IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **vs.** **RICHARD LEON,** **Defendant and Appellant.**	**CRIM. No. S056766** **Death Penalty Case** **Los Angeles** **County Superior** **No. PA012903**

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

The Honorable Judge Ronald S. Coen

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PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S056766
v.	)	Los Angeles County Superior Court
RICHARD LEON,	)	No. PA012903
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

In this reply brief, appellant, Richard Leon, addresses specific contentions made by respondent, but does not reply to arguments that are adequately addressed in his opening brief. In particular, this reply does not address Arguments IX, XII, XIII and XIV. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Mr. Leon (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. The arguments in this reply brief are numbered to correspond to the argument numbers in appellant's opening brief. [1]

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[1] All statutory references are to the Penal Code unless stated otherwise. As in the opening brief, citations to the record are abbreviated as follows: "CT" is the clerk's transcript on appeal, and "SCT" is the supplemental clerk's transcript on appeal. The reporter's transcript for the trial is abbreviated "RT." For each citation, the volume number precedes, and the page number follows, e.g. 1 CT 1-3, is the first volume to the

(continued...)

I.

THE TRIAL JUDGE ERRED IN REJECTING THE DEFENSE REQUEST THAT PROSPECTIVE JURORS BE ASKED WHETHER THEY WOULD ALWAYS VOTE FOR DEATH IF APPELLANT WAS CONVICTED OF MULTIPLE MURDERS AND WHETHER THEY WOULD CONSIDER MITIGATING EVIDENCE TO BE AN "ABUSE EXCUSE"

In his opening brief, Mr. Leon argued generally that the jury selection process at his trial deprived him of a fair and impartial jury in violation of his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the federal constitution. (AOB at 58-88.) He specifically argued that the trial judge erred in denying his requests for additional questions in the juror questionnaire and refusing to allow counsel to ask follow-up questions or even to ask follow-up questions himself. Appellant's opening brief ("AOB") also argued that the trial judge was improperly motivated by a desire to shorten the jury selection process and by a bias in his rulings regarding challenges for cause made by the two parties. (AOB at 59-60, 72-73.)

Respondent's brief rejects all these claims.

A. Respondent's Arguments Cannot Prevail

Respondent argues that appellant cannot rely on this Court's decision in *People v. Cash* (2002) 28 Cal.4th 703 because in this case

> jurors were asked the precise questions prohibited by the trial court in *Cash*. Specifically, jurors were asked about their views concerning their ability to perform their function in cases involving special circumstances (which in this case included robbery-murder and

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[1] (...continued)
clerk's transcript at pages 1-3.

> multiple murders), and specifically asked whether there were any circumstances under which a prospective juror would automatically impose the death penalty. (See Question 58(d).)

(RB at 68.)

Respondent misrepresents the record. As was true in the *Cash* case, the issue raised by defense counsel was the refusal of the trial judge to ask specific questions to the prospective jurors about facts in the case that might make it impossible for a prospective juror to vote for life without the possibility of parole at the penalty phase trial. In *Cash, supra*, 28 Cal.4th at p. 719, the question proposed by the defense and rejected by the trial court was whether there were "any particular crimes" or "any facts" that would cause a prospective juror to automatically vote for the death penalty.

Respondent's claim that subsection (d) of question 58 of the juror questionnaire in this case ". . . asked the precise questions prohibited by the trial court in *Cash*" (RB at 68) is not true. In *Cash*, the defense sought to determine whether a prospective juror would automatically vote for death when he or she learned that Mr. Cash, when he was a juvenile, had killed his grandparents. By contrast, question 58(d)[2] asked whether the

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[2] Question 58(d) stated:

> Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of life imprisonment without the possibility of parole and automatically vote for a penalty of death, without considering any of the evidence, or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant.

(continued...)

prospective juror generally would automatically refuse to vote for a sentence of life without the possibility of parole and automatically vote for the death penalty. Defense counsel in this case asked the trial judge to ask a more specific question; that is, whether the fact that the case involved more than one murder would lead them to vote automatically for the death penalty. The general nature of question 58(d) simply did not provide prospective jurors with the information necessary to determine their ability to remain open to both penalty options.

In this case, the proposed question[3] specifically asked if the jury

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[2] (...continued)
(Emphasis in the original.)
(1 SCT 43-44.)

[3] The question proposed by the defense and rejected by the trial court stated:

> 55-1. Assume, for the purpose of the following questions only, that a defendant has been found guilty of two counts of murder in the first degree, and that the special circumstance of multiple murder and/or the special circumstance of robbery murder has been found to be true.
> At the penalty phase, do you feel so strongly about the death penalty that regardless of the evidence presented by the defendant and the prosecution in the guilt and penalty phases of the trial:
> (a) You would <u>always</u> vote <u>against</u> the death penalty?
> ___Yes
> ___ No
> Please explain_____
>
> (b) You would <u>always</u> vote <u>in favor</u> of the death penalty?
> ___Yes
> ___No
> Please explain_____
> (8 CT 1867.)

were to be convict Mr. Leon of two counts of murder and find the special circumstance of multiple murder true, would that cause prospective jurors to automatically vote for or against the death penalty. The trial judge rejected the question, stating only that he would inform the prospective jurors about the charges in the case before they filled out the questionnaire.

What respondent's brief fails to address is the fact that the jurors in this case were not asked whether the fact that the case involved two murders and a multiple murder special circumstance allegation would lead them to automatically vote for death. The only time the fact that the case involved two murders came up before the prospective jurors completed their questionnaires or underwent voir dire was when the trial judge stated very briefly in his opening remarks before jury selection that appellant was charged with two murders and the special circumstance of multiple murder.[4] Prospective jurors were never instructed that their answers to any questions on the questionnaires should take into account the specific charges in this case.

Respondent also relies upon the decision in *People v. Carasi* (2008) 44 Cal.4th 1263. (RB at 69.) However, a key difference between the instant case and the *Carasi* case is that during the voir dire in the *Casari* case "the oral examination focused more specifically on premeditated

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[4] During the jury selection in this case, the only statements referring to the multiple murders alleged in this case were the following:

> Defendant is charged in two counts with a violation of Penal Code section 187 which is known as murder. Special circumstances are alleged. That is that the murders were committed in the course of a robbery and that there are multiple murders.

(13 RT 224-225.)

murder, multiple murder, and murder involving financial gain and lying in wait." (*Id.*, 44 Cal.4th at pp. 1284-1285.) By contrast, in this case, there were no questions, either in the juror questionnaire or during the very limited voir dire, that focused on the facts in Mr. Leon's case; that is, the two charges of murder and a special circumstance allegation of multiple murder as well as a special circumstance allegation of robbery murder.

In the *Carasi* decision, this Court observed:

> . . . a defendant cannot insist upon questions that are " 'so specific' " that they expose jurors to the facts of the case, or tempt them to prejudge penalty based on the aggravating and mitigating evidence. Nevertheless, voir dire cannot be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair their performance under *Witt, supra*, 469 U.S. 412, 424. Rules have developed to balance the competing interests. Thus, on the one hand, the trial court cannot bar questioning on any fact present in the case "that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances." But the court"s refusal to allow inquiry into such facts is improper only if it is "categorical " and denies all "opportunity" to ascertain juror views about these facts.

(*Id.*, 44 Cal.4th at p. 1286 [citations omitted].)

The voir dire which occurred in the *Carasi* case, as described in this Court's opinion, provided the opportunity to question the prospective jurors about the multiple murders involved in that case; no such opportunity was afforded appellant. The *Carasi* opinion described the process in that case as follows: "The court urged counsel to suggest additional or clarifying questions. The court asked many of counsel's questions, and resolved excusals for cause." (*Id.* at p. 1280.) Unlike the situation in *Carasi*, the jury selection process in appellant's case–both the jury questionnaire and the

voir dire – denied all opportunity to ascertain prospective juror views about the facts of this case, including the fact it involved two murders. And certainly, that a capital case charges more than one murder is a fact that could cause some jurors to vote for the death penalty, regardless of mitigation evidence presented at trial.

Similarly, in *People v. Vieira* (2005) 35 Cal.4th 264, another case cited in respondent's brief, the death qualification process differed significantly from that found in this case. This Court rejected Vieira's claim that the trial court erred in failing to include on the juror questionnaire the question, "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" However, the Court noted that the record in *Vieira* showed that the defense was not prohibited from asking questions on voir dire about the multiple murders in the case. The *Vieira* opinion states:

> Although asking the multiple-murder question in the jury questionnaire would not have been improper, *refusal to include the question was not error so long as there was an opportunity to ask the question during voir dire.* Because defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire, and the trial court was given no opportunity to rule on the propriety of that inquiry, we conclude defendant cannot claim error. [citations omitted]

(*Id.*, 35 Cal. 4th at pp. 352-353; emphasis added.)

By contrast, in this case, after the trial judge denied defense counsel's pre-trial request that the juror questionnaire include a question about whether if defendant were convicted of two murders and a special circumstance of multiple murder, it would lead a prospective juror to vote

automatically for the death sentence, counsel asked the court to voir dire prospective jurors about this issue in a motion entitled Defendant's Proposed Voir Dire Questions. At a hearing on this motion on May 15, 1996, defense counsel argued:

> How can we get a fair and impartial jury if we have people sitting on the jury who are going to say, if I believe beyond a reasonable doubt that he killed two people, I will automatically give him the death penalty? I will not listen to mitigation.

(14 RT 360-361.)

Respondent does not address the fact brought up at trial and again argued in appellant's opening brief that the answers actually given by prospective jurors about their attitudes about the death penalty undercut any claim that the questionnaire had questions which would effectively identify "automatic death penalty ("ADP")" prospective jurors. Trial counsel pointed out that, based on the answers of 108 prospective jurors to the death qualification questions on the questionnaires, none would automatically vote for death. (14 RT 356.) The trial judge countered by stating that his review of the answers on the jury questionnaire revealed *one* ADP prospective juror. (14 RT 356.) Therefore, even according to the trial judge, based on the juror questionnaire, which was the primary tool used in jury selection in this case, less than one percent of the prospective jurors called in Mr. Leon's case would automatically vote for death after having convicted appellant of first degree murder and a special circumstance.

As noted in the opening brief, several studies concerning the attitudes of those who actually had been chosen to sit on a capital jury showed much higher percentages of ADP jurors. (AOB at 66-67, n. 26.) Even if one were to ignore the studies cited in the opening brief, given the

overwhelming public support for the death penalty in the mid-1990s,[5] it defies common sense that less than one percent of any group of randomly selected prospective jurors called to jury service would qualify as ADP jurors. Therefore, as trial counsel argued, it is clear that the death qualification questions both on the juror questionnaire and in voir dire were not effective in uncovering the real attitudes about the death penalty of the prospective jurors in Mr. Leon's case.

