include objections both under the California Constitution (Article 1, Sections 7, 13, 15, and 16) and the United States Constitution (Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments). The purpose of the motion was "to insure that defendant's rights under the State and Federal Constitutions are adequately protected" and, moreover, "to streamline the trial procedure. . . by obviating the necessity for appending a lengthy recitation of constitutional provisions to each and every objection." (CT 573-574.) By virtue of the court's granting the motion, the court agreed with this procedure that each objection would include objections under both the state and federal Constitutions without the necessity for restating either the state or federal "constitutional provisions" with each objection. The prosecutor did not object to this process or the granting of the motion. (RT 395-396; *see also* RT 3750-3751.) Hence, the A.G.'s assertions of forfeiture predicated on defense counsel's failure to state or recite the various provisions and amendments to the state and federal Constitutions are untenable.

2. <u>The Case Law.</u>

The A.G. asserts that appellant failed to object on "specific grounds"

(RB 138-139, fn. 40) and "did not object on that ground" (RB 185) throughout their argument. However, this fails to address the objections made which, as noted above, incorporated both the state and federal constitutional objections in preserving the error.

Moreover, the A.G. asserts that appellant's various constitutional arguments have been forfeited because of a failure to specifically state or cite to the constitutional grounds now asserted. (RB 138-139, fn. 40; *see also* RB 155-156.) This argument, that the constitutional arguments raised by appellant have been forfeited because they were not cited to or referenced by appellant's defense counsel, is without merit. In light of the trial court's granting of the aforementioned motion deeming said state and federal constitutional objections to be included in each and every objection made, the constitutional arguments now raised have been preserved.

Further, this Court's decision in *People v. Partida* (2005) 37 Cal.4th 428, rejected the proposition the A.G. now asserts that the failure to include the constitutional objection, such as due process, forfeits said claim. This Court analyzed the trial court's role in addressing the objection and the reviewing court's role in determining the consequences in the event of error as follows:

> When a trial court rules on an objection to evidence, it decides only whether that particular evidence should be excluded. Potential consequences of error in making this ruling play no part in this decision. A reviewing court, not the trial court, decides what legal effect an erroneous ruling has. Here, the trial court was called on to decide whether the evidence was more prejudicial than probative. It did so. Whether its ruling was erroneous is for the reviewing court to decide. If the reviewing court

> finds error, it must also decide the consequences of that error, including, if the defendant makes the argument, whether the error was so serious as to violate due process. . . .

(*Id.* at 436-437.)

This Court reiterated that no purpose is served by requiring the defendant to state "every possible legal consequence" stemming from the asserted error in overruling the objection as follows:

> If the trial objection fairly informs the court of the analysis it is asked to undertake, no purpose is served by formalistically requiring the party also to state every possible legal consequence of error merely to preserve a claim on appeal that error in overruling the objection had that legal consequence. Specifically, no purpose would be served by requiring the objecting party to inform the court that it believes error in overruling the actual objection would violate due process.

(*Id.* at 437.)

This Court rejected the Attorney General's citation to a number of cases, including *People v. Boyette* (2002) 29 Cal.4th 381, 424, for the proposition that "a due process argument on appeal [*is*] not cognizable when the defendant had not objected on due process grounds at trial." (*Id.* at 437.) This Court limited the holding of the cited cases as follows:

> Those cases should be read to hold only that the constitutional argument is forfeited to the extent the defendant argued on appeal that the constitutional provisions required the trial court to exclude the evidence for a reason not included in the actual trial objection. They did not consider whether, and do not preclude us from holding that, defendant may argue an

> additional legal consequence of the asserted error in overruling the Evidence Code section 352 objection is a violation of due process. [*footnote omitted, citations omitted*]

(*Id.* at 437-438.) In other words, the grounds for a trial objection, without specifically asserting a due process argument, may be asserted on appeal when the claimed error has "the legal consequence of violating" due process rights. (*Id.*)

The A.G. cites to the constitutional violations asserted by appellant, including his right to "due process and a fair trial" and argues that appellant "raised none of these specific grounds in the trial court." Hence, the A.G. concludes the "arguments should be forfeited" (citing to *People v. Boyette* (2002) 29 Cal.4th 381, 424). (RB 138-139, fn. 40; *see also* 155-156.) The assertion of forfeiture must be rejected based not only on the court's granting of Motion In Limine No. 17, which incorporated both state and federal constitutional objections into each and every objection made, but this Court's decision in *People v. Partida* and others, which make clear that trial objections may implicate both state and federal constitutional rights, provided the claimed error related to the trial objections and "had the legal consequence of violating" the defendant's asserted state or federal constitutional rights. (*See also, People v. Pearson* (2013) 56 Cal.4th 393, 425 fn.5, (noting that "defendant's new constitutional arguments are not forfeited on appeal," when "the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply").)

Of note, the A.G. cites to this Court's decision of *People v. Boyette* (2002) 29 Cal.4th 381, 424, for the proposition that the "specific" constitutional grounds must be asserted in the trial otherwise they are

forfeited. (RB 138-139, fn. 40.) However, this position has been expressly rejected by this Court, both in *People v. Partida*, 37 Cal.4th at 437-438, and *People v. Thornton* (2007) 41 Cal.4th 391, 434, n.7. Further, the very decision that the A.G. relies on of *People v. Boyette* was asserted by the A.G. in the *Partida* case (37 Cal.4th at 437). The constitutional rights asserted by appellant were not only incorporated into the trial objections by virtue of the granting of Motion In Limine No. 17, but also the trial court's action or omission in connection with said trial objections "had the additional legal consequence of violating" the asserted state and federal constitutional rights. Consequently, there has been no forfeiture of either the state or federal constitutional rights asserted by appellant herein.

B. Prosecutorial Misconduct and Trial Court Errors.

The A.G. asserts that "appellant makes repeated claims of the prosecutorial misconduct, and also claims the trial court committed judicial misconduct. . . ." (RB 140.) In fact, the A.G. repeatedly asserts that appellant is making a claim for judicial misconduct. (*See* RB 142, 164, 174, 176, and 180.) Notwithstanding the repeated assertions by the A.G., appellant has made no claim of judicial misconduct. (AOB 161-200.) Appellant has asserted that "Trial Court's Errors" and the "Misconduct of the Prosecutor" denied him his due process rights and a fair trial. (AOB 172.) Appellant makes one reference to "judicial bias" in connection with the analysis of the trial court's response to a juror note. The court advised that the question posed by the juror "will be answered for you this afternoon," which, in effect, referenced the anticipated response by the prosecutor in rebuttal argument. The trial court's response, appellant asserts, is a "de facto endorsement" of the prosecutor's position. (AOB 162; *see also* discussion regarding Jury Question Regarding DNA Expert at

AOB 165-169, and the discussion of Trial Court Errors in this regard at AOB 172-184.) The reference to judicial bias in this context simply reflects upon the nature and degree of the error committed by the trial court in this context. Here, we are dealing with trial court errors and prosecutorial misconduct, not judicial misconduct as asserted by the A.G. Consequently, the A.G.'s argument in this regard misses the mark.

1. Prosecutorial Misconduct.

The A.G. spends considerable time purporting to justify the prosecutor's injection into evidence the fact that the defense had retained a DNA consulting expert by the name of Dr. Edward Blake. (RB 142-154.) However, the bottom line is that Dr. Edward Blake was not disclosed as a witness by the defense pursuant to Penal Code §1054 or otherwise. (Court Exhibit XII.) (RT 4107.) In fact, the identification of defense witnesses and the defense exhibit list pursuant to Penal Code §1054 were the subject of a lengthy discussion between counsel and the court on January 27, 1999 (RT 4103-4107); that is, on the second day of trial. The prosecutor, Mr. Anderson, produced the witness list that the defense had provided before the trial started (that is, the day before opening statement) and, at the court's request, the prosecutor read the witness list into the record. (RT 4107.) Dr. Edward Blake was not listed on the witness list (Court Exhibit XII) nor was his name read into the record as being a defense witness. (RT 4107.) The court expressly discussed the provisions of Penal Code §1054, noting the defense obligation to turn over to the prosecutor those witnesses they intended to call in their case. (RT 4103-4106.) The defense confirmed that they had identified and disclosed their witnesses to the prosecutor. (RT 4104-4105.) At the court's instruction, as noted, the prosecutor read into

the record the witnesses identified on the defense exhibit list (RT 4107). Dr. Edward Blake was not listed on the defense exhibit list provided pursuant to Penal Code §1054 (Court Exhibit XII) nor was his name referenced as a witness when the prosecutor read the defense witness list into the record. (RT 4107.) The A.G. concedes that the prosecutor was informed by the defense that Dr. Edward Blake was not going to be a witness (RB 171) (RT 5128, i.e., where the prosecutor confirms: "[t]hey told me Ed Blake wasn't going to be a witness.[9]"). Of note, during the pretrial proceedings, the court inquired as to whether Dr. Blake had written a report for the defense, to which defense counsel, Mr. Giller, responded: "[n]o, nor have I asked him for one, nor do we need one." (RT 313.) Moreover, Dr. Blake was not called as a witness in connection with the *Kelly-Frye* hearing regarding the State's DNA analysis. (RT 472-596) (*See* AOB 162-164.) It follows that there is no justification for the prosecutor's injecting into evidence the fact that the defense had retained a DNA consulting expert; that is, Dr. Edward Blake.

a. The Non-Disclosed Defense DNA Consulting Expert.

The A.G. asserts that appellant's arguments regarding the testimony elicited by the prosecutor, over objection, that the defense had secured the services of a DNA consultant (i.e., Dr. Edward Blake) who they had consulted with and who had examined the documentation supplied by Mr. Steve Myers (the State's DNA expert), and the introduction of a letter from

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The A.G. misquotes the record, saying that the prosecutor had been prepared for this issue since the defense had told the prosecutor "Ed Blake wasn't going to testify" as opposed to what was stated, i.e., "[t]hey told me Ed Blake wasn't going to be a witness" (RT 5128) (emphasis added).

Dr. Blake (People's Exhibit 51) confirming the same have been forfeited. (RB 155-156.) Moreover, the A.G. asserts that appellant's argument regarding the prosecutor's rebuttal argument concerning the failure of the defense to call their own DNA expert, Dr. Edward Blake ("they don't want another DNA finger of guilt pointing their way" [RT 5178]) has been forfeited. (RB 184.)

The A.G. concedes that defense counsel objected to the testimony of Mr. Myers regarding turning over all of his materials to Dr. Blake on the grounds of relevance and being improper. (RB 155; *see* RT 4509-4510.) The A.G. further concedes that defense counsel objected to the admission of Dr. Blake's letter (People's Exhibit 51) on the grounds of hearsay, being improper, and relevance. (RB 155; *see* RT 4510-4511.) The A.G. asserts that these objections and, apparently, the extended colloquy and objections in advance of the prosecutor's rebuttal argument regarding the juror note inquiring as to whether the defense had access to a DNA expert (*see* AOB 165-172), were insufficient to preserve the state and federal constitutional claims and state statutory claims appellant now asserts. (RB 155.) Moreover, the A.G. asserts that appellant's challenge to the admission of Mr. Myers' testimony and Dr. Blake's letter on state and federal constitutional grounds and state statutory grounds have also been forfeited. (RB 155-162.)

The problem here is that the A.G. has failed to come to grips with the effect of Motion In Limine No. 17 which, as noted above, incorporates by reference the state and federal constitutional objections into each and every objection. Thus, when defense counsel objected to the testimony of Mr. Myers regarding the defense securing the services of a DNA consultant (i.e., Dr. Edward Blake) who examined the documentation supplied by Mr.

Myers as being improper and irrelevant, Motion In Limine No. 17 clearly preserved appellant's claims as follows: (1) the denial of due process and a fair trial as reflected in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state constitutional counterparts; (2) impermissibly shifted the burden of proof and denied him the presumption of innocence as reflected in the Fifth, Sixth, Eighth, and Fourteenth Amendments and reciprocal state constitutional counterparts; (3) violated the right to remain silent, as reflected in the Fifth and Fourteenth Amendments and reciprocal state constitutional counterparts; (4) interfered with his right to counsel and present a defense, as reflected in the Fifth, Sixth, and Fourteenth Amendments and state constitutional counterparts; and (5) violated the attorney-work-product privilege, as reflected in the Fifth, Sixth, and Fourteenth Amendments and state constitutional counterparts. Further, the claim of prosecutorial misconduct is certainly reflected in the Fourth, Fifth, Eighth, and Fourteenth Amendments and state constitutional counterparts. Moreover, the state statutory rights under Penal Code §1054 and the attorney-work-product privilege reflected in CCP §2018.030 are also reflected in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments as well as the state constitutional counterparts. The same analysis holds true with regard to the admission of Dr. Blake's letter (People's Exhibit 51), which was also objected to on the grounds of being improper and relevance as well as hearsay. (*See* AOB 164-165 and RT 4509-4511*; see also* AOB 172-200.) As noted, the state and federal constitutional objections set forth in Motion In Limine No. 17 related to and included the admissibility of evidence, conduct of the trial, conduct of the parties, and conduct of the court. Certainly the trial court's granting of this motion is sufficient, coupled with the objections tendered at trial, to include

the current claims asserted on state and federal constitutional grounds, as well as state statutory grounds.

Moreover, the A.G.'s assertion of forfeiture, particularly as to the constitutional claims, based on a failure to specify, fails to address the decisional authority noted above (*People v. Partida* (2005) 37 Cal.4th 428; *People v. Thornton* (2007) 41 Cal.4th 391; and *People v. Pearson* (2013) 56 Cal.4th 393). Here, defense counsel objected to the admission of both Mr. Myers' testimony and Dr. Blake's letter on the grounds of relevance and being improper, as well as the additional ground of hearsay as to the letter. The incorporation of defendant's state and federal constitutional objections into these objections, based on the court's granting of Motion In Limine No. 17, reflects that all claims asserted by appellant on appeal have been preserved. Additionally, based on *Partida*, *Thornton*, and *Pearson*, the current constitutional claims asserted by appellant would be deemed falling within the rubric of the "additional legal consequence" of the asserted error, i.e., the overruling of the objections predicated on relevance and being improper, and hence, would be preserved.

b. The Prosecution's Rebuttal Argument.

The A.G. also asserts that the prosecutor's rebuttal argument predicated on the testimony from Mr. Myers, and the introduction of Dr. Blake's letter which showed appellant had secured the services of a DNA consultant who had examined the documentation supplied by Mr. Myers, which was the predicate for the prosecutor's rebuttal argument (i.e., the defense did not call their own DNA expert because "they don't want another DNA finger of guilt pointing their way" [RT 5178]) has been forfeited. (RB 154-156.) Further, the A.G. argues that "without objection" the prosecutor addressed the fact that the defense had not called a DNA

expert, citing to RT 5151-5152. (RB 183.) The A.G. contends that appellant has forfeited his claims of the denial of due process and a fair trial in this regard. (RB 155-156.)

The record is clear that defense counsel made an extensive record regarding the juror's note inquiring as to whether the defense had a DNA expert or whether there were limitations of funding in this regard. There was an extended colloquy between the court and defense counsel regarding: (1) the court's decision to permit the prosecutor to answer the question posed by Juror No. 7; (2) the objections asserted thereto by defense counsel; and (3) the court's denial of the defense request to briefly reopen for the limited purpose of responding to the juror's note. (RT 5121-5124.) Further, defense counsel requested that the court read to the jury "an appropriate" jury instruction, and again objected to the court's decision to permit only the district attorney to respond to the juror note on the grounds of "fundamental fairness." (RT 5125-5133.) Moreover, defense counsel requested that the court instruct the jury, in response to the juror's note, that "[n]ot everybody has to call every witness," "so that she [the juror submitting the note] doesn't feel that a question to the Judge is delegated to the prosecutor." (RT 5131-5132.) The court had already responded, noting that "[t]he DA can argue the way he wants." (RT 5122.) The court responded further, noting that if defense counsel felt the ruling was "so outrageous," they may have a good ground for "appeal" as follows: "[s]o if you find it so outrageous, then you have a good ground for an appeal. [¶] But we are not going to reopen the argument. We are going to let the district attorney argue." (RT 5123-5124.) (*See* AOB 162-172.)

During this extended colloquy, defense counsel asserted a host of objections and responded as follows with regard to the court's decision to

allow the prosecutor to respond to the juror's note as follows: (1) "it's an unfair advantage" (RT 5122-5123); (2) "[i]t's outrageous because the note came after he finished his argument" (RT 5123); (3) requested that the court read to the jury an "appropriate" instruction (RT 5131-5133); (4) objected to the court's decision to permit only the district attorney to respond to the juror note on the grounds of "fundamental fairness" (RT 5125-5127); (5) noted "that is unfair" (RT 5126-5127); (6) requested to reopen for "probably two, three minutes" to address the note (RT 5127-5130); and (7) specifically requested that the court instruct the jury in response to the juror's note that "[n]ot everybody has to call every witness," "so that she [the juror submitting the note] doesn't feel that a question to the Judge is delegated to the prosecutor" (RT 5131-5132). (*See* AOB 165-169.) The aforementioned request by the defense to reopen for two to three minutes as well as the request that an appropriate jury instruction be read, coupled with the asserted objections regarding fundamental fairness, reflects on appellant's claims of due process and fair trial rights.

As discussed above, in *People v. Partida* (2005) 37 Cal. 4th 428, 434, this Court made clear that while the requirement of a "specific objection" is important, said "requirement must be interpreted reasonably, not formalistically." This Court noted further that: "'Evidence Code section 353 does not exalt form over substance,'" quoting from *People v. Morris* (1991) 53 Cal.3d 152, 188. (*Id.*) This Court also noted that "[t]he statute does not require any particular form of objection." (*Partida, supra*, 37 Cal.4th at 434-435.) Here, the objections predicated on unfair advantage, fundamental fairness, and being unfair, reflects the quintessential language of due process and fair trial rights. There can be no doubt under these circumstances that defense counsel was raising an objection predicated on

due process and the right to a fair trial when employing this language in the context of the colloquy with the court regarding the propriety of the court's anticipated response to the juror's note which allowed the prosecutor to respond to the juror note, while precluding defense counsel from doing the same. In *Partida*, 37 Cal. 4th at 439, this Court equated a "due process violation" with "fundamental fairness." Hence, employing the language of "fundamental fairness" certainly informed the court and the prosecutor that defense counsel was raising a due process violation and the right to a fair trial. In this context, particularly given the incorporation of appellant's state and federal constitutional objections by virtue of Motion In Limine No. 17, it follows that appellant's claims of due process and the right to a fair trial as well as the other asserted state and federal constitutional rights have not been forfeited.

The A.G. asserts that the defense did not object to the prosecutor's closing argument (RB 184), and hence, any claims associated with the argument were forfeited. It is well settled that defense counsel need not make an objection that is futile in order to preserve an issue for appeal. 6 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW (4th ed.), Reversible Error, §52 Exception: Where Request Would Be Futile, p. 582. That is, in cases of misconduct by the prosecutor, no objection or request for an admonition need be made when "the reviewing court may determine that the request would have been futile, and hence, that the failure to make the assignment and request was not a forfeiture of the objection." *Id.* (*See People v. Clark* (1993) 5 Cal.4th 950, 1035 (failure to object to prosecutor's argument in capital case that responsibility for penalty determination rests with "the law" does not waive issue on appeal; *People v. Hill* (1998) 17 Cal.4th 800, 820 (timely objection or request for admonition is not required if either

would be futile).)

Here, given the extended colloquy between the court and defense counsel regarding the anticipated rebuttal argument by the prosecutor with respect to the juror's note inquiring as to whether the defense had access to a DNA expert, any further objection during argument or request for an admonition would have been futile. The trial court made this clear when it denied defense counsel's request to reopen and/or to read an instruction to the jury in response to the juror's note and stated as follows: "[t]he DA can argue the way he wants. Overruled" (RT 5122); "So if you find it so outrageous, then you have a good ground for an appeal. [¶] But we are not going to reopen the argument. We are going to let the district attorney argue." (RT 5123-5124.) In light of the court's comments, particularly noting that the district attorney "can argue the way he wants," this makes clear that any further objection or request for an admonition with regard to the prosecutor's rebuttal argument would have been futile.

2. Trial Court Errors.

The A.G. repeatedly recasts the issue raised on appeal by appellant as one involving judicial misconduct. (RB 164-181.) Appellant makes no claim of judicial misconduct, but predicates his claims on trial court errors.

The A.G. fails to address the trial court error in responding to the juror note (RB 164-181), but simply concludes the trial court did not abuse its discretion, nor did the court reverse the burden of proof. (RB 173-174 and 174-175.) Moreover, the A.G. obfuscates the issue by quoting extensively from the trial court record involving the closing arguments and the court's comments. (RB 164-173.) The A.G. notes that a "very substantial portion" of defense counsel's submission (i.e., Mr. Horowitz) challenged the prosecution's DNA evidence. (RB 167.) There is nothing in

the cited summation by Mr. Horowitz which would justify the comment by the prosecutor on the failure of the defense to call a non-disclosed DNA expert. (RB 167-168.) Defense counsel had every right to argue that "samples used for DNA testing were contaminated" (RB 167, citing to RT 5005-5006) (*see* AOB 57-63), as well as to challenge the "professional competence" of Mr. Myers to do DNA testing (RB 167, citing to RT 5061-5067, 5069-5070, 5074, 5082-5087) (*see* AOB 43-57). In order to assert that the DNA testing involved contamination and challenge the "professional competence" of Mr. Myers, this did not require that the defense present their own expert witness since the argument presented by defense counsel, Mr. Horowitz, was predicated on testimony elicited in the cross-examination of the State's DNA experts, Sharon Anne Smith and Steven Myers. (RT 167-168.) (*See* AOB 39-43 and 43-63.) Here, the State had the burden of proof with regard to the DNA evidence, not the defense. The A.G. cites to the comments of the court responding to defense counsel, stating: "You've got an expert in this case. We know his name. We know there's a letter there." (RB 169, referencing RT 5121-5123.) The problem here is that the court committed error, as discussed above, when the court admitted the letter, also referenced as the Dr. Blake letter (People's Exhibit 51), into evidence over the defense objection. Thus, here we have error on top of error. The A.G. further cites to the court's statement as follows: "And he [the prosecutor] has a right to comment on the fact the defense didn't call a particular witness." (RB 169, referencing RT 5121-5123.) However, as noted above, Dr. Blake is not identified on the defense witness list (Court Exhibit XII). (RT 4107.) The A.G. cites further to the court's statement: "Don't tell me you didn't have an expert." (RB 169, referencing RT 5121-5123.) Again, the defense did not disclose (pursuant to Penal

Code §1054) Dr. Blake as a witness or otherwise. (*See* Court Exhibit XII; *see also* RT 4103-4107.)