This was particularly true in this case because the four rote voir dire questions asked of the few prospective jurors actually orally examined were very similar to the questions about the death penalty on the questionnaire. The questions on the questionnaire regarding the death penalty were as follows:

> 56. What are GENERAL FEELINGS regarding the death penalty?
>
> 57. What are your feelings on the following specific questions:
> (a) Do you feel that the death penalty is used too often? Too seldomly? Please explain:
> (b) Do you belong to any group(s) that advocate(s) the increased use or the abolition of the death penalty? (Yes? No?)
>
> 1. What group(s)?
> 2. Do you share the views of this group(s)?
> 3. How strongly do you hold these views?
>
> (c) Is you view in answers (a) and (b) based on religious consideration (Yes? No?)

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[5] During the mid-1990s, when the Pew Research Center first surveyed on this issue, support for the death penalty was at a historic high point. In 1996, 78% favored capital punishment for people convicted of murder. See www.people-press.org/2012/01/06/ continued-majority-support-for-death-penalty. Appellant was tried in 1996.

58. In a death penalty case, there may be two separate phases or trials, one on the issue of guilt and the other on penalty. The first phase is the "guilt" phase, where the jury decides on the issue of guilty as to the charges against the defendant and the truth of any alleged special circumstance(s). The second phase is called the "penalty" phase. If, and only if, in the guilt phase, the jury finds the defendant guilty of first degree murder (which will be defined at trial) and further finds any alleged special circumstances to be true, then and only then would there be a second phase or trial in which the same jury would determine whether the penalty would be death or life imprisonment without possibility of parole. (A special circumstance is an alleged description which relates to the charged murder, upon which the jury is to make a finding. For example, was the murder committed in the commission of certain felonies such as robbery, rape, or other enumerated offenses, or was the murder an intentional killing of a peace officer in the course of the performance of duty, a previous conviction of murder, etc.?)
The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating facts and mitigating factors (bad and good things) that relate to the facts of the crime and the background and character of the defendant, including a consideration of mercy. The weighing of these factors is not quantitative but qualitative, in which the jury, in order to fix the penalty of death, must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors, that death is warranted instead of life imprisonment without parole.
(a) Assume for the sake of this question only that, in the guilt phase, the prosecution has proved first degree murder beyond a reasonable doubt and you believe the defendant is guilty of first degree murder. Would you, because of any views that you may have concerning capital punishment, refuse to find the defendant guilt of first degree murder, even though you personally believed the defendant to be guilty of first degree murder, just to prevent the penalty phase from taking place?
(b) Assume for the sake of this question only that, in the guilt phase, the prosecution has proven to be true one or more special circumstances, beyond a reasonable doubt and you

personally believe the special circumstance to be true. Would you, because of any views that you may have concerning capital punishment, refuse to find the special circumstance(s) true, even though you personally believe it (them) to be true, just to prevent the penalty phase from taking place?
(c) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence, or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?
(d) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of for a penalty of life imprisonment without the possibility of parole and automatically vote for the penalty of death, without considering any of the evidence or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?
(e) If your answer to either question (c) or question (d) was "yes," would you change your answer, if you are instructed and ordered by the court that you must consider and weigh the evidence and the above mentioned aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of penalty?
(f) Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?

The four voir dire questions asked by the trial judge were as

follows:

> Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for murder in the first degree merely to avoid reaching the death penalty issue?
>
> Do you have such conscientious objections to the death penalty thatregardless of the evidence in this case, you would automatically vote for a verdict of not true as to any special circumstance merely to avoid the death penalty issue?
>
> > Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for death and never vote for life imprisonment without the possibility of parole?
>
> Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for the verdict of death?

(14 RT 385-387.)

These questions were so similar to the ones on the juror questionnaire that the voir dire in this case was meaningless since the questions were evidently not designed to go beyond the inquiry made by the few questions about the death penalty on the questionnaire. In fact, the questionnaire actually contained two questions (questions 58 (e) and (f), quoted *ante*) that went to the heart of the issue most relevant to death qualification under *Wainwright v. Witt* (1985) 469 U.S. 412, 424-426, whether a prospective juror could aside his or her views about capital punishment and make the penalty determination based on all of the

case did not cover this important issue.

Moreover, all of the questions about capital punishment, except question 57 on the questionnaire, posed to the prospective jurors in this case were close-ended; that is, they elicited only yes or no answers. Such questions are not as effective in uncovering the true views and feelings of prospective jurors as open-ended questions. In discussing closed-end questions, this Court observed in *People v. Crowe* (1973) 8 Cal. 3d 815:

> . . . questions to which there is a 'right' and a 'wrong' answer may be less likely to reveal such bias than more open-ended questions. See generally Blauner, *Sociology in the Courtroom: The Search for White Racism in the Voir Dire in Minimizing Racism in Jury Trials* (Ginger ed. 1969) pages 43—71; Broeder, *Voir Dire Examinations: An Empirical Study* (1965) 38 So.Cal.L.Rev. 503.

(*Id.* at p. 831.)

As the United States Supreme Court noted in *Dennis v. United States* (1950) 339 U.S. 162, "preservation of the opportunity to prove actual bias is a guarantee of defendant's right to an impartial jury." (*Id.* at pp. 171-172.) Appellant's constitutional right to an impartial jury meant that he was entitled to ". . .an adequate voir dire to identify unqualified jurors." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729.) Moreover, as the *Morgan* decision stated, appellant was entitled ". . . upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, has predetermined the terminating issue of his trial, that being whether to impose the death penalty." (*Id.* at p. 736.) The death-qualification questions in this case were so inadequate to the task of uncovering prospective jurors' attitudes about the death penalty that they call to mind the Supreme Court's caution in *Wainwright v. Witt* (1985) 469 U.S. 412, 424: "determinations of

juror bias cannot be reduced to question-and-answer sessions which obtain results in the *manner of a catechism*." (emphasis added; see also *Morford v. United States* (1950) 339 U.S. 258, 259 [reversing conviction where voir dire was unduly restricted].) The four pattern questions during voir dire in this case did resemble a catechism.

Since Mr. Leon filed the opening brief in this case, this Court decided *People v. Valdez* (2012) 55 Cal.4th 82, which dealt with the issue of when, in a case involving more than one murder, a trial judge should allow certain questions to prospective jurors concerning how those facts will affect their ability to be impartial jurors in the penalty phase of a capital case.

This Court rejected Valdez's claim that the trial judge had erred in restricting voir dire concerning how the fact that the case involved five charges of murder would affect prospective jurors' ability to decide the issue of penalty fairly. The Court, however, stated:

> . . . a trial court would err in categorically prohibiting a defendant from asking prospective jurors whether they could vote for life without parole for a defendant convicted of 'multiple murder.'

(*People v. Valdez, supra*, 55 Cal.4th at p. 165.)

The Court rejected Valdez's claim because the trial judge did not so curtail the voir dire. In fact, in the *Valdez* case, the juror questionnaire specifically asked whether in a case involving multiple murder, a juror would always vote for death, never impose the death penalty or base their decision on the evidence presented at both the guilt and penalty phases. (*Ibid.*) In addition to this question, before distributing the juror questionnaire, the judge in the *Valdez* case told the prospective jurors that

questionnaire, the judge in the *Valdez* case told the prospective jurors that the death penalty was at issue because there was a multiple murder special circumstance allegation. (*Ibid.*) Even more importantly, in questioning each prospective juror during voir dire, the trial judge in *Valdez* asked "whether, in a penalty phase where the special circumstance is more than one murder, he or she would always vote to impose the death penalty no matter what the evidence was, or would be open to returning either the death penalty or life without parole depending on what the evidence was." (*Id.* at p. 166.) Moreover, in the *Valdez* case, unlike the instant case, both the defense attorney and the prosecutor were allowed to question prospective jurors about what effect the fact that the case involved multiple murders would have on their deliberations. (*Id.* at p. 166, fn. 43.)

Thus, it is clear that in *Valdez,* where this Court rejected the appellant's claim that the trial judge had erroneously restricted voir dire about multiple murder, the death qualification process was very different than the one in this case. Here there were no questions to the prospective jurors about whether the fact the case involved two murder charges and a multiple murder special circumstance allegation would affect their ability to render an impartial penalty phase decision. Also, in this case the trial judge did not allow the attorneys to do any of the questioning during voir dire, and he refused all requests by defense counsel that he ask follow-up questions to prospective jurors which the prosecutor challenged for cause because of their views about the death penalty. In fact, the record shows that the trial judge never asked any follow-up questions, despite the defense counsel's requests. (14 RT 387-389, 14 RT 434, 14 RT 549.)

B. The Prejudice Resulting From the Failure to Include Appropriate Questions on the Juror Questionnaire and in Voir Dire

Respondent argues that Mr. Leon cannot prove that he was prejudiced by any restriction of voir dire in this case, and that any error in restricting death-qualification voir dire does not automatically require reversal of a judgement of death. (RB at 69.)

This Court has held that a defendant who establishes that a juror who eventually served was biased against him is entitled to a reversal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.) However, in *People v. Cash, supra,* this Court recognized that it may not be possible to make such a showing. In *Cash*, as in the present case, the trial court's ruling prevented the defense from examining prospective jurors about whether they believed that the death penalty should be imposed invariably and automatically when the defendant had committed one or more murders other than the murder charged in the case. Like Mr. Leon, the defendant in *Cash* could not identify a particular biased juror because he had been denied adequate voir dire about convictions for multiple murders, which this Court recognized as a possibly determinative fact for a juror in *Cash*.[6] (*People v. Cash, supra,* 28 Cal.4th at pp. 722-723.) The *Cash* decision found that reversal of the judgment of death was the appropriate remedy, stating:

> Because the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the murder charged in this case, it

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[6] As explained previously, the issue in the *Cash* case was not a charge of two murders and a special circumstance allegation of multiple murders. The question in that case was whether prospective jurors could consider a life sentence once they learned that the defendant had killed his grandparents when he was a juvenile.

> cannot be dismissed as harmless. Thus, we must reverse defendant's judgment of death.

(*Id.* at p. 723, citing *Morgan v. Illinois, supra,* 504 U.S. at p. 739.)

Similarly, in this case, it is equally impossible for the Court to determine from the record whether any of the individuals seated as jurors would not have been able to consider a sentence of life without parole because the case involved two murders and a multiple murder special circumstance. As a result, as found in *People v. Cash, supra*, the error cannot be found harmless, and Mr. Leon's sentence of death must be reversed.