The A.G. also cites to the court's statement in response to the defense objection and request to limit the comments by the prosecutor in closing argument as follows: "[h]e [the prosecutor] can say whatever he wants." (RB 169, citing to RT 5121-5123.) This statement by the court reflects on both the defense objections and efforts to limit comment by the prosecutor; and moreover, confirms the reversal of the burden of proof by the court. (*See* AOB 175-181.) In fact, the A.G. cites to the prosecutor's statement to the court regarding the reference to "Mr. Ed Blake is on page 4508." (RB 171, citing to RT 5128.) This reflects back on the prosecutor's injection into evidence, through the testimony of Mr. Myers, that Myers provided his "entire work notes and copies of everything" to "Dr. Edward Blake, who was hired by the defense in this case." (RT 4509-4510.) This was promptly objected to by defense counsel, Mr. Horowitz, as being "an improper question" and a request that it be "stricken" was made, which the court "[o]verruled." Moreover, defense counsel had objected on the grounds of relevance when the prosecutor initiated the question. (RT 4509-4510.) Here, again, we have error on top of error. When the prosecutor sought to inject the fact that the defense retained a DNA consulting expert and that Mr. Myers had provided him will all of his documentation, defense counsel promptly, and properly, objected on the grounds of relevance and the question being improper, and further sought to have the question stricken, which was overruled. Thus, the genesis of the problem begins with the prosecutor, who improperly sought to inject into this case the fact that the defense had retained a DNA consulting expert, which the trial court allowed to stand, but in doing so committed error.

The Ninth Circuit decision of *United States v. Chase*, (9th Cir. 2007) 499 F.3d 1061, both distilled and crystalized the two-fold purpose of an expert: (1) to produce his or her own investigation, interpretation, and testimony on a given issue, and (2) to educate, inform, and prepare defense counsel for purposes of cross-examination of the adverse expert. *Id.* at 1066-1067. (*See* discussion at AOB 192-197.) Here, defense counsel elected to utilize the services of Dr. Blake to educate, inform, and prepare counsel for purposes of the cross-examination of Criminalist Smith as well as Criminalist Myers. However, this did not impose an obligation on defense counsel to call Dr. Blake as a witness at trial and provide testimony regarding a DNA analysis. In fact, pursuant to Penal Code §1054, defense counsel were precluded from calling Dr. Blake because he was not disclosed as a witness nor was a report provided by him. Hence, it was error for the trial court to allow the prosecutor to elicit the testimony from Mr. Myers, over objection, that he had provided all of his documentation to Dr. Blake who had been retained by defense counsel. Moreover, this error was compounded by allowing the prosecutor, not the trial judge, to respond to the juror note regarding whether the defense had access to a DNA expert or whether there was a limitation of funds in this regard. (Court Exhibit XXV.) (RT 5121.) This reflects more than an abuse of discretion; it reflects trial court error which had the legal consequence of shifting the burden of proof on the DNA evidence to the defense. (*See* AOB 175-181.)

a. Reversal of the Burden of Proof.

The A.G. seeks to reshape appellant's argument regarding shifting the burden of proof by asserting that it was predicated on the court's failure to interrupt the defense summation and disclose the jury note, the failure to allow the defense to reopen its summation for "two or three minutes," and

the failure to instruct the jury prior to the prosecution's rebuttal argument. (RB 174.) From this, the A.G. asserts that the trial judge did not abuse his discretion as he is given latitude in controlling the scope of the closing summation. (RB 175.) The A.G. seeks to recast the trial court's conduct as involving an abuse of discretion in controlling the trial which, according to the A.G., did not impermissibly shift the burden of proof. (RB 174-176.) However, the issue here is one of due process and a fair trial, with the court's conduct resulting in a reversal of the burden of proof. This Court's decision *People v. Serrato* (1973) 9 Cal.3d 753 (*overruled on other grounds* by *People v. Fosselman* (1983) 33 Cal.3d 572, 584 n.1) is on point, and is discussed at length in appellant's opening brief. (*See* AOB 178-181.) In *Serrato*, this Court concluded that "[t]he thrust of the court's statement was to reverse the burden of proof on the only contested factual issue in the case." (*People v. Serrato*, 9 Cal.3d at 765-767.)

Appellant asserts a reversal of the burden of proof as a consequence of the following events: (1) the injection by the prosecutor that the defense had an expert in DNA; (2) the trial court's failure to respond to the juror's inquiry regarding whether the defense had access to a DNA expert and/or any limitations thereto; (3) the failure of the trial court to give an appropriate instruction regarding the issue, as requested by the defense; (4) the trial court's allowance of the prosecutor, over objection, to respond to the jury inquiry and point out in detail that the defense had a DNA expert, but they did not call him; and (5) the trial court's preclusion of the defense from commenting on the jury's inquiry and/or responding to the need and/or propriety of calling a DNA expert and/or responding in some fashion to the jury's inquiry. (*See* AOB 180.) Of note, each of these circumstances reversed the burden of proof and deprived appellant of due process.

Moreover, the amalgamation of these circumstances resulted, in effect, in a reversal of the burden of proof, wherein the issue became not whether the prosecutor had met his burden on the DNA evidence, but the failure of the defense to call a DNA expert. (*See* discussion and cases cited at AOB 180-181.) Again, in *Serrato*, this Court concluded that the effect of the trial court's erroneous instruction was to, in effect, reverse the burden of proof, which violated defendant's constitutional right of due process. (*People v. Serrato*, 9 Cal.3d at 766-767.)

As noted above, the events that resulted in the reversal of the burden of proof do not include, as asserted by the A.G., the failure of the court to interrupt the final portion of the defense summation to disclose the juror note. The A.G. seeks to trivialize the events referenced which resulted in a reversal of the burden of proof by recasting the circumstances as involving a simple matter of trial court discretion in conducting the trial. The aforementioned events make clear that what transpired were a set of circumstances set in motion by the prosecutor and acquiesced in by the trial court that ultimately resulted in a reversal of the burden of proof as to the DNA evidence, with the focus being placed on the failure of the defense to call a DNA expert, i.e., Dr. Blake, who the defense had no obligation to call.

The A.G. also notes that appellant "contends for the first time" that there was an impermissible shifting of the burden of proof. (RB 174.) The A.G. has failed to come to grips with this Court's decision in *Partida* and *Thornton*, which clearly establish that said error is reviewable as the "legal consequence" of the asserted trial court errors, without having to specifically assert the impermissible shifting of the burden of proof as a separate trial objection, since it involves the legal consequence of the trial

court errors which were objected to. (*See People v. Partida*, 37 Cal. 4th at 437-439; *People v. Thornton*, 41 Cal.4th at 434, n.7.)

The A.G. also argues as a justification for the trial court's purported "exercise of discretion" that "the defense deliberately failed to address the prosecution evidence and summation regarding Dr. Blake during its summation." (RB 175.) The problem here is that the trial had already committed error by permitting the prosecutor to inject into evidence the fact that Mr. Myers turned over all of his DNA documentation to Dr. Blake who had been retained by the defense. Defense counsel did not have to fight fire with fire and compound trial court error which permitted, over objection, testimony by Mr. Myers that he had provided said documentation to Dr. Blake who had been retained by the defense. Thus, the genesis of the problem is the prosecutor's injection into evidence the fact that Mr. Myers provided DNA documentation to Dr. Blake, who had been retained by the defense, and trial court error that compounded the problem by overruling defense counsel's objection and denied the request that the testimony be stricken.

b. Judicial Endorsement of the Prosecutor's Rebuttal Argument.

The A.G. also asserts that the trial court's response to the note inquiry by Juror No. 7 regarding the DNA evidence "did not, in any *[sic]*, constitute a judicial 'endorsement' of the prosecutor's later argument." (RB 177.) This assertion is belied by the record. The A.G. asserts that part of the concluding instructions ameliorated the trial court's endorsement of the prosecutor's rebuttal argument, noting that the jury should "disregard" anything that the court had said or done regarding the belief or disbelief of "any witness." (RB 176.) (RT 5197.) This concluding instruction was

given in conjunction with 23 pages of instructions. (RT 5180-5203.) There is an old adage that actions speak louder than words. This adage is particularly apt here.

The Court acknowledged that Juror No. 7 handed him a note with a question to which the court responded: "I do believe that that question will be answered for you this afternoon." (RT 5120.) The note inquired as to whether "the defense have access to a DNA expert" or whether there was "a limitation of funds" in this regard. (Court Exhibit XXV.) (RT 5121.) The court did not respond to this jury note other than to inform the jury that it would be "answered for you this afternoon," i.e., when the prosecutor argued. Hence, rather than respond to the juror's inquiry directly, the court abdicated the response to the prosecutor and, at the same time, denied the defense an opportunity to respond. (RT 5122-5124.) Moreover, the court denied the defense request that the court read an "appropriate" jury instruction to respond to the juror note "so that she [the juror submitting the note] doesn't feel that a question to the Judge is delegated to the prosecutor." (RT 5131-5132.) (*See* AOB 165-169.) The prosecutor did respond to the jury note, commenting at length regarding the failure of the defense to call their own DNA expert, Dr. Edward Blake. (RT 5151-5155, and RT 5178.) (*See* AOB 169-172.) The prosecutor was emphatic that the defense did not call Dr. Myers because "they don't want another DNA finger of guilt pointing their way." (RT 5178.) Here, the Court's statement that the question posed by Juror No. 7 "will be answered for you this afternoon" (RT 5120), the declination of the defense request to reopen for two or three minutes to respond to the question and/or for the court to read an appropriate jury instruction (RT 5127-5130 and 5131-5132), and allowing the prosecutor to respond to the question, i.e., "[t]he D.A. can

argue the way he wants" (RT 5122-5123), followed by the extended response by the prosecutor to Juror No. 7's question in rebuttal argument (RT 5151-5155, and RT 5178), reflects what the jury may perceive as a de facto endorsement of the prosecution's position. Here, Juror No. 7's question was responded to not by the court, but by the prosecutor, with the trial judge giving advance notice that the question would be answered "this afternoon," i.e., by the prosecutor, since only the prosecutor responded to the question. (RT 5120.) The quoted portion of the concluding instruction did not vitiate the trial court's perceived endorsement of the prosecutor's position relative to the DNA evidence.

The A.G. restates their argument that part of the concluding instructions vitiated any perceived judicial endorsement of the prosecutor's case by making the same argument that the court's refusal to give the defense requested instruction (CALJIC No. 2.11) before the prosecutor's rebuttal argument, in response to the juror note (Court Exhibit XXV) (RT 5121), is essentially the same argument discussed above. The A.G. asserts that the trial court had discretion with regard to instructing the jury, that the court instructed the jury following the prosecutor's argument, which included the CALJIC 2.11 instruction requested by the defense, and concludes further that "the court's instructions made clear to the jury that appellant had no obligation to present evidence." (RB 177-180.)

The A.G. then seeks to distinguish *People v. Serrato* (1973) 9 Cal.3d 753, 766-767, where this Court concluded that a burden-shifting instruction was a violation of due process. (*Id.* at 766-767.) (RB 181.) The A.G. asserts that this "did not happen here." (RB 181.) The A.G. asserts further that neither the prosecutor nor the court informed the jury that the "DNA evidence was the only factual issue before it," nor that the defense "had the

burden to establish that Mr. Myers' results were erroneous." (RB 181.)

There are a number of problems with the A.G.'s argument in this regard. (*See* AOB 175-181.) First, the A.G.'s argument that the court's instructions made clear to the jury that appellant had no obligation to present evidence is without merit. In the context of this case, in light of the court's response to the juror note regarding the DNA question, the prosecutor's rebuttal argument certainly indicated to the jury that the defense had an obligation to call Dr. Blake, but failed to do so because, as the prosecutor stated, "they don't want another DNA finger of guilt pointing their way." (RT 5178) The 23 pages of jury instructions are one thing (RT 5180-5203), but the trial judge made clear that the district attorney would address the juror note regarding the DNA inquiry as follows: " I told the juror that this question would be answered for her this afternoon," implying that the district attorney intended to address that issue. (RT 5126.) Hence, it is clear that the court intended for the prosecutor to address the juror question, not the court. The subsequent 23 pages of jury instructions did not vitiate this pronouncement by the court. Moreover, when the court acknowledged the juror note from Juror No. 7 with regard to the DNA question, the court had just announced to the entire jury that they would be taking "the noon recess because Mr. Anderson [the district attorney] will be arguing at 1:30 this afternoon," and then stated further "I can tell Juror No. 7 that I do believe that that question will be answered for you this afternoon." (RT 5120.) Thus, it is clear, based on the court's comments, that the entire jury was informed that the answer to the DNA question posed by Juror No. 7 would be answered by the prosecutor, not the court nor by defense counsel. The effect of the court proceeding in this fashion muddled any purported clarity regarding appellant having no obligation to present

evidence, as asserted by the A.G. (RB 180.) Moreover, the subsequent reading of CALJIC 2.11, a jury instruction entitled "Production Of All Available Evidence Not Required" (CT 907 at 919; RT 5186), did not cure the prejudice suffered by appellant as a consequence of the court abdicating to the prosecutor its responsibility to respond to the juror inquiry.

The A.G. argues that neither the court nor the prosecutor informed the jury that "the DNA evidence was the only factual issue before it." (RB 181.) There can be no doubt that the DNA evidence in this case was critical to the verdict. This is clearly reflected in the note from Juror No. 7 regarding the DNA inquiry (Court Exhibit XXV) (RT 5121), the court's comment regarding the *Kelly-Frye* hearing that "the DNA evidence in this case is probably the most crucial evidence" (RT 313), the defense closing argument by Mr. Horowitz which addressed in detail the DNA evidence, particularly contamination (RT 4947-5120), and the prosecutor's rebuttal closing argument (RT 5133-5179). As to the A.G.'s assertion that neither the prosecutor nor the court informed the jury that "the defense had the burden to establish that Mr. Myers' results were erroneous" (RB 181), this assertion is belied by the record. The net effect of the prosecutor's rebuttal closing argument was, in effect, to imply that the defense had the burden to establish that Mr. Myers' results were erroneous and they failed to do so, which is why they did not call Dr. Blake as a witness because "they don't want another DNA finger of guilt pointing their way." (RT 5178.) (*See also* AOB 169-172.)

Contrary to the A.G.'s analysis of the *Serrato* case, which dealt with an instructional error, the same principle applies in this case.

C. Prejudice.

The A.G. also argues that appellant has failed to establish prejudice

(RB 156, 164, and 186), or that the claimed errors deprived him of a fair trial. (RB 176, 177, and 187.) In effect, the A.G. asserts that the prosecutor's argument regarding the failure of defense counsel to call their own DNA expert, Dr. Blake, which was, according to the prosecutor, due to the fact that Dr. Blake concurred with Mr. Myers and that defense counsel did not "want another DNA finger of guilt pointing their way," caused no prejudice or unfairness to the trial proceedings. (RT 5178.) (*See* AOB 169-172.) In this case, the DNA evidence was critical to the verdict, as reflected by the note from Juror No. 7 (Court Exhibit XXV) (RT 5121) (*see* AOB 165-169), and the trial judge's conclusion that "the DNA evidence in this case is probably the most crucial evidence. . . ." (RT 313.) Hence, the juror's note and the conclusion of the trial judge make clear that the DNA evidence in this case was the critical evidence. This is particularly true in light of the evidence of DNA contamination. (AOB 57-62.) Consequently, the admission into evidence of the testimony of Mr. Myers informing the jury that the defense had their own DNA expert to whom he had provided all his documentation, and Dr. Blake's letter (People's Exhibit 51) confirming receipt of said documentation, were exploited by the prosecutor in rebuttal closing argument. In rebuttal, the prosecutor argued that the reason defense counsel did not call Dr. Blake was because Dr. Blake undoubtedly agreed with Mr. Myers, and hence, the defense did not "want another DNA finger of guilt pointing their way." (RT 5151-5155 and 5178.) The force of the prosecutor's argument, as well as the prejudice stemming therefrom, not only bore the endorsement of the court, but was in response to the DNA inquiry as reflected in the note from Juror No. 7, and thus, had added force. Under these circumstances, appellant was prejudiced under both the state constitutional standard (*People v. Watson* (1956) 46

Cal.2d 818, 836) and the federal constitutional standard (*see Chapman v. California* (1967) 386 U.S. 18, 24; and *People v. Booker* (2011) 51 Cal.4th 141, 186).

III. APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN THE RESULTS OF TERENA FERMENICK'S AUTOPSY WERE ENTERED INTO EVIDENCE THROUGH IN-COURT TESTIMONY OF A FORENSIC PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSY.

Dr. Rogers testified regarding the findings, observations, activities, conduct and conclusions of Dr. Herrmann, including the DNA collection, in performing the autopsy of Terena Fermenick. (AOB 201-204, 212-223, and 227-230.) Appellant has argued that the testimony of Dr. Rogers violated the Confrontation Clause because it was based on the autopsy protocol that he did not prepare. (AOB 205-207, 211-225, and 227-230.)

During the trial, Dr. Rogers expressly acknowledged that his testimony was predicated on the findings and conclusions of Dr. Herrmann as reflected in the autopsy protocol (People's Exhibit 3 [CT 017512]) which had been prepared by Dr. Herrmann as follows:

> MR. ANDERSON: Q. Dr. Rogers, are you acquainted with a doctor also of pathology known by the name of Paul Herrmann?
>
> [DR. ROGERS:] A. Yes, I am.
>
> Q. Who is Paul Herrmann?
>
> A. He is an associate of mine. He's also a member of the Institute of Forensic Sciences.
>
> . . .
>
> Q. Okay. Did you review some records and photographs and other details and writings performed by Dr. Herrmann after an autopsy that he did on January 19th of 1996 upon a body known as Terena Fermenick?

A. Yes, I did.

Q. Is there a document which is produced after every autopsy done by the coroner's office in this county which is numbered and is accepted as a business record?

A. Yes, there is.

Q. What is that document called, sir?

A. It's called an autopsy protocol.

. . .

THE COURT: That will be People's 3 next in order, the autopsy protocol.

. . .

MR. ANDERSON: Q. And does the source of information from that document come within the observations of Dr. Herrmann, the actual autopsy physician?

A. Yes, it does.

Q. Sir, now, just so we're patently clear, sir, you're testifying as an expert in the area of forensic pathology as to the findings made by Dr. Herrmann who is unavailable at this time? Would that be a fair statement?

A. That is fair.

(RT 3800-3802.) Later in his testimony, Dr. Rogers again confirmed that his testimony was predicated on the autopsy protocol, prepared by Dr. Herrmann, when he referenced a coroner's evidence envelope (People's

Exhibit 12 [CT 17513]) which bore the coroner's case number 9600217, and noted: "that corresponds to the autopsy protocol from which I've been testifying." (RT 3819-3820.)

The A.G. asserts that Dr. Rogers, in many respects, "gave his own opinion on multiple issues" (RB 191-192) and that "Dr. Rogers did not rely on Dr. Herrmann's ultimate conclusions during his testimony." (RB 192.) These assertions are belied by the record, which makes clear that the testimony of Dr. Rogers was predicated on "the autopsy protocol from which I've been testifying." (RT 3820.) Of note, Dr. Rogers addressed the cause of death as follows:

> [MR. ANDERSON:] Q. Doctor, what was the cause of death of Terena Fermenick?
>
> [DR. ROGERS:] A. Incised wound to the neck.

(RT 3827.) Dr. Rogers does not express the cause of death as his opinion, i.e., "[i]ncised wound to the neck," but simply restates almost verbatim what Dr. Herrmann has listed as the cause of death in the autopsy protocol. That is, "Cause of death: incised wound of the neck." (People's Exhibit 3, p. 1 [CT 17512].)

The A.G. also asserts that Dr. Rogers reviewed various autopsy photographs with the jury, which the court deemed admissible, and gave his own "opinion" on what he "believed caused the particular wound." (RB 191-192.) However, a review of the autopsy photographs (People's Exhibits 4-11 [CT 17512]) and the testimony of Dr. Rogers regarding said photographs (RT 3803-3811) reflects that the photographs are simply illustrative of the "external injuries" (RT 3804) depicting "incised wounds" (RT 3805) and "blunt-force trauma" injuries (RT 3811) as set forth in detail

by Dr. Herrmann in the autopsy protocol (People's Exhibit 3, pp. 2-17 [CT 17512]).