C. The Trial Judge Erred in Refusing Appellant's Request for a Question About "Abuse Excuse" Evidence

In his opening brief, Mr. Leon argued that the trial judge erred in refusing to include the following question in the juror questionnaire:

> Do you feel any attempt by the defense to put on mitigation evidence of the defendant's background and character is an "abuse excuse," and should be ignored?

(8 CT 1868.)

As defense counsel argued pre-trial, this question was important because Mr. Leon's trial came on the heels of the much publicized murder trial of the Menendez brothers in Los Angeles County. The theory of the defense in that case was that the defendants had killed their parents because they had been abused by them. Critics of this defense pejoratively described it as the "abuse excuse." Defense counsel in this case was rightfully worried that appellant's mitigation case in the penalty phase of his trial would be prejudiced by the media fixation in Los Angeles on the "abuse excuse."

As defense counsel observed:

> We are living in a climate in which a major trial –the Mendez [sic] case has been going on for several years, just recently concluded, the terminology of abuse excuse as well as the content, though pattern, is one that is common and current in in our society. Listen (sic) to any talk radio in this community will reveal that there are any number of people who feel that it makes absolutely no difference what a defendant's background or character is, that they wouldn't consider any of those factors, that given the circumstances of a crime they feel that although those things should be ignored and they just couldn't consider such evidence."

(1-10 RT 141A.)

The trial judge denied the request to include this proposed question on the questionnaire, citing the following language in Code of Civil Procedure section 223, "examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." (1-10 RT 140A.) The trial judge's ruling was in error. First, the proposed question about the "abuse excuse" was relevant to possible challenges for cause since it went to the crucial issue of whether a prospective juror would be able to listen to and consider mitigation evidence at the penalty phase of the trial. If a prospective juror could not consider mitigating evidence because he or she believed it was merely an "abuse excuse" that would violate appellant's constitutional rights to a fair trial and to a reliable sentencing verdict in a capital case and would be a basis for a challenge for cause.

Moreover, this Court has found that a lack of adequate voir dire impairs a defendant's right to exercise peremptory challenges. *(People v. Roldan* (2005) 35 Cal.4th 646, 689; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) In the latter decision, the Court wrote:

> The impartiality of prospective jurors is explored at the

> preliminary proceeding known as voir dire. Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] *Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule ....*"

(Ibid., quoting *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188; emphasis added.)

The necessity of including at least one question about prospective jurors' views of so-called "abuse excuse" evidence was demonstrated by the prosecutor's penalty phase closing argument to the jury in this case. Making a not too oblique reference to the Menendez trial, the prosecutor told the jurors: "I think you ought to reject this abuse excuse wholesale. This excuse has been offered by many, many defendants. It's not new. It's being offered all the time." (41 RT 3292.)

Respondent's brief does not address the argument that the trial judge erred in failing to include this question on the juror questionnaire and that Mr. Leon was prejudiced by that error. Given the place and timing of appellant's trial, his request to question prospective jurors about their exposure to discussion in the media about so-called "abuse excuse" evidence offered by defendants in criminal cases was entirely appropriate and necessary. Given the intense and widespread media coverage, including live coverage of the entire trial on Court TV, of the Menendez case and the ubiquitous and overwhelmingly negative public discussion about the "abuse excuse" which resulted from that trial, it was unreasonable for the trial judge to deny appellant's counsel any opportunity to question

prospective jurors about their thoughts about the "abuse excuse" controversy.[7] Given her statements during closing argument at the penalty phase, the prosecutor obviously believed characterizing Mr. Leon's mitigation evidence as an "abuse excuse" was an effective way to persuade the jurors to return a verdict of death. (41 RT 3292.) Her reliance on this argument demonstrated the importance of asking prospective jurors about their knowledge of and/or attitudes about the so-called "abuse excuse" during the jury selection process.

D. Conclusion

For all of the foregoing reasons as well as for the reasons set in appellant's opening brief, the trial judge erred when he failed to conduct voir dire adequate to protect Mr. Leon's constitutional rights, in particular his right to a panel of jurors who would be able to consider the mitigation evidence offered during his penalty phase trial and remain open to voting for the penalty of life without the possibility of parole in a case where two murders had been charged. Thus, Mr. Leon's death sentence should be reversed because his rights, under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, to a fair trial and a reliable penalty phase determination were violated.

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[7] Two people who sat on appellant's jury stated in their juror questionnaires that they had followed the Menendez trial. (8 SCT 2358, 8 SCT 2104.)

II.

THE TRIAL JUDGE ERRONEOUSLY DISMISSED FOR CAUSE THREE PROSPECTIVE JURORS BECAUSE OF THEIR VIEWS ABOUT THE DEATH PENALTY

Appellant's opening brief argues that the trial judge erred in dismissing for cause three prospective jurors, R.C., D.A., and N.C.,[8] based on their opposition to the death penalty. This error violated Mr. Leon's right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution. (AOB at 77-88.) The record in this case does not establish that the views of these prospective jurors concerning capital punishment "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424-426.) This error requires the reversal of Mr. Leon's sentence of death.[9]

Respondent claims that this Court must defer to the trial judge's determination of the state of mind and qualifications of these prospective jurors because he did not abuse his discretion. (RB at 80.) Respondent is mistaken.

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[8] This reply brief will refer to the prospective jurors by their initials, but the opening brief used their full names.

[9] In *People v. Riccardi* (2012) 54 Cal.4th 758, this Court noted that under federal constitutional law, as interpreted by the United States Supreme Court, "the erroneous excusal of a prospective juror for cause based on that person's views concerning the death penalty automatically compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant's penalty determination." (*Id.* at p. 783, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667.)

A. Introduction

In this case, the juror selection process was extremely truncated. The juror questionnaire contained only a few questions regarding attitudes about the death penalty:

56. What are your GENERAL FEELINGS regarding the death penalty?

57. What are your feelings on the following specific questions:
(a) Do you feel that the death penalty is used too often? Too seldomly? Please explain.
(b) Do you belong to any group(s) that advocates(s) the increased use or abolition of the death (Yes?No?)
1. What group(s)?
2. Do you share the views of this group(s)?
3. How strongly do you hold these views?

(c) Is your view in answers (a) and (b) based on religious consideration (Yes? No?)

58. In a death penalty case, there may be two separate phases or trials, one on the issue of guilt and the other on penalty. The first phase is called the "guilt" phase, where the jury decides on the issue of guilt as to the charges against the defendant and the truth of any alleged special circumstance(s). The second phase is called the penalty phase. If, and only if, in the guilt phase, the jury finds the defendant guilty of first degree murder (which will be defined at trial) and further finds any alleged special circumstances to be true, then and only then would there be a second phase or trial in which the same jury would determine whether the penalty would be death or life imprisonment without possibility of parole. (A special circumstance is an alleged description which relates to the charged murder, upon which the jury is to making a finding. For example, was the murder committed in the commission of certain felonies such as robbery, rape, or other enumerated offenses, or was the murder an intentional killing of a peace officer in the course of the performance of duty, a previous conviction of murder, etc.?)

The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating factors and mitigating factors (bad and good things) that relate to the facts of the crime and the background of the defendant, including a consideration of mercy. The weighing of these factors is not quantitative but qualitative, in which the jury, in order to fix the penalty of death, must be persuaded that the aggravating factors are so substantial in comparision with the mitigating factors, that death is warranted instead of life imprisonment without parole.

Based on the above:
(a) Assume for the sake of this question only that, in the guilt phase, the prosecution has proved first degree murder beyond a reasonable doubt and you believe the defendant is guilt of first degree murder. Would you, because of any views that you may have concerning capital punishment, refuse to find the defendant guilty of first degree murder, even though you personally believed the defendant to be guilty of first degree murder, just to prevent the penalty phase from taking place?
(b) Assume for the sake of this question only that, in the guilt phase, the prosecution has proven to be true, one or more special circumstances, beyond a reasonable doubt and you personally believe the special circumstance(s) to be true. Would you, because of any views that you may have concerning capital punishment, refuse to find the special circumstance(s) true, even though you personally beieved it (them) to be true, just to prevent the penalty phase from taking place?
(c) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence, or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

(d) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of for a penalty of life imprisonment without the possibility of parole and automatically vote for the penalty of death, without considering any of the evidence or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?
(e) If your answer to either question (c) or question (d) was "yes," would you change your answer, if you are instructed and ordered by the court that you must consider and weigh the evidence and the above mentioned aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of penalty?
(f) Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?

The voir dire was even more limited. The trial judge asked prospective jurors if they wished to change anything they had written on their questionnaire, and then asked four rote questions about their attitudes about the death penalty:

> Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for murder in the first degree merely to avoid reaching the death penalty issue?
>
> Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would automatically vote for a verdict of not true as to any special circumstance merely to avoid the death penalty issue?
>
> Do you have such conscientious objections to the death

> penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for the a verdict of death?
>
> Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for death and never vote for life imprisonment without the possibility of parole?

There was a crucial difference, however, between the death-qualification questions on the questionnaire and those asked during voir dire. Unlike question 58(e) and (f) on the juror questionnaire, quoted *ante*, the voir dire questions did not ask the prospective jurors if they could set aside their personal views about the death penalty and consider the evidence, including the aggravating and mitigating factors, before voting on penalty. Therefore, the voir dire in this case did not include any questions about the issue at the heart of *Witt*: whether a juror, who has scruples against the capital punishment, can nonetheless put aside those feelings and base his or her decision on penalty on a fair consideration of both the aggravating and mitigating evidence.

This difference was critical in this case because on the questionnaire, as respondent's brief concedes, each of these three disputed prospective jurors answered "yes" to question 58 (e), thus agreeing that they would change their answers on questions 58 (c) and (d) about automatically voting for or against the death penalty and would consider and weigh the evidence and the aggravating and mitigating factors before voting on the issue of penalty. Each of them also agreed in answer to question 58 (f) that they could set aside their personal feelings regarding what the law ought to be

and follow the law as the court explained it to them.

Defense counsel asked the trial judge to ask Prospective Jurors R.C., D.A., and N.C. follow-up questions during voir dire to clarify if, in fact, they could set aside their scruples about capital punishment and consider all of the evidence, both aggravating and mitigating, before voting on whether to vote for or against the death penalty. The trial judge refused these requests; thus, as the record in this case stands, all three prospective jurors qualified as acceptable jurors under the *Witt* standard. In *Lockhart v. McCree* (1986) 476 U.S. 162, 172, the High Court stated that prospective jurors who express strong feelings against the death penalty nonetheless can serve in a capital cases "so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." In this case Prospective Jurors R.C., D.A. and N.C. each wrote on their questionnaires that they could do just that.

As the following discussion makes clear, the trial judge's decisions to dismiss these jurors cannot be upheld; they are not entitled to deference nor are they supported by substantial evidence.