Moreover. Dr. Rogers' opinion testimony regarding the collection of the DNA sample material as to the rectal, vaginal and vulva swabs, as reflected in People's Exhibits 12, 12A, 13, and 13A (CT 17513) (RT 3819-3824) (*see* AOB 204 and 228-230), related to the autopsy protocol (People's Exhibit 3 [CT 17512]). Dr. Rogers' testified regarding the collection of the DNA sample material as to the conduct and activities of Dr. Herrmann in gathering said DNA material in the form of opinion testimony (i.e., "my opinion") (RT 3821 and 3823) but, in fact, said testimony related to the autopsy protocol, with Dr. Rogers simply providing surrogate testimony for what Dr. Herrmann actually did during the DNA-gathering process. (RT 3820-3823.) (*See* AOB 204 and 228-230.) Dr. Rogers related the gathering of the DNA sample material to the autopsy protocol when he noted that the DNA "evidence envelope" corresponded "to the autopsy protocol," based on the "coroner's case number;" that is, "9600217" (RT 3820-3821; People's Exhibit 12 [CT 17513]; *see also* RT 3822-3823; and People's Exhibit 13 [CT 17513].)

The A.G. suggests that Dr. Rogers may have had personal knowledge as to the autopsy, noting that he had been present for part of the autopsy, and noting further that he "had some vague recollection of it" (citing to 18RT 3832). (RB 191.) However, when asked a specific question regarding the presence of a "forensic dentist," Dr. Rogers responded: " . . . I don't remember." (RT 3832.) Appellant, however, had no opportunity to cross-examine Dr. Herrmann about the autopsy, the autopsy protocol, or the DNA-collection process. (AOB 201-230.) *Bullcoming v. New Mexico* (2011) 564 U.S. ____, 131 S.Ct. 2705, 2716.

The A.G. relies upon this Court's decision in *People v. Dungo* (2013) 55 Cal.4th 608, as well as *People v. Edwards* (2013) 57 Cal.4th 658, to argue that the testimony of Dr. Rogers did not implicate the Confrontation Clause. (RB 197-200.) In *Dungo*, a prosecution expert, who had not conducted the autopsy of the victim, testified about the cause of death based upon the coroner's report. In determining whether the autopsy report was testimonial for the purposes of the Confrontation Clause, this Court focused on the degree of formality or solemnity and whether its primary purpose pertained to a criminal prosecution. (*Dungo*, 55 Cal.4th at 619.) This Court found that statements of objective fact in the report were "forensic" rather than being formal and solemn testimony. (*Id.* at 620.) It also found that criminal investigation was not the primary purpose of an autopsy report: "The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Id.* at 621, citing *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 324.) The Court concluded that the use of the autopsy report did not implicate the Confrontation Clause. (*Dungo* 55 Cal.4th at 621.)

In *Dungo*, this Court found it significant that the autopsy report was not introduced into evidence and that the testimony given never described the conclusions of the coroner as to the cause of the victim's death. (*Dungo* 55 Cal.4th at 618-619.) Here, however, the use of the autopsy protocol went beyond that at issue in *Dungo*. Dr. Rogers, the pathologist who testified, as noted above, stated the cause of death to be "[i]ncised wound to the neck" (RT 3827); that is, almost verbatim the cause set forth in the autopsy protocol, i.e., [i]ncised wound of the neck." (People's Exhibit 3, p. 1 [CT 17512])

Dr. Rogers' testimony made clear that he was relying upon the

findings and conclusions in the autopsy protocol as the basis for his testimony. In fact, Dr. Rogers expressly acknowledged his reliance on the autopsy protocol when he noted: "the autopsy protocol from which I've been testifying." (RT 3820.) Although the autopsy protocol itself was not introduced into evidence, there is no question that both its findings and conclusions were presented for the truth of the matter through Dr. Rogers' surrogate testimony. As used in this case, the Court should find that the report violated the Confrontation Clause.

As Justice Corrigan noted in her dissenting opinion in *Dungo*, the coroner is required by law to record all findings pertinent to establish the cause of death. (*Dungo*, 55 Cal.4th at 640 (dis. opn. of Corrigan, J .).) Under California law, a coroner is a "peace officer." (Cal. Pen. Code § 830.35(c); Cal. Govt. Code § 27491.) Here, the coroner was under a duty to determine the cause of death since this case involved a violent crime. (Gov. Code, § 27491.) "It is through the coroner and autopsy investigatory reports that the coroner 'inquire[s] into and determine[s] the circumstances, manner, and cause' of criminally related deaths. [*Citation omitted*] And officially inquiring into and determining the circumstances, manner and cause of a criminally related death is certainly part of law enforcement investigation." (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277.) In this context, the autopsy report is an investigatory record compiled for law enforcement purposes. (*Id.* at p. 1279.) The autopsy protocol used here was functionally equivalent to the documents at issue in *Bullcoming*, where the investigative report relating to a blood analysis was formalized as a signed document. (*See Bullcoming*, 131 S .Ct. at 2717.)

Moreover, appellant asks the Court to reconsider the emphasis it placed in *Dungo* on the formality or solemnity aspect of evidence. Justice

Thomas is alone among the Supreme Court justices who has placed such importance on this factor. As Justice Kagan noted in her dissenting opinion in *Williams v. Illinois* (2012) 567 U.S. ___, 132 S.Ct. 2221, 2275-2276, Justice Thomas's method of defining testimonial statements based on "indicia of solemnity" is unique and was eschewed by the majority in the Court's decision in *Bullcoming*, 131 S.Ct. at 2717, which found that a signed forensic report was sufficiently formal under the Confrontation Clause. "The difference in labeling – a 'certificate' in one case, a 'report of laboratory examination' in the other – is not of constitutional dimension." (*Williams*, 132 S .Ct. at 2276 (dis. opn. of Kagan, J .).) Any other approach would make it easy to evade the Confrontation Clause simply by not formalizing a report. (*See Davis v. Washington* (2006) 547 U.S. 813, 826.) Here, the autopsy protocol on the letterhead of the Alameda County Sheriff's Department, Coroner's Bureau, bearing the Sheriff's Department, Alameda County Badge, reflects the autopsy protocol being prepared at the Coroner's Bureau, comprises 21 pages, each page bearing the reference to "Sheriff-Coroner Alameda County," and bears the signature of Paul Herrmann, M.D. (People's Exhibit 3 [CT 17512].) Under these circumstances, this Court should find that the autopsy protocol is sufficiently formal to be testimonial for the purposes of the Confrontation Clause.

This Court's opinion in *Dungo* also found that criminal investigation was not the primary purpose for the autopsy report's description of the condition of the body. (*Dungo*, 55 Cal.4th at 621.) As discussed above, it is clear that the autopsy protocol prepared in this case was directly related to criminal investigation. (*Id.* at 645 (dis. opn. of Corrigan, J.) ["question is whether *this* autopsy report was made for the primary purpose of

establishing past facts for possible use in a criminal trial" *(italics in original)*].) The autopsy protocol was prepared as part of a criminal investigation. Sergeant James Taranto of the City of Alameda Police Department (RT 4145), the chief investigator in the case (RT 4170), was present during the autopsy. (RT 4184.) The Coroner's Bureau of the Alameda County Sheriff's Department had received the victim's body as part of its investigation. (*See* People's Exhibit 3, p. 1 [CT 17512] [autopsy protocol].) The autopsy protocol was copied to the "District Attorney" of Alameda County. (People's Exhibit 3, p. 1 [CT 17512].) Dr. Herrmann concluded in his report that the "cause of death" was "[i]ncised wound of the neck." (People's Exhibit 3, p. 1 [CT 17512] [autopsy protocol].) Officially inquiring into such matters was "certainly part of law enforcement investigation." (*Dixon v. Superior Court*, 170 Cal.App.4th at 1277.) Under these circumstances, Dr. Herrmann would have expected that his autopsy protocol would be used as part of the criminal investigation.

In *United States v. Ignasiak* (11th Cir. 2012) 667 F.3d 1217, the federal court panel considered autopsy reports that were not authored by the testifying pathologist. (*Id.* at 1229.) The court reviewed various factors, including the relationship between the coroner and law enforcement under Florida law. (*Id.* at 1231.) It also focused on the preparation of the particular reports at issue. (*Id.* at 1232-1233.) The panel concluded that although not all autopsy reports in Florida were prepared for use in criminal trials, the reports prepared in that case were testimonial. (*Id.* at 1232; *see also United States v. Moore* (D.C. Cir. 2011) 651 F.3d 30,73 [relationship of autopsy report to criminal investigation indicated that it would be used at a later trial]; *Dixon v. Superior Court, supra*, 170 Cal.App.4th at 1279 [coroner reports constituted an investigation of a death that was a suspected

homicide in which the prospect of criminal law enforcement proceedings was concrete and definite]; *United States v. James* (2d Cir. 2013) 712 F.3d 79, 98-99 [distinguishing between "routine" autopsies and those prepared as part of a criminal investigation].)

Moreover, there is no reason to distinguish between the objective facts of a report and the conclusions of an analyst. (*See People v. Dungo*, 55 Cal.4th at 619.) Autopsy reports are dependent upon the skill, methodology and judgment of the examiner and are "replete with the extensive presence and intervention of human hands and exercise of judgment" that can only be explored on cross-examination. (*United States v. Ignasiak*, 667 F.3d at 1233.) Thus, an opinion concurring with the original pathologist "cannot truly be regarded as independent in a way that is meaningful" under the Confrontation Clause. (*Id.* at 1234-1235; *see People v. Edwards* (2013) 57 Cal.4th 658, 768-775 [no distinction between "objective facts" and medical "opinions"] (conc. & dis. opn of Corrigan, J.).)

Here, Dr. Rogers similarly had to rely on the findings and conclusions of the autopsy protocol itself as reflected in his testimony (RT 3802 and 3820,[i.e., "the autopsy protocol from which I've been testifying."].) The Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming*, 131 S.Ct. at 2716.) Accordingly, this Court should find that the use of the autopsy evidence, particularly the autopsy protocol, in this case was error. For the reasons set forth in appellant's opening brief (AOB 227-230), the Confrontation Clause violations were not harmless under the *Chapman* standard, *Chapman v.*

California (1967) 386 U.S. 18, 24.

IV. THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS, AS WELL AS HIS CONCOMITANT RIGHTS UNDER THE STATE CONSTITUTION, BY FAILING TO PERFORM AN APPROPRIATE INQUIRY AS TO JUROR MISCONDUCT WITH RESPECT TO THE GUILT PHASE DELIBERATIONS.

The A.G. asserts that appellant's argument and reliance on Evidence Code §1150 has been "forfeited." (RB 227-228.) The A.G., in effect, argues that the specific provision of Evid. Code §1150 must be cited in order to preserve the error on that statutory basis. (RB 228.) Thus, according to the A.G., notwithstanding the extended discussion between defense counsel and the court regarding (1) potential jury misconduct relating to the two poems, (2) repeated objections by defense counsel to the court's inquiry process of asking each juror three questions, (3) several requests by defense counsel that the court conduct a fact based investigation, and (4) several requests for a mistrial by defense counsel on the grounds that the court was conducting an inadequate and improper inquiry regarding potential juror misconduct relating to the two poems (see AOB 231-243, and AOB 248-257), the A.G. asserts that appellant must specifically cite to Evid. Code §1150 in order to preserve the objection on that ground. (RB 227-228.) This assertion is without merit.

The A.G.'s specificity argument must again be rejected. (*See* discussion, *ante* at pp. 113-117.) This Court has rejected the A.G.'s specificity argument, as reflected in *People v. Scott* (1978) 21 Cal.3d 284, 290, which discussed the issue as follows:

> An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. [*citations omitted*] In a criminal case, the objection will be deemed preserved if,

> despite inadequate phrasing, the record shows that the court understood the issue presented. [*citations omitted*] The transcript of the hearing on the motion to compel the examination reveals that the trial court fully understood and considered the nature of the constitutional challenges which defendant now raises. Under the particular circumstances, we therefore hold defendant's objections on this ground were not waived by any lack of specificity.

(*See also*, *People v. Partida* (2005) 37 Cal.4th 428, 433-439 ("the requirement of a specific objection . . . must be interpreted reasonably, not formalistically").)

Here, Judge Delucchi clearly understood the nature of the statutory challenge that appellant now raises, i.e., Evid. Code §1150. This Court has made clear that the intent of Evid. Code §1150 is to "focus on the conduct of the jurors," not "the deliberations." (*People v. Allen* (2011) 53 Cal.4th 60, 72 fn. 10.) In response to a request by defense counsel, Mr. Horowitz, that the court conduct an inquiry to ascertain whether prior to submission of the case the jurors had been discussing "their reaction to the evidence, their feelings about the case in ways that might violate the jurors' obligation not to deliberate except in the presence of all 12 and after the case is submitted to them," Judge Delucchi responded: "[w]ell, I don't think I can really inquire as to that." (RT 5512.) Judge Delucchi stated further: "I don't think I can go into that reasoning or so forth." (RT 5512.) Defense counsel, Mr. Horowitz, responded ". . . I'm not asking you to go into that reasoning." (RT 5513.) Thus, Judge Delucchi was well aware of his obligation not to inquire into the jury's deliberative process, i.e., reasoning, and defense counsel made clear that he was not seeking to have the court inquire into the jury's deliberative or "reasoning" process. (RT 5513.)

Hence, both the court and defense counsel were speaking the language of Evid. Code §1150(a), i.e., reasoning, without citing or referencing the Evidence Code section itself (i.e., §1150).

The record reflects that defense counsel, Messrs. Giller and Horowitz, repeatedly requested that the court conduct an inquiry that would be consistent with the provisions of Evid. Code §1150(a) concerning a fact based investigation (RT 5519-5520); that is, an inquiry into the "circumstances" regarding the poems and the "factual basis." (RT 5521-5522.) These requests are consistent with obtaining evidence as to the statements, conduct, conditions, or events "likely to have influenced the verdict improperly." Evid. Code §1150(a). However, the trial judge repeatedly responded that he was going to follow its own procedure, i.e., "I'm going to do it my way." (RT 5521, *see also* RT 5524.) In this regard, the trial court denied the multiple requests for a further inquiry as well as the alternative motions for a mistrial (RT 5543-5545). (*See* AOB 255-257.) Thus, the colloquy between the court and defense counsel, objections by defense counsel, requests for further factual inquiry, and the motions for mistrial implicated the provisions of Evid. Code §1150(a) without citing or referencing the statutory provision itself (i.e., Evid. Code. §1150(a)). Under these circumstances, the claimed error predicated on Evid. Code §1150(a) was preserved.

In *People v. (Tharon) Hill* (1992) 3 Cal.App.4th 16, 33, fn.5, the court of appeal concluded that the prosecutor's objections implicating Evid. Code §1150(a) were preserved as follows:

> [W]e do not agree that the prosecutor failed to preserve his objections to those parts of the dissident jurors' declarations and testimony which are rendered inadmissible by Evidence

> Code section 1150, subdivision (a). At the new trial hearing the prosecutor repeatedly objected to the inadmissible testimony. Before submission, pursuant to the express invitation of the court, the prosecutor renewed his objections in argument with respect to both the declarations and the testimony. Immediately upon conclusion of argument the court denied the motion for new trial without indicating how it ruled on the prosecution's objections. At that juncture it would have been pointless for the prosecutor to press for a ruling on his objections. . . .

Hence, appellant's claimed error predicated on Evidence Code §1150(a) was preserved by virtue of the objections tendered, requests for further factual inquiry, and motions for a mistrial. (*See* AOB 231-243 and 248-257.)

Of note, the A.G. asserts that appellant predicates his Evidence Code section 1150(a) claim on the second and third questions posed by the court to the jury; i.e.: (2) did the poems in any way affect their decision in arriving at the guilty verdict; and (3) whether reading the poems had compromised their ability to be a fair juror as far as the penalty phase (RT 5517-5518 and RT 5520). (RB 213-214.) The A.G. asserts that "appellant cannot demonstrate that by asking the third question, he was prejudiced." (RB 228.) Appellant makes no such claim as to the third question, because the question of whether the juror could be "a fair juror" as to the penalty phase became moot when the jury was unable to reach a verdict as to the penalty phase and, hence, a mistrial was declared. (AOB 249.) Thus, appellant's Evidence Code section 1150(a) claim is predicated on the second question regarding whether the poems in any way affected their

decision in arriving at the guilty verdict. The inquiry reflected in question number 2 invaded the jury's deliberative process, and hence, violated Evidence Code section 1150.

For the reasons set forth in AOB at pages 231-259, the trial court's failure to conduct an appropriate and proper inquiry and, alternatively, grant the motion for mistrial, violated appellant's rights to a trial by a fair and impartial jury, due process, and a reliable determination of guilt and penalty. Consequently, both the guilt and penalty phase verdicts must be vacated.

V. THE TRIAL COURT DEPRIVED DEFENDANT OF A FAIR AND RELIABLE PENALTY DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND STATE LAW AND DEPRIVED DEFENDANT OF DUE PROCESS OF LAW UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS BY EXCLUDING DNA EVIDENCE OF LINGERING OR RESIDUAL DOUBT IN THE PENALTY RETRIAL.

The A.G. acknowledges that appellant "places great reliance" on *People v. Gay* (2008) 42 Cal.4th 1195 (*Gay*), but then seeks to relegate *Gay* to footnote status. (RB 248-249, fn. 61.) Moreover, the A.G. asserts that "[t]his Court has clarified or distinguished *Gay* on several occasions," citing to *People v. Streeter* (2012) 54 Cal.4th 205, *People v. Enraca* (2012) 53 Cal.4th 735, and *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254. (RB 249, fn. 61.) However, the cited decisions reflect a steadfast adherence to this Court's decision in *Gay*. This Court in *Gay* held that the exclusion of evidence concerning lingering or residual doubt that related to "the circumstances of the crime," constituted error. (*Gay*, 42 Cal.4th at 1217-1223.) This Court discussed the importance of lingering doubt evidence which may "'in some measure affect the nature of the punishment'" and, if excluded from a penalty retrial, noted that "'the second jury necessarily will deliberate in some ignorance of the total issue'" (quoting from *People v. Terry* (1964) 61 Cal.2d 137, at 146). (*Gay*, 42 Cal.4th at 1218-1219.) (*See* AOB 274-282.)

In *People v. Gonzales/Soliz* (cited in AOB at p. 277), this Court reiterated that this Court's holding in *Gay* concerning lingering doubt was "based on California's death penalty statute, which authorizes the admission of evidence of innocence at a penalty retrial." (*Gonzales*, 52 Cal.4th at 326 (citing *Gay*, 42 Cal.4th at 1220).) In *People v. Enraca* (cited in AOB at p.

277), this Court again reiterated that lingering doubt evidence is admissible "based on California's death penalty statute, which authorizes the admission of evidence of innocence at a penalty retrial." *Enraca*, 53 Cal.4th at 768 (citing *Gay*, 42 Cal.4th at 1220). However, in *People v. Streeter,* the defendant presented "extensive evidence of lingering doubt" regarding his state of mind which reflected on "the only disputed issue open to lingering doubt." (*Streeter*, 54 Cal.4th at 266.) This Court, by comparison, noted that *Gay* involved "error" in the exclusion of "lingering doubt evidence contesting defendant's guilt," which coupled with the "court's instruction to jury to disregard defense counsel's opening statement" regarding lingering doubt evidence and the "instruction on conclusiveness of prior guilt jury's findings," resulted in prejudice. (*Id.*) *Gay* is predicated on the exclusion of lingering doubt evidence. (*Gay*, 42 Cal.4th at 1217-1223.) (AOB 274-281.) Here, the DNA evidence of contamination and the presence of a third donor was excluded (AOB 266-270, and 283-284), and hence, this Court's decision in *Gay* has direct application.

For the reasons set forth in appellant's opening brief (AOB 260-304), this Court's decision in *People v. Gay* has direct application to this case and should be applied, and consequently, compels reversal of the penalty verdict.

VI. THE STATE'S RETRIAL OF THE PENALTY PHASE, FOLLOWING THE 7-4-1 DEADLOCK IN THE ORIGINAL PENALTY PHASE, WAS UNCONSTITUTIONAL

First, the A.G. asserts that appellant has forfeited his Eighth Amendment cruel and unusual punishment claim regarding retrial of the penalty phase following the first hung jury. (RB 255.) This assertion of forfeiture is without merit. The issue was raised and preserved in connection with appellant's motion entitled "Motion For New Trial On Guilt; Alternatively For Order Re Scope Of Trial Evidence," filed April 6, 1999.. (CT 1115-1118.) The motion sought an order for "a new unitary trial on guilt/innocence and penalty. . . ." (CT 1115.) The motion noted that "absent the right to fully relitigate guilt/innocence" that the penalty-phase retrial "would be unconstitutional per se, depriving" appellant his "Eighth Amendment right to a reliable and proportionate sentence. . . ." (CT 1115-1116.) Hence, appellant raised his Eighth Amendment claim regarding cruel and unusual punishment in said motion.

On June 2, 1999, the court held a hearing on the motion. (RT 6099) As to the requested order for a "new unitary trial on guilt/innocence and penalty," the court denied the requested order, noting that the motion "for a new trial on the guilt phase is denied." (RT 6103.) As discussed, *ante* at pp. 111-113, the court had granted Motion In Limine No. 17, by which the court agreed that each objection by defense counsel would include objections under both state and federal constitutions, including the Eighth Amendment. Of note, the motion for new trial was, in effect, an objection regarding a penalty retrial without the benefit of DNA evidence and hence, said motion necessarily includes the constitutional claim now asserted regarding the Eighth Amendment prohibition against cruel and unusual punishment. Moreover, a further specific objection is not needed to

preserve the claim. (*See ante*, pp. 113-117.) Furthermore, the granting of Motion In Limine No. 17, which incorporated appellant's state and federal constitutional objections into each and every objection, was continued into the second penalty phase trial. (*See ante*, pp. 111-113.) The court had noted that the incorporation of the court's prior rulings into the second penalty phase trial would obviate the need for defense counsel to be "[o]bjecting over and over and over again just to protect the record." (RT 8526.) Thus, both the initial granting of Motion In Limine No. 17 as to the first guilt phase and penalty phase trial, and the renewal of said ruling into the second penalty phase trial, had the effect of incorporating both the state and federal objections, including the Eighth Amendment, into the motion for a new trial. Consequently, the claimed error regarding the Eighth Amendment prohibition against cruel and unusual punishment has been preserved.