B. Responses on the Questionnaire and During Voir Dire

1. Prospective Juror R.C.

Looking first at his juror questionnaire, in describing his general feelings about capital punishment, R.C. wrote that he did not "believe the death penalty is a humain (sic) punishment. I do not believe the death penalty stops or prevents anyone from committing a crime." (3 SCT[10] 867.) He did not answer the question asking if he thought the death penalty was used too often or too seldom. (3 SCT 868.) R.C. wrote that he did not

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[10] "SCT" refers to the Supplemental Clerk's Transcript in this case.

belong to any group that advocates the increased use or the abolition of the death penalty and that his views about the death penalty were not based on any religious considerations. (3 SCT 868.)

In response to the questions of whether he would refuse to find the defendant guilty of first degree murder or refuse to find the special circumstances true to prevent the penalty phase of the trial from taking place, R.C. wrote "no." (3 SCT 869.) When asked if he would automatically refuse to vote in favor of the death penalty, R.C. wrote: "I would vote for life imprisonment." (3 SCT 870.) He did not answer the question that asked if he would automatically vote for the penalty of death. (3 SCT 870-871.) In responding to the question about whether he would change his answer to the previous two questions (Question 58 (c) and (d)) if instructed by the judge to consider and weigh the mitigating and aggravating evidence about the crime and the background and character of the defendant, R.C. wrote "yes." (3 CT 871.) He also wrote "yes" to the question whether he could set aside his personal feelings regarding what the law ought to be and follow the law as the court explained it to him. (3 SCT 871.)

During voir dire, the trial judge asked R.C. the same four questions he asked all prospective jurors who were orally questioned. The entire voir dire of R.C. was as follows:

> The Court: Mr. R.C., you are now in Box number 1. I have read your questionnaire. Is there anything you wish to have changed?
>
> Prosp. Juror R.C.: No.

The Court: Before I get to the other questions, I want to get to the four questions that I am going to ask every juror. These are questions you have already answered. I may ask them in a different way. Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for murder in the first degree merely to avoid reaching the death penalty issue?

R.C: No.

The Court: Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would automatically vote for a verdict of not true as to any special circumstance charged merely to avoid the death penalty issue?

R.C.: No.

The Court: Three, do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death?

R.C.: That's the one I have a problem with.

The Court: I understand. What's your answer?

R.C.: I would vote for life imprisonment.

The Court: Regardless of the evidence?

R.C.: Regardless of the evidence.

The Court: Finally, do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically, and in every case, vote for a verdict of death and never vote for a verdict of life imprisonment without the possibility of parole?

R.C.: It's still life in prison.

The Court: Would you always vote for death? That was the question. Regardless of the evidence.

R.C.: Yes.

The Court: You would vote for death?

R.C.: Well, I mean – can you rephrase the question?

The Court: It's the opposite of the third question. Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for death and never vote for life imprisonment without the possibility of parole?

R.C.: No.

(14 RT 384-387.)

At the invitation of the judge, the prosecutor challenged R.C. for cause. (14 RT 387.) Defense counsel argued that there were inconsistencies between R.C.'s answers on the questionnaire and his statements on voir dire and requested that the trial judge ask follow-up questions to see if, as he stated on his questionnaire, R.C. could set aside his views about the death penalty, follow the court's instructions and weigh all relevant evidence before deciding the issue of punishment. (14 RT 387-388.) The trial judge refused to ask any more questions, stating that R.C.'s views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions." (14 RT 388.) Further, the judge stated that even if R.C.'s answers could be viewed as equivocal, "[t]he determination of an equivocal response is by me." (14 RT 388.)

2. Prospective Juror D.A.

D.A.'s answers on the juror questionnaire were confusing. Some tended to show that she was opposed to the death penalty; for example, in response to the question about her general feelings about the death penalty,

she wrote: "I opposted (sic) to the death penalty." (3 SCT 798.) In answer to the question of whether she felt the death penalty was used too often or too seldomly, she wrote: "I think we should not have a death penalty at all." (3 SCT 799.) However, in responding to the question asking whether she would automatically refuse to vote for the death sentence, D.A. wrote "no." (3 SCT 801.) In response to the question of whether she would automatically refuse to vote for the penalty of life imprisonment without the possibility of parole and automatically vote for the penalty of death, she wrote: "Yes, I don't believe in death penalty." (3 SCT 802.) Moreover, she agreed that if she were instructed and ordered by the court to consider and weigh the evidence, both aggravating and mitigating, she could change her answers to the foregoing questions. She also answered "yes" to the question of whether she could set aside her personal feelings and follow the law as the court explained it. (3 SCT 802.)[11]

The questioning of this prospective juror on voir dire was even more cursory than that of R.C. The totality of the voir dire of D.A. was as follows:

> The Court: I have read your questionnaire. Is there anything that you wish to have changed?
>
> D.A.: No.
>
> The Court: All right. I am going to ask you the four questions. Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you

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[11] Those answers establish that despite her statements indicating opposition to the death penalty, D.A. was not substantially impaired under *Witt*. See *People v. Riccardi, supra*, 54 Cal.4th 758, where this Court wrote that two very similar questions on the *Riccardi* questionnaire were "most directly relevant to the *Witt* standard. (*Id.* at p. 780.)

would refuse to vote for a verdict of guilty of murder in the first degree merely to avoid reaching the death penalty issue?

D.A.: Yes.

The Court: You wouldn't even vote for murder in the first degree?

D.A.: I vote for first degree, but I didn't believe in the death penalty.

The Court: I understand that. Let me ask you, would you let your feelings as to that, regardless of the evidence, stop you from voting guilty of murder in the first degree?

D.A.: No.

The Court: All right. Do you have such conscientious objections to the death penalty that, no matter what the evidence is, you would automatically vote for a verdict of not true as to any of the special allegations alleged merely to avoid reaching the death penalty issue?

D.A: No.

The Court: Do you have such conscientious object ons to the death penalty that, should we get to the penalty phase of this trial, and regardless of what the evidence is, you would automatically and in every case, vote for a penalty of life imprisonment without the possibility of parole and never vote for death?

D.A.: Yes.

The Court: Yes?

D.A.: Yeah.

The Court: Do you have such conscientious opinions about the death penalty that, regardless of the evidence in this case, and should we get to the penalty phase of this trial, you would automatically, and in every case, and should we get to the penalty phase of this trial, you would automatically, and in

every case, vote for death and never vote for life imprisonment without the possibility of parole?

D.A.: No.

(14 RT 432-434.)

Despite the inconsistencies among her answers on the juror questionnaire as well as the contradictions between those answers and what she said during voir dire,[12] the trial judge did not seek clarification when he questioned her during voir dire. Rather, he asked her the same four rote questions he asked all prospective jurors who were actually called for voir dire. (14 RT 432-433.) As this Court noted in *People v. Stewart* (2004) 33 Cal.4th 425, 448, a written response that suggests ambiguity establishes "the need for clarification on oral voir dire," but does not, by itself, disqualify the prospective juror. Nevertheless, the trial judge in this case once again summarily rejected defense counsel's argument that because D.A. had written on her questionnaire that she said she could set aside her feelings about the death penalty and follow the law D.A.'s answers did not show that she would be substantially impaired in performance of her duties as a juror under the *Witt* standard. (14 RT 434.) Given the contradictions in the record, as defense counsel repeatedly requested, the trial judge should have asked D.A. follow-up questions. Accordingly, D.A.'s dismissal for cause was not supported by substantial evidence.

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[12] For example, on the questionnaire, D.A. answered no to question 58 (c), which asked if she would automatically vote for life without the possibility of parole and against the death penalty. (3 SCT 801.) During voir dire, D.A. contradicted her answer to question 58 (c), stating that she would automatically vote for LWOP and against the death penalty. (14 RT 433-434.)

3. Prospective Juror N.C.

Prospective juror N.C.'s answers on the questionnaire were inconsistent and confusing. In responding to question 56 regarding her general feelings about the death penalty, she wrote: "I disagree because if he is guilty and death penalty will be the punishment - person will not suffer anymore." (2 SCT 476.) Her answer to question 57 about whether she thought the death penalty is used too often or too seldomly, N.C. wrote: "too seldomly." (2 SCT 477.) Despite the fact that her answers to questions 56 and 57 suggested she favored the death penalty (although she thought that it wasn't punitive enough), she answered "yes" to question 58 (c) which asked whether she would automatically refuse to vote for the penalty of death and would automatically vote for the penalty of life without the possibility of parole (LWOP). (2 SCT 479.) In answering question 58 (d) which asked whether the prospective juror would automatically vote against LWOP and for the death penalty, N.C. wrote: "I'm in favor of life imprisonment without parole." (2 SCT 480.) However, she also agreed that, if instructed by the court, she would consider the mitigating and aggravating evidence before voting on the issue of penalty and would set aside her personal feelings about the law and follow the law as explained by the judge. (2 SCT 480.)

The entire voir dire of N.C. was as follows:

> The Court: Let me ask you the four questions before I go on. By the way, I do have your questionnaire. Is there anything you want to change?
>
> N.C.: No.
>
> The Court: As to the four questions. Do you have such conscientious objections to the death penalty that, regardless of the evidence, you would absolutely refuse to vote for a verdict of guilty of murder in the first degree merely to avoid

reaching the death penalty issue?

N.C.: No.

The Court: Do you have such conscientious objections to the death penalty that, regardless of the evidence, you would automatically vote for a verdict of not true as to any of the special circumstances alleged merely to avoid reaching the death penalty issue?

N.C.: No.

The Court: Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death?

N.C. Yes.

The Court: Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for a verdict of death and never vote for a verdict of life imprisonment without the possibility of parole?

N.C.: No.

(15 RT 549-550.)

Once again, the trial judge refused the defense request that he ask some follow-up questions to clarify the inconsistency between her answers on the questionnaire stating that she could set aside her feelings about the death penalty and her answers about being opposed to capital punishment. (15 RT 550-551.)

Given that on her questionnaire N.C. expressed the view that LWOP was actually a more severe punishment than the death penalty, the trial judge's failure to engage in a more searching voir dire and to ask follow-up

questions was particularly important in her case. In responding to question 56 regarding her general feelings about the death penalty, N.C. wrote: "I disagree because if he is guilty and death penalty will be the punishment-person will not suffer anymore." (2 SCT 476.)