Second, the A.G. asserts that appellant's Eighth Amendment cruel and unusual punishment claim should be rejected, based on this Court's precedent of *People v. Taylor* (2010) 48 Cal.4th 574, 633-634, and *People v. Gonzales* (2011) 52 Ca1.4th 254, 311, noting that these cases have rejected the "national consensus" argument asserted by appellant regarding the evolving standards of decency as it pertains to a penalty retrial. (RB 255-256) The A.G. acknowledges Justice Ginsberg's dissent wherein she concluded that "[r]etrial is not the prevailing rule for capital penalty-phase proceedings." *Jones v. United States* (1999) 522 U.S. 373, 419 (Ginsberg, J., dissenting). Appellant acknowledges this Court's recent decision of *People v. Trinh* (2014) 59 Cal.4th 216, 237, where the Court noted that the California Legislature's authorization of a "penalty phase retrial" is "rare." However, this Court reiterated its rejection of the claim that the "retrial

statute" is "inconsistent with 'evolving standards of decency' [citation omitted] in violation of the Eighth Amendment to the federal Constitution." (*Id.* at 237-238.)

For the reasons set forth in appellant's opening brief, a national consensus has emerged that a capital case prosecutor should have only one opportunity to make his/her case for a death sentence. (AOB 308.) Consequently, in light of said national consensus, both the federal and state bans on cruel and/or unusual punishment prohibit a prosecutor from seeking to exact that penalty in a second penalty trial. (AOB 308.) The detailed data, set forth in AOB at 305-310, regarding those states that prohibit the death penalty and those that prohibit a penalty retrial, clearly reflects a national consensus against a penalty retrial as being beyond "the evolving standards of decency" as recognized by the Supreme Court in *Trop v. Dulles* (1958) 356 U.S. 86, 100-101, and hence, penalty retrials are in violation of the Eighth Amendment's proscription against cruel and unusual punishment. For these reasons, this issue should be revisited by this Court.

VII. THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED MR. NADEY OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND RENDERED HIS PENALTY PHASE RETRIAL FUNDAMENTALLY UNFAIR.

The A.G. asserts forfeiture, no misconduct, and no prejudice in response to appellant's claims of prosecutorial misconduct during closing argument in the second penalty phase trial. (RB 256-281.) These assertions have no merit.

A. The Claims of Prosecutorial Misconduct Have Not Been Forfeited.

As discussed, *ante* at pp. 111-113, Motion In Limine No. 17 incorporated into each and every objection appellant's state and federal constitutional objections. (CT 573-574.) Said constitutional objections based on Motion In Limine No. 17 included objections made regarding the admissibility of evidence, conduct of the trial, and conduct of the parties or the court, among others. (CT 573-574.) As noted above, Judge Delucchi granted the motion. (RT 395-396.)

Prior to the second penalty phase trial, Judge Delucchi deemed the order granting Motion In Limine No. 17 to be continued into the second penalty phase trial. That is, each objection by defense counsel included both the state and federal constitutional objections. At a pretrial hearing on January 13, 2000, Judge Delucchi noted that "all the motions that have been made in this trial as they relate to the penalty phase, made either by this team of attorneys [i.e., Mr. Giller and Mr. Selvin] or by Mr. Horowitz, be deemed renewed with the same rulings by the Court . . .." (RT 8526). The court noted further that this would preclude "[o]bjecting over and over and over again just to protect the record." (RT 8526.) Both counsel for the

defense and counsel for the prosecution agreed with this process. (RT 8526-8527.) The prosecutor, Mr. Anderson, stated: "I'll say sure, go ahead." (RT 8526.) Counsel for the defense, Mr. Selvin, concurred as well. (RT 8527.) Thus, just as in the guilt phase and first penalty phase trial, all objections made by defense counsel included both the state and federal constitutional objections which, as noted, related to the "conduct of the parties" (i.e., the prosecutor).

The A.G. concedes that appellant preserved his claim of misconduct regarding the prosecutor's use and argument as to the two Nazi books. (RB 258 and 276-278) (*see also* AOB 328-330). However, the A.G. asserts that the claim of misconduct regarding the prosecutor's disparaging remarks as to appellant have been forfeited. (RB 258 and RT 270-274.) The court's renewed granting of Motion In Limine No. 17 (CT 573-574) (RT 8526), which incorporated appellant's state and federal objections into each and every objection to preclude the necessity of defense counsel from "[o]bjecting over and over and over again just to protect the record," (RT 8526) and the obvious link between the use and argument of the two Nazi books for which there was an objection (AOB 328-330) and the disparaging remarks as to appellant for which there was no objection (AOB 332-333) forecloses the assertion of forfeiture. The link between the disparaging remarks, which repeatedly used the term "tattooed" (i.e., seven times) as to Nadey was a reference to People's Exhibit 45, a photograph depicting the runes or lightning bolts tattooed on the right hand of Nadey which, according to the prosecutor, reflected gang membership by virtue of the Nazi books. That is, Nadey was a member of a Nazi gang, i.e., the Aryan Brotherhood. (*See* AOB 328-333.) Thus, the link between the disparaging remarks, which repeatedly used the term "tattooed," and the Nazi books,

which reflects upon gang membership by virtue of the Nazi symbols of runes or lightning bolts contained therein, are intertwined, as they both go to the prosecutor's assertion that Nadey was a gang member; that is, a member of a Nazi gang, i.e., the Aryan Brotherhood. (AOB 328-333.) Here, the objection to the Nazi books is linked to the derogatory remarks, both reflecting upon gang membership. In light of the renewed granting of Motion In Limine No. 17, the objection to the Nazi books must be deemed an objection to the related disparaging remarks to further the court's stated purpose to preclude the necessity of defense counsel from "[o]bjecting over and over and over again just to protect the record." (RT 8526.)

Hence, the claim of misconduct as to the disparaging remarks was preserved.[10]

B. The Prosecutor's Disparaging Remarks and References to the Nazi Books Constitutes Misconduct.

1. Disparaging Remarks.

The A.G. asserts that the disparaging remarks did not constitute misconduct as the reference to the "lightning bolt tattoo" did not relate to Mr. Park's testimony. (RB 275; *see also* RB 258.) The reference to the fact that appellant was tattooed is a code word for gang membership. (AOB 332.) Moreover, the reference to Nadey being "tattooed" was undoubtedly

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Appellant has also asserted the exception that any further objection would have been futile and, moreover, said objection would have only reinforced the damaging force of the disparaging remarks. (AOB 332-333.) The A.G. disputes the assertion of futility (RB 273-274) but fails to establish that an objection and/or a request for an admonishment would have remedied the misconduct. This is particularly true given the court's comments to the jury that the runes or lightning bolts depicted in the Nazi books "goes to the issue of gang membership." (RT 9538-9539.)

a reference to People's Exhibit 45, which reflects runes or lightning bolts tattooed on his right hand. (AOB 332.) This is borne out by the closing argument of the prosecutor, who read extensively from his cross-examination of Mr. Park in addressing the issue of gang membership and the tattoos of the runes or lightning bolts on Nadey's right hand as depicted in People's Exhibit 45. (RT 9535-9539.) (*See* AOB 321-326.)

Contrary to the assertion of the A.G. (RB 275), the record reflects that in closing argument the prosecutor related the "lightning bolts" or "runes" tattooed on "the right hand of Mr. Nadey" to his challenge of Mr. Park (i.e., "this 31-year expert"). (RT 9538.) The prosecutor reiterated his reference to "SS runes" or "thunderbolts" to "the identical thing we have on Nadey's hands." (RT 9539.) In light of this, the prosecutor questioned the "expertise" of Mr. Park; that is, "I questioned his opinion." (RT 9539.) Thus, the prosecutor related the "runes" or "thunderbolts" tattooed on Nadey's right hand to gang membership and, in doing so, he challenged the expert opinion of Mr. Park that Nadey was not a gang member. (RT 9538-9539.) Consequently, there is a direct relationship between the tattoo of "lightning bolts" or "runes" and the prosecutor's challenge of the testimony by Mr. Park regarding gang membership.

2. <u>The Nazi Books</u>.

The A.G. first argues that the prosecutor did not either "explicitly or implicitly" argue the substantive import of the two Nazi books. (RB 276.) However, a review of the record clearly demonstrates that the prosecutor both explicitly and implicitly argued the substantive import of the Nazi books regarding the Nazi symbols as to the runes or lightning bolts reflecting on appellant Nadey's membership in a Nazi gang, i.e., the Aryan Brotherhood. (*See* AOB 312-317, and 319-328.) Further, the prosecutor

substantively argued the import of the Nazi books to impute and/or rebut the credibility of Mr. Park regarding his expert opinion as a prison consultant regarding his knowledge of gangs and conclusion that Mr. Nadey would be a good prisoner. (*See* AOB 312-317, and 319-328.) In effect, the prosecutor utilized the Nazi books to the extent that he became an unsworn expert witness for the purpose of either impeachment or rebuttal of Mr. Park regarding gang membership. (AOB 321-328.) Of note, the prosecutor's unsworn testimony in this regard bore the imprimatur of the court when the trial judge overruled the defense objection regarding the Nazi books and instructed the jury that "[i]t only goes to the issue of gang membership, Ladies and Gentlemen of the Jury." (RT 9539; *see also* AOB 329-330.) While the A.G. asserts that the prosecutor did not argue "facts" which were "outside" the record (RB 276), the Nazi books had not been admitted into evidence nor were they identified for the record. It was only through the efforts of Mr. Nadey's appellate counsel via "Appellant's Request To Complete And Correct The Record On Appeal" that the Nazi books, "The Gestapo and SS Manual" and the "SS Regalia," were made a part of the record on appeal. (*See* AOB 314, fn. 30; and AOB 315-316, fn. 31.)[11]

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The A.G. purports to raise a question as to whether the aforementioned books are, in fact, the books referenced by the prosecutor during closing argument, notwithstanding their addition to the record through the record correction process. (See RB 257 at fn. 66.) However, there were two record correction hearings before Judge Larry J. Goodman, the first on January 8, 2009, and the second on April 23, 2009. At the first hearing, D.D.A. Dolge acknowledged his consultation with the prosecutor, Mr. Anderson, regarding the books, which were identified as the "SS Regalia," and a book about the "Gestapo." (See Reporter's Transcript, January 8,

(continued...)