Because the notion that LWOP is a more severe penalty than a death sentence is legally wrong, the trial judge should have clarified that point with N.C. The United States Supreme Court has consistently stated that the death penalty is the most severe punishment. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gregg v. Georgia* (1976) 428 U.S. 153, 187.) The High Court has been absolutely clear on this point: "Because the death penalty is the *most severe* punishment, the Eighth Amendment applies to it with special force." (*Roper v. Simmons* (2005) 543 U.S. 551, 568, citing *Thompson v. Oklahoma* (1987) 487 U.S. 815, 856 (conc. opn. of O'Connor, J.), emphasis added.) This Court also has recognized this principle. (See, e.g., *People v. Jones* (2012) 54 Cal.4th 1, 81; *People v. Hernandez* (1988) 47 Cal.3d 315, 362.) It is probable that the trial judge's failure to assure that prospective juror N.C. understood this important principle resulted in an unnecessary dismissal of a prospective juror who was fully qualified to serve.

C. Respondent's Arguments Regarding the Dismissals of Prospective Jurors R.C., D.A., and N.C. are not Persuasive

Respondent's arguments in support of the trial judge's decision to excuse these three prospective jurors misconstrues the meaning of the *Witt* decision. Also, the caselaw cited in respondent's brief is distinguishable.

The first argument offered by respondent is: "The three prospective jurors at issue were properly excused for cause based on their answers expressing reservations concerning their ability to impose the death

penalty." (RB at 73.) "Expressing reservations" about the death penalty or about one's ability to impose it is not a sufficient ground for dismissing a prospective juror for cause. The United States Supreme Court has long held that prospective jurors should not be excluded from sitting in a capital case simply because they oppose the death penalty. (See, e.g., *Uttecht v. Brown* (2007) 551 U.S. 1, 6; *Wainwright v. Witt* (1985) 469 U.S. 412, 421; *Adams v. Texas* (1980) 448 U.S. 38, 45, 48.) Indeed, as this Court has observed,

> A prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty.

(*People v. Stewart, supra*, 33 Cal.4th at p. 447, citing *People v. Kaurish* (1990) 52 Cal.3d 648.)

A prospective juror can be removed for cause in a capital case only if the record shows that he or she would not be able to set aside his views, follow the law as set forth by the trial court and fairly consider death as an option. (*Uttecht v. Brown, supra*, 551 U.S. at p. 9; *Adams v. Texas, supra*, 448 U.S. at p. 48.) In this case, on their juror questionnaires, R.C., D.A. and N.C. answered yes to questions 58 (e) and (f), which asked if they could change their answers about their views about the death penalty if instructed to and ordered by the court and could set aside their personal feelings regarding what the law ought to be and follow the law as the court explained it. (3 SCT 871, 3 SCT 802, 2 SCT 480.)

Respondent's brief relies principally on this Court's decision in *People v. Lancaster* (2007) 41 Cal.4th 50, to support the contention that the trial judge properly dismissed these three prospective jurors. Because the

jury selection process in *Lancaster* was so different from the one used in this case, the applicability of the *Lancaster* decision to this case is questionable. (RB at 80-81.) In *Lancaster*, the inquiries made of the two prospective jurors dismissed for cause were extensive when compared to the inquiries made in this case. Moreover, the prospective jurors at issue in that case were questioned both by the trial judge and the attorneys. More importantly, there were follow-up questions in an effort to resolve the ambiguities in the prospective jurors' statements concerning their feelings about capital punishment and their ability to set aside those feelings and consider all of the relevant evidence presented by both the prosecution and the defense and render a fair and impartial verdict on sentencing. (*Id.* at pp. 78-80.)

Similarly, in *Uttecht v. Brown, supra*, 551 U.S. 1, another decision cited by respondent, the Supreme Court stated that it would defer to the decision of the trial judge in that case to excuse Juror Z for cause because:

> . . . where, as here, there is *lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire*, the trial court had broad discretion.

(*Id.*, 551 U.S. at p. 20, emphasis added.)

As described in the opening brief (AOB at 83-84), the voir dire in the *Uttecht* case took more than two weeks, including 11 days of voir dire devoted to death qualification. (*Id.* at p. 10.) In addition to the initial voir dire in that case, the trial court gave each side a chance to recall the contested prospective juror for additional questioning. (*Ibid.*) By contrast,

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in the instant case, not only was the voir dire very truncated — four questions — but the trial judge refused requests of counsel to ask any follow-up questions and also refused to ask such questions himself. Since both the juror questionnaire and the voir dire were so limited, the information available to determine whether Prospective Jurors R.C., D.A., and N.C. were substantially impaired on the issue of capital punishment was woefully inadequate. Therefore, the trial court's decision to excuse these three prospective jurors for cause could not be and was not supported by substantial evidence.[13]

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[13] In *Uttecht, supra*, Justice Kennedy, writing for a five-member majority, described other factors relevant to the issue of whether the trial court in that case had improperly dismissed jurors for cause based on their opposition to the death penalty. For example, one of the factors considered in the *Uttecht* majority decision was the number of challenges for cause made by both the prosecution and the defense and how the trial court ruled on those. Justice Kennedy observed that in the *Uttecht* case that the trial court had ruled in favor of the defense challenges for cause over the prosecution's objections with far greater frequency (11 excused out of 18 challenges or 61%) than it had to the prosecution's challenges for cause over the defense objections (2 excused out of 7 challenges or 29%.) (*Id.* at pp. 10-11.)

By contrast, the record in this case shows how the defense was more disadvantaged than the prosecution by the way the trial judge conducted juror selection. The prosecutor challenged eight prospective jurors for cause; the trial court granted five of those eight. (14 RT 382, 389, 424, 430, 434;15 RT 506, 507, 517.) The defense challenged eleven prospective jurors for cause; the trial court granted two of those. (14 RT 382, 426, 427, 428, 429, 448, 449, 475; 15 RT 529, 534.) That means that the success rate of the prosecution cause challenges was 43% while the success rate for the defense was 18%. Under the analysis set forth in the *Uttecht* decision, this disparity between the success of the prosecution and the defense challenges for cause provides yet another reason to question the validity of the trial judge's decision to dismiss Prospective Jurors R.C., D.A. and N.C..

D. No Deference is Due to the Trial Judge; Instead, This Court Must Conduct De Novo Review

While this Court has deferred to a trial court's ruling under the *Witt* standard in certain circumstances, such deference is not universal. For example, in a case where the decision to excuse a prospective juror for his or her views about capital punishment is based solely on the answers on a juror questionnaire, the appellate court does not accord as much deference because the trial judge has not had any opportunity to observe the demeanor of the juror. In such a case, the appellate court applies a de novo standard of review. (*People v. Riccardi, supra,* 54 Cal.4th at p. 758, citing *People v. McKinnon* (2011) 52 Cal.4th 610, 647.)

The sine qua non of deference to the trial judge's determination is that the voir dire process truly provided an opportunity for the judge to observe the demeanor of the prospective juror. As the Court observed in *People v. Watkins* (2012) 55 Cal.4th 999:

> If, *after reasonable examination*, the prospective juror has given conflicting or equivocal answers, and the trial court has had the opportunity to observe the juror's demeanor, we accept the court's determination of the juror's state of mind.

(*Id.* at p. 1012, citing *People v. Thomas* (2012) 53 Cal.4th 771, 790; emphasis added.)

The *Watkins* opinion shows that there was extensive voir dire of the disputed prospective juror by the trial judge, the prosecutor and defense counsel. (*Id.*, at pp. 1011-1018.) An appellate court op defers to a trial judge's decision to dismiss a prospective juror for cause when the lower court is in the "best position to determine the potential juror's true state of mind for a particular reason, i.e., because it has observed firsthand the prospective juror's demeanor and verbal responses." (*People v. Martinez*

(2009) 47 Cal.4th 399, 426.)

Although there was nominal voir dire in this case, it was so perfunctory and inadequate that it failed to add anything to the purpose of jury selection process in a death penalty case: to determine whether a prospective juror can set aside his or her views about capital punishment and make the penalty determination based on the evidence presented by both the prosecution and the defense.

The voir dire in this case added nothing at all to the information provided in the questionnaire because, as noted, the voir dire consisted of the same exact four questions asked of every prospective juror actually examined orally by the trial judge. In fact, voir dire made the determination of whether a prospective juror was substantially impaired under *Witt* more difficult because the trial judge failed to ask the prospective jurors if they could set aside their scruples and follow the law. R.C., D.A. and N.C. all wrote on their questionnaires that they could set aside their feelings about the death penalty, consider all of the evidence and follow the law as explained by the judge. Yet, during voir dire, the trial judge failed to ask questions that either would confirm those answers or test their accuracy. Indeed, he resolutely refused to ask any follow-up questions despite the repeated and consistent requests by defense counsel to do so. It was particularly important in this case that the trial judge ask these follow-up questions in light of the prospective jurors' assertions at the beginning of voir dire that they did not want to change the answers they had written on the questionnaire. (14 RT 382, 14 RT 432, 15 RT 549.)

When the trial judge has conducted very limited voir dire, this Court should not defer on appeal to the judge's decisions regarding challenges for

cause. If, as this Court has held,[14] an appellate court independently reviews a trial court's decision to excuse for cause a prospective juror based solely upon that juror's written responses to a questionnaire de novo, this principle should apply in a situation where the voir dire was so minimal that it would be impossible to make any decision based on the demeanor of prospective jurors. The record shows that the voir dire in this case met this criterion.

E. Nothing in the Record Shows that Demeanor Played Any Part in the Decision to Excuse Prospective Jurors R.C., D.A., and N.C.

As established previously, given the very limited voir dire in this case, coupled with inadequate death-qualification questions on the questionnaire, this Court should not defer to the trial judge's decisions to dismiss Prospective Jurors R.C., D.A. and N.C. for cause. There is nothing in the record suggesting that the trial judge in this case relied upon the demeanor of the prospective jurors in making his decision to dismiss them. Mr. Leon recognizes that this Court has affirmed decisions to dismiss prospective jurors based in part on demeanor even though the lower court has not mentioned demeanor in its ruling. For example, in *People v. Watkins, supra*, a case where the trial judge did not specifically cite the prospective juror's demeanor, the Court stated that it could "reasonably infer that the trial court reached this conclusion based on both [prospective juror's] demeanor and her prior responses. (*Id.*, 55 Cal.4th at p. 1016.)

However, in this case the record does not provide any basis from which *a reasonable inference* could drawn that the trial judge excused R.C.,

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[14] See *People v. McKinnon* (2011) 52 Cal.4th 610, 643; *People v. Russell* (2010) 50 Cal.4th 1228, 1261, citing *People v. Avila*, (2006) 38 Cal.4th 491, 529.

D.A., and N.C. because of what he had discerned about their demeanor during the jury selection process. As noted previously, the voir dire of each of these jurors was perfunctory, involving the same four rote questions which elicited primarily yes or no responses. Given these circumstances, it strains credulity that anything could be gleaned from their demeanor during the limited voir dire that would resolve the inconsistencies in their answers about capital punishment and would justify the trial judge's determination that their scruples about the death penalty would substantially impair their ability to sit as impartial jurors at the penalty phase Mr. Leon's trial, despite their statements on the questionnaire that they could set aside those views and feelings and consider all evidence, aggravating and mitigating, before deciding what penalty to impose.