Second, the A.G. argues that the prosecutor used the Nazi books for purposes of illustration regarding the Nazi symbols, i.e., runes and thunderbolts, which, according to the A.G., is "akin" to the permissible tactic of "reading of a quotation from a book or other sources" during argument, citing to *People v. Riggs* (2008) 44 Cal.4th 248, 325. (RB 277.) Again, a review of the record reflects that the prosecutor did not utilize the two Nazi books for purposes of illustration, but for substantive purposes to establish that Mr. Nadey was a gang member and to further establish that Mr. Park was in error in his assessment that Mr. Nadey would be "a good prisoner." (RT 9114.) (*See* AOB 312-317, and 319-328.)

The A.G.'s reliance on *Riggs* and on *People v. Zapien* (1993) 4 Cal.4th 929, 992-993 is misplaced. (RB 276-277.) The A.G. correctly quotes from *Riggs*, that "the reading of a quotation from a book or other source, which is generally a permissible tactic during argument to the jury,"

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[11](...continued)
2009, 8:9-20.) Appellant's counsel noted that the books were explicitly referenced in closing argument. (*Id.* at 8:22-10:1.) The court directed appellant's counsel to "[g]o on Google, get on Amazon" to obtain the books. (*Id.* at 10:2-3.) Appellant's counsel did so. (*See* AOB 315, fn. 30, and AOB 315-316, fn. 31.) At the subsequent hearing on April 23, 2009, before Judge Goodman, appellant's counsel presented the two Nazi books, "SS Regalia, and "The Gestapo and SS Manual," to be the books referenced in closing argument. (*See* Reporter's Transcript, April 23, 2009 at 8:20-10:2.) There was no objection by D.D.A. Dolge to these books being included in the record on appeal. (*Id.*) Specifically, as to Exhibit U, the book entitled "The Gestapo and SS Manual," appellant's counsel made clear that this was the book, i.e., "I'm convinced that that is the book. It's Exhibit U." (*Id.* at 9:22-23.) The court ruled: "[t]hat's fine. That's the one that will bode as the exhibit," and further quipped, "[i]f it's the wrong book, it's not our problem." (*Id.* at 10:3-5.) The record correction process makes clear that the aforementioned Nazi books are, in fact, the books referenced by the prosecutor in closing argument.

but this reflects on the proposition that such a tactic may be utilized for purposes of illustration, not for substantive purposes. This is clear from the fact that, in *Riggs*, this Court was addressing the question of whether the prosecutor's argument "was based upon facts not in evidence at the trial." (*Riggs*, 44 Cal.4th at 325.) On the very next page, this Court concluded that the use of the "chart" was "improper" because, in part, it "offered facts not in evidence." (*Id.* at 326.) Moreover, this Court's citation in *Riggs* (*id.* at 325) to *People v. Vieira* (2005) 35 Cal.4th 264, 298, which involved a "quotation from Lord Denning," and *People v. Hines* (1997) 15 Cal.4th 997, 1063, which involved the reading of a "passage from an unidentified book," both reflect on the propriety of utilizing the quotation and passage for purposes of illustration, not for substantive purposes as the prosecutor did in this instance. Here, the prosecutor used the two Nazi books as a vehicle to establish gang membership by Nadey, and further sought to repudiate the expert testimony of Mr. Park. The citation to *Zapien* reflects the same, where the reference to an editorial cartoon was for purposes of illustration relative to the prosecutor's argument, but was not utilized for substantive purposes. (*Zapien*, 4 Cal.4th at 992-993.)

Finally, the A.G. argues that prosecutors are entitled to state matters that are not in evidence but which are a matter of common knowledge. (RB 277.) While this is generally true, regarding argument involving a matter for purposes of illustration (*People v. Loker* (2008) 44 Cal.4th 691, 742), it does not permit the prosecutor to "refer to facts beyond the evidence, but to a viewpoint that [*is*] a matter of common experience." Here, when the prosecutor was arguing the import of the two Nazi books regarding gang membership, as reflected in the Nazi symbols of the SS runes and/or thunderbolts, he was referring to facts beyond the evidence, not to a matter

reflecting a viewpoint of common experience.

Of note, the A.G. admits that the purpose of the Nazi books was to, in effect, cross-examine Mr. Park as an expert witness, as reflected in the following:

> [T]he reference to the books was a part of the prosecutor's attack on Mr. Park's knowledge or lack thereof, of the runes tattooed on appellant's right hand, which was a valid basis for challenging his expert opinions. " '[I]t is well settled that the scope of cross-examination of an expert witness is especially broad; a prosecutor may bring in facts beyond those introduced on direct examination in order to explore the grounds and reliability of the expert's opinion. [Citation.]' [Citation.]" (*Loker, supra*, 44 Ca1.4th at p. 739.) . . .

(RB 277-278.) While the citation to *Loker* reflects a correct statement of law concerning the scope of cross-examination, the problem here is that we are not dealing with cross-examination, but closing argument. While it may be permissible for a prosecutor to bring in facts beyond those introduced on direct examination to challenge an expert on cross-examination, it is not permissible after the close of evidence for the prosecutor to seek to impugn the integrity or knowledge of the expert in closing argument by reference to matters outside the record, such as the two Nazi books.

C. The Prosecutorial Misconduct Was Prejudicial.

The A.G. asserts that any misconduct by the prosecutor during the rebuttal penalty argument was harmless. (RB 278-281.) First, the A.G. asserts that there was "substantial new aggravating and rebuttal evidence" in the second penalty trial that was not presented in the first trial. (RB 278.) Hence, according to the A.G., this "new aggravating" evidence as well as

additional rebuttal evidence was the cause of the death verdict in the second penalty trial, not the prosecutor's argument, as contrasted with the first penalty trial where the jury hung 7-4-1. (*Id.*) (*See also*, AOB 260-261.) However, with the exception of the DNA evidence, the evidence presented in the first trial and the second trial was essentially the same. (*See generally* AOB 284-295; *see specifically* AOB 284-285, noting: "a comparison of the evidence presented in the first penalty trial [*citations omitted*] as contrasted with the evidence presented in the second penalty trial [*citations omitted*] reflects that essentially the same evidence was presented in both penalty determinations, excepting the evidence of lingering doubt [*i.e., DNA*].") Of note, eight criminal acts were presented in the first penalty trial, and these same eight criminal acts were presented in the second trial, plus two additional criminal acts; to wit, the possession of a billy (RT 8870-8876) and the possession of a weapon while confined in the county jail (RT 8728-8733). (AOB 288.) Here, the so-called "substantial new aggravating" evidence was relegated to two additional criminal acts involving possession of a weapon, one of a billy and the other of a weapon while confined to the county jail. Neither of these criminal acts of possession of a weapon explain the difference in the result from the first jury trial where the jury hung at 7-4-1, and the second jury trial which resulted in the imposition of a death verdict.

Second, the A.G. asserts that the court instructed the jury that they could consider the Nazi books "only as it bore on Mr. Park's credibility and expertise," and further, "could not consider" them "for the purpose of showing that appellant was a gang member." (RB 280.) The A.G. misrepresents the court's instruction regarding the Nazi books; that is, they could not be used for purposes of showing that appellant was a gang

member. In fact, the court instructed the jury that the Nazi books could be used as substantive evidence for the purpose of establishing that Nadey was a gang member when the court stated: "It only goes to the issue of gang membership, Ladies and Gentlemen of the Jury." (RT 9539; *see also* AOB 314-315, 324-325, and 329-330.) Moreover, as noted above, the prosecutor utilized the Nazi books as substantive evidence to establish as fact that Nadey was a gang member; that is, a member of a Nazi gang, i.e., the Aryan Brotherhood. (AOB 321-330.)

Accordingly, the assertion by the A.G., that any misconduct was harmless, is without merit.

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

The issues raised Argument VIII of appellant's opening brief are adequately briefed, consistent with this Court's decision in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304. (*See* AOB 336.) For the reasons set forth in appellant's opening brief at pages 336-346, appellant Nadey respectfully requests that the Court reconsider its prior rulings on these issues. One issue, however, is now stronger.

Appellant has asserted the death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment, while acknowledging this Court's precedent rejecting such a claim. (AOB 345.) The A.G. contends that appellant has offered nothing to distinguish this case from this Court's precedent, i.e., *People v. DeHoyos* (2013) 57 Cal. 4th 79, 151, rejecting such a claim or to support the reconsideration of this Court's precedent in that regard. (AOB 288.)

A recent decision by the United States District Court for the Central District of California, *Jones v. Chappell*, No. CV-09-2158-CJC (C.D. Cal., July 16, 2014) 2014 WL 3567365 [2014 U.S. Dist. LEXIS 97254] has determined that California's death penalty system is unconstitutional, in violation of the Eighth Amendment to the United States Constitution, as a consequence of systemic delay and dysfunction, which has resulted in an arbitrary system that serves no penological purpose. This decision has been appealed to the United States Court of Appeals for the Ninth Circuit (Ernest Dewayne Jones, Petitioner/Appellee v. Kevin Chappell, Respondent/Appellant, 9th Cir. No. 14-56737). Appellant submits that this Court should reconsider its precedent that the death penalty does not violate

the Eighth Amendment prohibition against cruel and unusual punishment for the reasons noted by U.S. District Judge Carney in his decision and, of course, any reasons cited by the Ninth Circuit in the event that it upholds the decision by Judge Carney that the California death penalty system is unconstitutional in violation of the Eighth Amendment.

IX. CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED

Respondent answers by contending that there are no errors, and that if there are, none of them matter. (RB 289.) This is nonresponsive. Appellant Nadey's point here is that should this Court find more than one error, the impact of all errors should be considered cumulatively, and not one by one. (AOB 347-350.)

CONCLUSION

For the reasons stated in this reply brief and his opening brief, Appellant Nadey respectfully requests this Court to reverse the judgment in its entirety and grant him a new trial.

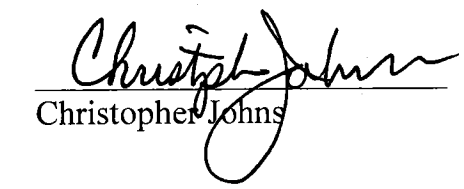
Dated: January 21, 2015

Respectfully submitted,

Christopher Johns
Attorney for Appellant
Giles Albert Nadey, Jr.

WORD COUNT

I declare that the number of words in Appellant's Reply Brief is 47,588. The font is Times New Roman and the font size is 13 point.



Christopher Johns

PROOF OF SERVICE BY MAIL

I, Denise M Brown, declare as follows:

I am over the age of 18 years, employed in the County of Marin and not a party to the within action; my business address is 1010 "B" Street, Suite 350, San Rafael, California 94901.

On January 21, 2015, I served the: APPELLANT'S REPLY BRIEF on the below parties in this action by placing true copies thereof in envelopes, addressed as shown, said envelopes were then sealed and deposited in the United States mail at San Rafael, California, with postage fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 21st day of January, 2015, at San Rafael, California.

Denise M Brown