The facts of this case contrast with those present in *People v. Rountree* (2013) 56 Cal.4th 823, 157 Cal. Rptr 1. In *Rountree*, a prospective juror stated on his questionnaire that he could set aside his religious opposition to the death penalty and follow the law as instructed. This Court held that the prospective juror was nonetheless properly excused for cause because his answers to *numerous* questions during voir dire showed that he was very equivocal about whether he could really set aside religious scruples. (*Id.* at p 24 ["This juror could hardly have been more equivocal about whether he could set aside his religious convictions and perform a juror's duties."].) The extensive voir dire in *Rountree, supra*, showed that the juror was substantially impaired in spite of his statement that he was willing to set aside his beliefs. In his concurring opinion, Justice Liu observed:

> Although the juror said he could follow the law if required to do so, the question is whether the juror would have been

> *substantially* impaired, that is, impaired to a substantial degree. The juror's discursive answers during voir dire were sufficient to leave the trial court "with the definite impression that [he] would be unable to faithfully and impartially apply the law."

(*Id.* at pp. 38-39.)

The facts in Mr. Leon's case are entirely different: during voir dire, there was no questioning of the prospective jurors about the meaning of their answers on the questionnaire that they were opposed to the death penalty, but could, if asked to do so, set aside such opposition and follow the law. As such, in this case, there is nothing in the record disputing the statements of Prospective Jurors R.C., D.A., and N.C. on the questionnaire that they could set aside their views about capital punishment, consider all the evidence pertaining to penalty and follow the law as explained by the trial court. Moreover, during voir dire each of them stated that they did not want to change their answers on the questionnaire.

The record does not contain the slightest hint that the judge considered the demeanor of prospective jurors R.C., D.A., and N.C. as a factor either for or against dismissing them for cause. The judge made no reference to demeanor in his rulings on defense counsel's request to ask more questions. Neither the prosecution nor the defense mentioned demeanor in any of the discussions about the disputed cause challenges. In upholding the trial court's resolution of the *Witt* issue based on the judge's assessment of demeanor, this Court has uniformly pointed to something in the record that showed that demeanor was a reason for the judge's decision[15] – this case does not contain any comparable indications.

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[15] See, e.g., *People v. Jones* (2012) 54 Cal.4th 1, 42-43 [prosecutor brought question of challenged juror's "body language" to trial court's

(continued...)

In this case it appears that the trial judge took the prospective jurors' "yes" answer to the voir dire pattern question "Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically vote for a verdict of life imprisonment without the possibility of parole" as "unequivocal" evidence that the jurors were not qualified to serve. Demeanor played no role in his assessment. If the trial judge was really taking demeanor into account, he surely would not have had the identical response to defense counsel's objections that the record did not show that the jurors R.C. and N.C. were disqualified under *Witt*. (See trial judge's response at 14 RT 388 [R.C.'s answers cannot be viewed as equivocal] and at 15 RT 551 [N.C.'s answers were "unequivocal"].) Given that the judge apparently believed that these particular answers by R.C. and N.C were unequivocal and thus justified their dismissals, there is no reason to believe that he had an additional demeanor-based reason for dismissing them.

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[15] (...continued)
attention]; *People v. Thomas* (2011) 51 Cal.4th 449, 470 (although opposing the challenge, defense counsel "acknowledged that the prospective juror was 'very, very nervous,' looked almost like 'a deer in the headlights,''couldn't gather her thoughts' and 'was having trouble following . . . questions'"); *People v. Farley* (2009) 46 Cal.4th 1053, 1088 [prosecutor noted hesitancy in A.S.'s responses]; *People v. Martinez* (2009) 47 Cal.4th 399, 435, 444 [prosecutor remarked on E.H.'s emotional state and unease and trial court indicated in general comments it was particularly "sensitive" to and observant of the demeanor of prospective jurors]; *People v. Lewis* (2008) 43 Cal.4th 415, 485 (record showed that H.G. "'loudly'" and "emphatically" stated her belief that she could not consider the death penalty.)

F. To the Extent the Answers of Prospective Juror R.C. and N.C. Were Not Inconsistent or Equivocal, They did not Establish that These Prospective Jurors Were Substantially Impaired and Thus Not Qualified to Sit on a Capital Jury

As discussed previously, at the time the trial judge addressed defense counsel's objection to the removal of Prospective Juror R.C. for cause, he suggested that the responses of R.C. on the issue of capital punishment were not "equivocal." (14 RT 388.) In the case of Prospective Juror N.C., the trial judge was more explicit in stating that he believed her answers regarding the death penalty were unequivocal. (15 RT 551.) As Mr. Leon previously showed in this brief and in his opening brief, the answers of R.C. and N.C. were in fact equivocal. However, assuming arguendo that the trial judge was correct in finding the statements of R.C. and N.C. were not conflicting or equivocal on the issue of capital punishment, the trial court's decision to dismiss them was erroneous.

This Court has made it clear that more deference is given by an appellate court to the decisions of the trial court under *Witt* when the answers of the prospective jurors are deemed to be equivocal, inconsistent or ambiguous. (See, e.g., *People v. Pearson* (2012) 53 Cal.4th 306, 327-328 [When a prospective juror has made conflicting or equivocal statements regarding his or her ability to impose either a death sentence, the trial court is in the best position to assess the potential juror's true state of mind, a finding that must be deferred to on appeal.]) There is no such deference due when a prospective juror's answers are unequivocal. Rather: "[i]n the absence of such contradictions or equivocation, the trial court ruling is reviewed for substantial evidence . . ." (*Id.* at pp. 327-329, citing *People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

If the answers of R.C. and N.C. were not equivocal, as the trial judge

asserted, this Court must find that there is not substantial evidence to find that either of these two prospective jurors were substantially impaired under the *Witt* standard. On her questionnaire, N.C. stated that, if instructed by the court, she would consider the mitigating and aggravating evidence before voting on the issue of penalty and would set aside her personal feelings about what the law should be and follow the law as explained by the judge. (2 SCT 480.) Similarly, R.C.'s statements on his questionnaire that he too could set aside his views about the death penalty, follow the court's instructions and weigh all relevant evidence before deciding the issue of punishment showed that he was not substantially impaired under the *Witt* standard. Moreover, both N.C. and R.C. said during voir dire that they did not want to change their answers on the questionnaire.

G. The Trial Court's Error in Dismissing Prospective Jurors R.C., D.A., and N.C. Requires Reversal of Appellant's Death Sentence

The question before a trial court is not whether a prospective juror has personal scruples against the death penalty, but whether he or she is able to set aside his or her own beliefs and follow the law. (*Lockhart v. McCree, supra*, 476 U.S. at p. 176; *People v. Stewart, supra*, 33 Cal. 4th at p. 446.) The focus, therefore, is on the juror's decision-making process, not his or her personal or moral feelings about the death penalty. (*Id.* at p. 453, n.16.) Even where a juror would find it *very difficult* to impose the death penalty, it would not be appropriate to excuse the juror for cause "unless he or she were unable or unwilling to follow the trial court's instructions." (*Id.* at p. 447, emphasis added.)

As demonstrated *ante*, in the cases of prospective jurors R.C., D.A., and N.C., the trial court's dismissals for cause were not supported by substantial evidence. There were inconsistencies in the answers of all three

which could have been clarified if the trial judge had asked a few follow-up questions as defense counsel repeatedly requested.

In *People v. McKinnon, supra*, 52 Cal. 4th at p. 644, this Court concluded:

> When counsel failed to openly contest an excusal, we may logically assume counsel did not oppose it. It is equally logical to assume that when, having been advised of the court's intention to excuse a prospective juror, counsel declined an opportunity for further voir dire to clarify the juror's views, counsel accepted the record as it stood was sufficient to support the intended ruling.

Surely, the converse is true. That is, the fact that in Mr. Leon's case defense counsel repeatedly but unsuccessfully asked the trial judge to ask follow-up question demonstrates that the defense did not accept the record as sufficient to support the trial judge's decision. The lower court's stubborn refusal to conduct a more searching and meaningful examination about how prospective jurors' views about capital punishment would affect their ability to serve as jurors in this case necessarily meant that his determination that R.C., D.A., and N.C. should be excused for cause is not supported by substantial evidence. Because the record in this case shows that each of these prospective jurors said they could set aside their views about capital punishment and consider all of the evidence before voting on penalty, it establishes that they were not "substantially impaired" under the *Witt* standard and were qualified to serve as jurors in a death penalty case.

Further, because the voir dire in this case was so minimal, the trial judge's resolution of inconsistencies on the prospective jurors' answers during the jury selection process is not entitled to deference. The brief voir dire of R.C., D.A., and N.C., which consisted primarily of yes and no answers to four questions, did not offer anyone in the courtroom, including

the judge, insight into whether or not these three prospective jurors were "substantially impaired" for purposes of the standard set forth in *Witt v. Wainwright, supra, Uttecht v. Brown, supra*, and the relevant caselaw of this Court.

"The erroneous dismissal of [these three prospective jurors] for cause based on that person's views concerning the death penalty automatically compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant's penalty determination." (*Gray v. Mississippi, supra*, 481 U.S. at p. 666.) Accordingly, Mr. Leon's sentence of death must be reversed.

* * *

III.

THE TRIAL JUDGE ERRED IN ALLOWING THE TESTIMONY OF JULIO CUBE PURSUANT TO EVIDENCE CODE SECTION 1101, SUBDIVISION (B)

As explained in appellant's opening brief, the trial judge violated Mr. Leon's rights to a fair trial, due process and a reliable determination of guilt under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when he erroneously allowed the prosecution to present, under California Evidence Code section 1101, subdivision (b), the testimony of Julio Cube about two uncharged robberies. (AOB at 89-111.)

A. Introduction

Respondent's brief fails to address fundamental questions involving the prosecutor's decision to call Julio Cube as her first witness in the guilt phase of Mr. Leon's trial. This case involved the joinder of ten unrelated robbery counts, two of which also involved felony murders. Why did the prosecutor deem it necessary to present evidence of two other robberies, which had been dismissed as counts from the case because the victim could not identify Mr. Leon, for the supposed reason that such evidence would show his intent and a plan in the other crimes actually charged against him? The answer lies, it appears, in how the prosecutor used Mr. Cube's testimony in making her closing argument to the jury. She made an entirely inappropriate appeal to emotion in that speech at the guilt phase trial, and Mr. Cube played a central role. The theme of the prosecutor's guilt phase argument was that the crimes in the case involved "cruel and unnecessary violence:"

> Same thing with Mr. Cube, the violence in that case is so unnecessary. I don't know whether you noticed but that that [sic] Mr. Cube was disabled. He had one hand that was disfigured. He was a man of only five feet four inches tall.

> He was a man of 110 pounds. And the robber came back twice, once sticking a knife in his belly as he says, and the other time sticking a gun in his neck. Examples of excessive violence in this case. Unnecessary cruelty towards the victims. . . .

(30 RT 2149.)

Defense counsel properly objected to this argument as an improper appeal to the passions of the jurors and as irrelevant to the question of Mr. Leon's guilt of the charged crimes. (30 RT 2149.)

B. The Testimony of Julio Cube was not Probative of the Real Issue in This Case: the Identity of the Perpetrators

Mr. Leon acknowledged in his opening brief that a plea of not guilty technically places all elements of a crime at issue. (AOB at p. 98.) However, the facts of this case are such that, as a practical matter, the intent of whoever committed the charged robberies and the felony murders was not in dispute. As noted in the AOB, it was not the intent of the perpetrator (or perpetrators) that was at issue in this case, it was his (or their) identity that was highly contested. Offering the testimony of Julio Cube for alleged purpose of showing intent was, at the least, "gilding the lily." In *People v. Lopez* (2011) 198 Cal.App.4th 698, 715, the Court of Appeal, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 406, wrote:

> Simply put, evidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute; the prejudicial effect of the evidence of the uncharged acts outweighs its probative value to prove intent as it is cumulative regarding that issue.

As the following summary shows, the evidence presented by the prosecution concerning each of the robberies and the robbery murders charged did not leave any room for interpretation about the intent of the perpetrator or perpetrators involved.

- The manager of Chan's Shell Service testified that a man put a gun to his neck and demanded that he open the cash register, at which point, the man took all the money out of the register. (17 RT 715-716.)
- Several employees and customers of Ben's Jewelry testified that three men, all carrying guns, entered the store and ordered everyone into a bathroom where they were tied up. The men demanded money from the customers, and once the robbers left, it was discovered that almost all of the contents of the jewelry cases and safe had been taken. (18 RT 805-819;24 RT 1578-158; 19 RT 938; 20 RT 991.)
- The owner and employees of H & R Pawn Shop testified that three men, who had guns, entered the pawn shop; opened fire, injuring several of the witnesses, and took jewelry from the display cases and then fled the store. (20 RT 1011, 1013-15, 1027, 1059-1060, 1062.)
- The manager of the Seven Star Motel testified about two robbers entering her office, pushing her in corner and holding "something" to her back and demanding money. They took money from her desk drawer and from her purse. (19 RT 955-959.)
- An employee of the Original Blooming Design flower shop testified that three men asked him about "after Valentine" specials. One of them grabbed his hair, pulled him down and held a gun to head. He opened the cash register, and one of the robbers took the money. (22 RT 1286-1291.)
- Two employees of Rocky's Video Store testified that three men robbed them. All of them had guns. One of them pointed a handgun into one of the employee's stomach and told her to give him money, which she took from the cash register and gave to him. He also took

money from a drawer and a radio or "boom box."

- An employee of the Nice Price Store testified about two men robbing her store. Both of them had guns. One of them told her "this is a robbery" and pointed a gun at her. She opened the cash register and gave him the money in it as well as the money she had in her purse. (24 RT 1489-1503.)
- An employee of the Valley Market testified that three men entered the market. One of them pointed a gun in his face, then reached over the counter and removed money from the cash register. (21 RT 1198-1203; 1209, 1213.)
- Two witnesses testified about the robbery of the Sun Valley Shell Gas Station and the killing of Norair Akhverdian. One witness heard coins falling on the floor inside the gas station store; saw a frighten look on the face of Mr. Akveridian and then saw a man shoot him. The witness testified: "As far as I could tell, hearing change falling and stuff like that, the place was getting robbed." (28 RT 1907-1908.)
- Several witnesses testified about the robbery of Jack's Liquor Store and the killing of its owner, Varouj Armenian. None of the witnesses actually viewed the robbery and homicide, but they heard gun shots emanating from the liquor store and found Mr. Armenian's dead body in the store. When the police arrived, they found two $5 bills and some small change left in the cash register and about $1000 in cash on the body. (23 RT 1455.) A bank security bag, containing $2000, which Mrs. Armenian gave to her husband the night before was never found. (23 RT 1445,1455.)

As the above summary establishes, there was never any question

about the intent of whomever committed the robberies and the two felony murders charged in this case. Therefore, the probative value of Julio Cube's testimony as it related to the issue of the intent involved in the charged crimes was extremely limited. As this Court observed in *People v. Balcom* (1994) 7 Cal.4th 414, 422-423,

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

Therefore, because other crimes evidence is so prejudicial (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404), it should not be admitted to show intent unless there is some real possibility that the jury might otherwise fail to find that element beyond a reasonable doubt.

Since evidence of uncharged crimes is inherently prejudicial, such evidence must have " 'substantial probative value' " to be admissible. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, italics omitted; *People v. Lindberg* (2008) 45 Cal.4th 1, 23; *People v. Kelly* (2007) 42 Cal.4th 763, 783.) The *Ewoldt* decision identified various factors affecting the weighing of the probative value of uncharged crimes evidence against its prejudicial effect, including the tendency of that evidence to demonstrate the fact in issue, the independence of the source of the uncharged crime, whether the uncharged crime resulted in conviction, whether the facts of the uncharged crime are more inflammatory than the facts of the charged offense, the remoteness in time to the charged offense, and whether there is other evidence to substantiate the fact at issue. (*People v. Ewoldt, supra*, at pp. 404–406.)

The probative value of the Cube robberies was limited. As found by the magistrate at the preliminary hearing and affirmed by Judge Asheman at

the 995 motion hearing, Cube's identification of Mr. Leon as the man who robbed him twice was so inadequate that it did not even meet the sufficient cause standard applicable at a preliminary hearing, let aside the preponderance of evidence standard required to introduce other crimes evidence.

Further, contrary to respondent's assertions, the similarity between the Cube robberies and the charged robberies was minimal. Indeed, there was nothing particularly distinctive about any of these robberies; unfortunately, robberies of small retail establishments in Los Angeles are common. Moreover, the first robbery of Cube involved one perpetrator, using a knife. The second one involved one robber with a gun. By contrast, most of the charged robberies involved more than one perpetrator, and none of them involved the use of a knife. Certainly, there was not enough similarity to be admissible to show a common design or plan, as described by this Court in *People v. Ewoldt, supra,* 7 Cal.4th at p. 406.) [16]

Moreover, the alleged purpose of presenting the testimony of Julio Cube — to show intent and common plan or design — was more than adequately covered by the evidence offered to prove the charged crimes. As described *ante*, the intent of the perpetrator or perpetrators in the charged crimes was not and could not be disputed. Also, because Mr. Leon was charged with eight robberies and two robbery murders, to the extent

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[16] In *Ewoldt, supra*, this Court wrote: "A greater degree of similarity [between uncharged crimes and the charged crimes] is required in order to prove the existence of a common design or plan. . . .Evidence of uncharged misconduct must demonstrate 'not merely a similarity in their results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.'" (*Id.* at p. 402.)

that the prosecutor thought she needed to show "common plan or design," to prove her case, the joinder of these eight robberies and two robbery murders should have been sufficient to accomplish that purpose. If the prosecution couldn't show common plan or design with the evidence presented concerning the ten charged robberies (including two felony murders), the testimony of Julio Cube would not accomplish that purpose. It is clear that the Cube testimony was merely cumulative on the issues of intent and common plan or design.

C. The Trial Judge Should Have Excluded Cube's Testimony Under Evidence Code Section 352

As discussed in the opening brief, the trial judge never ruled on Mr. Leon's objection that, under Evidence Code section 352, Julio Cube's testimony should have been excluded because its prejudicial effect outweighed whatever minimal probative value it had. (AOB at pp. 103-110.) A recent decision of the California Court of Appeal, *People v. Paniagua* (2012) 209 Cal.App.4th 499, 512, involved a similar situation where a trial judge failed to even mention section 352 when ruling on the defendant's motion to exclude evidence under that Evidence Code section. The *Paniagua* Court found reversible error because of the trial court's failure to exercise discretion under section 352.

In *Paniagua*, the Court of Appeal reversed a commitment of the defendant to the Department of Mental Health for an indeterminate term after a jury found him to be a sexually violent predator. At issue was the prosecution's introduction of evidence suggesting that Paniagua, who had pled guilty to two counts of molestation of a child younger than 14, had traveled to Thailand in 1998. The defense objected to the evidence's authenticity and reliability since it consisted only of one document from

Homeland Security and that information was refuted by other evidence. The Homeland Security document stated that Paniagua had flown from Trang Airport in Thailand to Los Angeles on United Airlines Flight 842 on August 21, 1998; however, officials of United Airlines stated that it had never flown into Thailand and that on the date mentioned in the Homeland Security document, its Flight 842 went from Auckland, New Zealand to Melbourne, Australia to Los Angeles to Chicago.

Defendant Paniagua's principal objection to this evidence was made pursuant to Evidence Code section 352. Paniagua argued that apart from its unreliability or lack of authenticity, the evidence had very limited relevance or probative value while also being unduly prejudicial because Thailand had a reputation for being a place where sex with minors was easily available. (*Id.* at p. 509.)

The prosecutor claimed that he was introducing the evidence to impeach Paniagua and show that he had not been truthful with the prosecution experts about whether he had traveled outside the United States during that period.[17] The defense countered that if that were the true purpose of the prosecutor, he should have been willing to "sanitize" the evidence by stipulating that the jury would learn that Paniagua had traveled to some unnamed foreign country. While the parties did stipulate to the fact that the records of United Airlines showed that Flight 842, on August 21, 1998, flew from Auckland to Melbourne to Los Angeles to Chicago (*id.* at p. 514), the Court of Appeal observed that "the district attorney took every opportunity to have his experts mention Thailand." (*Id.* at p. 522.)

In deciding to reverse, the Court of Appeal noted that it must apply

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[17] There was no dispute that Paniagua had visited El Salvador several times during this time period.

an abuse of discretion standard to its review of the trial judge's admission of this evidence and that in ruling on a section 352 objection the trial judge need not expressly weigh prejudice against probative value or even expressly state that it has done so. (*Id.* at 518.)

However, in the *Paniagua* case, as is in the present case, the record showed that the trial judge had not exercised his discretion under section 352 nor had he weighed the probative value of the proposed evidence against its prejudicial effect. (*Id.* at p. 519.) In the view of the Court of Appeal, the trial judge's statement in *Paniagua* that he was denying the defense motion to exclude evidence that defendant had gone to Thailand because there was a conflict in evidence which the jury could resolve showed that the judge had not properly exercised discretion. The Court observed:

> . . . the record show that the court [should] exercise[d] "its discretion in an informed manner." The record here does not measure up. Indeed, there was no weighing at all.

(*People v. Paniagua, supra*, 209 Cal.App.4th at p. 518, quoting *Andrews v. City & County of San Francisco* (1988) 205 Cal.App.3d 938, 947.)

Similarly, in the instant case, the record shows that in ruling on Mr. Leon's objection to the Cube robbery evidence, the trial judge did not exercise his discretion in an informed manner, as required by section 352. None of his statements about the ruling suggest that his decision to admit the evidence took into account the issue of whether the probative value of Julio Cube's testimony was outweighed by its undue prejudicial effect. Accordingly, as in *Paniagua*, the trial court erred.

D. The Introduction of Julio Cube's Testimony was Prejudicial Error, Requiring Reversal

Respondent urges that this testimony was properly introduced as evidence relevant to the issues of intent and common plan or design. It is clear, however, that given all of the evidence presented in this case to prove multiple counts of second degree robbery of small stores as well as two counts of robbery murder, Mr. Cube's testimony was cumulative. Moreover, this case involved a situation where the "other crimes evidence" concerned crimes that had been charged originally in the Information and then dismissed because the evidence was so weak that it didn't meet the low standard of "sufficient cause" at the preliminary hearing.

The record of this case — that is, the prosecutor's closing argument to the jury — also makes clear that the real purpose behind the prosecutor's insistence that Mr. Cube testify as the first witness at Mr. Leon's guilt phase trial was to use Cube's physical disability and his small stature to convince the jury that Mr. Leon was not only a robber but one who violated the "criminal code" by choosing vulnerable individuals and engaging in excessive violence and cruelty. (30 RT 2147-2149.) In the context of instructional error, the Court of Appeal noted in *People v. Chavez* (2004) 118 Cal.App.4th 379, 388, that "closing arguments to the jury are relevant in evaluating prejudice." Certainly, in this case, the prosecutor used the Cube robberies to make an improper and inflammatory guilt phase argument to the jury.

As argued *ante* and in the opening brief, not only did the trial judge err in denying Mr. Leon's motion, pursuant to both sections 1101(b) and 352, to exclude the testimony of Julio Cube, he violated Mr. Leon's constitutional rights to a due process and a fair trial because this evidence

tainted the trial by lightening the State's burden of proof and allowing the jury to convict Mr. Leon based, at least in part, on evidence of criminal propensity which had limited probative value while being unduly prejudicial. The State cannot prove beyond a reasonable doubt that the improper testimony of Mr. Cube did not affect the convictions and death sentence in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Nor can the State show that if this evidence had not been introduced, the jury would not have returned a verdict more favorable to Mr. Leon. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, his convictions and death sentence must be reversed.

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IV.

THE ERRONEOUS ADMISSION OF IDENTIFICATION TESTIMONY OF DETECTIVE OPPELT CONTRAVENED STATE EVIDENTIARY RULES AND APPELLANT'S DUE PROCESS RIGHTS

In his opening brief, Mr. Leon argued that the trial judge erred in admitting, over his objection, the testimony of Detective Oppelt regarding videotapes of two robberies which took place at two different stores. The detective identified Mr. Leon as one of the robbers depicted in a videotape of a robbery at the Valley Market which occurred on February 17, 1993[18] (26 RT 1743.) Oppelt also identified Mr. Leon as the robber/murderer in a videotape taken at the Sun Valley Shell Gas Station on February 2, 1993.[19] This identification testimony was improper and prejudicial both under California evidentiary law and under federal constitutional principles.

The trial judge overruled Mr. Leon's objection to this testimony, relying exclusively on three California Court of Appeals decisions:

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[18] The videotape taken of the robbery at the Valley Market was marked as People's Exhibit 9. (26 RT 1708.)

[19] The videotape taken at the Sun Valley Shell Gas Station was marked as People's Exhibit 8. (26 RT 1745.) Subsequently, the police made another tape comprised of portions of Exhibit 8; this tape became People's Exhibit 93, which the prosecutor played during the trial. The prosecutor asked Detective Oppelt to identify the jacket, marked as People's Exhibit 3, which Mr. Leon was wearing when he was arrested as being the one worn by the robber depicted in Exhibit 93, the partial tape of the Shell gas station. (26 RT 1752-1753, 1755-1757.) Therefore, during his testimony about what was depicted in Exhibit 93, Detective Oppelt identified Mr. Leon by stating that the jacket on the person in the tape was the same jacket that he had been wearing when he was arrested.

People v. Perry (1976) 60 Cal.App.3d 608; *People v. Mixon* (1982) 129 Cal.App.3d 118 and *People v. Ingle* (1986) 178 Cal.App.3d 505. (26 RT 1711-1713, 1716-1717.) While it is true that in each of those decisions the appellate court upheld the trial judge's admission of identification testimony by law enforcement officers[20] about the content of photographs and a tape, the facts in those cases were distinguishable from those present in this case.

In *Perry, supra*, a concealed surveillance camera photographed the robbery of a cashier's office. There were two robbers; the cashier was not able to identify defendant Perry in the photograph taken from the surveillance camera film, in a photo lineup or in an in-person lineup. The trial court allowed Perry's parole officer and a police officer to testify that defendant was one of the robbers appearing in the photograph, and the appellate court upheld this ruling. The California Court of Appeal found that this evidence was properly admitted under California Evidence Code section 800, governing non-expert opinion testimony, because of the following factors:

> The witnesses each predicated their identification opinion upon their prior contacts with defendant, their awareness of his physical characteristics on the day of the robbery, and their perception of the film taken of the events. Evidence was introduced that defendant, prior to trial, altered his appearance by shaving his mustache. The witnesses were able to apply their knowledge of his prior appearance to the subject in the film. Such perception and knowledge was not available directly to the jury.

(*People v. Perry, supra*, 60 Cal.App.3d at p. 613.)

The decision in *People v. Mixon, supra*, cited *People v. Perry, supra*,

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[20] The *Ingle* decision involved testimony of the victim, not police officers, about what was depicted on the videotape.

and relied upon some of the same factors to find the disputed testimony to be admissible. In *Mixon*, a surveillance camera took a photograph of a robbery of a gas station. The Court of Appeal upheld the admission of two officers' identification testimony because they had seen defendant Mixon several times over many years and also had knowledge of his appearance during the time period when the crimes occurred. In affirming the admission of this testimony, the appellate court also cited the fact that the defendant had changed his appearance between the time of the robbery and trial and that the surveillance photograph was not clear. (*Mixon, supra*, 129 Cal.App.3d at p. 130.)

In *People v. Ingle, supra,* the witness who testified about the identity of the robber in the surveillance videotape was the victim. Relying on the reasoning of both the *Perry* and *Mixon* decisions, the Court of Appeal upheld the trial court's decision to allow the victim to testify that the person in the videotape of the robbery appeared to be defendant because she had "an adequate opportunity to view defendant's physical features during the robbery and to relate her observations and recollections to both the video picture and the defendant's person." (*People Ingle, supra*, 178 Cal.App. 3d at p. 514.) The *Ingle* decision also noted that the fact that a person's appearance might have changed in the period between the crime and the trial justifies identification testimony based on a videotape. (*Ibid.*)

Applying the factors identified in these three Court of Appeal decisions to an analysis of this case, Detective Oppelt should not have been allowed to identify Mr. Leon in the videotapes of the Valley Market and Sun Valley Shell Gas Station robberies. First, there was no evidence that Detective Oppelt had ever seen Mr. Leon before he was arrested. Therefore, unlike the officers in the *Perry* and *Mixon* cases, Oppelt did not

have prior contact with appellant, and both of those decisions emphasize the importance of the witness having such prior knowledge of the defendant's appearance. Second, there was no evidence offered at trial that Mr. Leon's appearance had changed between the time the surveillance cameras took photos of the robberies and when the trial took place. Respondent argues that the prosecutor noted "during closing argument that appellant had shaved his mustache, gained weight and changed his hair." (RB at p. 99.) The prosecutor's argument is not evidence. Moreover, during the discussion at trial about the defense objection to Oppelt's identification testimony, the prosecutor never argued that one of the justifications for the testimony was the changed appearance of Mr. Leon.

When defense counsel argued that allowing Detective Oppelt to testify that Mr. Leon appeared on the surveillance tapes of the robberies at Valley Market and Sun Valley Shell Gas Station would be particularly prejudicial because the jury would tend to defer to the opinions of a police officer, the trial judge dismissed this claim as purely speculative. (26 RT 1711, 1716.) However, the *Mixon* decision clearly states that having law enforcement personnel testify as to his or her opinion about the identity of a defendant in a surveillance photograph or videotape raises legitimate concern about undue prejudice. (*People v. Mixon, supra*, 129 Cal.App.3d at p. 129.)

Other courts have recognized the potential prejudice which can result from having a police officer testify that in his opinion the defendant appears in a surveillance photograph or videotape. Very recently, in *Proctor v. State* (2012) 97 So.3d 313, the Florida District Court of Appeal found reversible error when a police officer testified that in his opinion defendant Proctor was the person shown on a bank videotape cashing some stolen

checks. The Court noted:

> "[E]rror in admitting improper testimony may be exacerbated where the testimony comes from a police officer." *Martinez v. State,* 761 So.2d 1074, 1080 (Fla.2000). There is the danger that jurors will defer to what they perceive to be an officer's special training and access to background information not presented during trial.

(*Proctor, supra*, 97 So.3d at p. 315.)

Similarly, in *State v. Belk* (2009) 689 S.E.2d 439, the North Carolina Court of Appeals reversed a conviction because it relied upon a police officer's testimony that defendant Belk was the individual depicted in a surveillance videotape of a breaking and entering incident. One of the reasons why the appellate court found that this evidence was both improper and prejudicial was because of the witness's status as a police officer:

> . . . because the witness was a police officer with eighteen years of experience, the jury likely gave significant weight to Officer Ring's testimony. Officer Ring's testimony identifying the individual depicted in the surveillance video as the defendant played a significant if not vital role in the State's case, making it reasonably possible that, had her testimony been excluded, a different result would have been reached at trial.

(*Id.* at p. 443.)

State v. George (2009) 150 Wash.App. 110, involved a robbery which had been captured on a surveillance video. One of the investigating officers testified at trial and identified defendant George and a co-defendant as two of the robbers depicted on the videotape. The Washington Court of Appeals found that the trial judge had abused his discretion in admitting this evidence because the detective did not have sufficient contact with the defendants prior to the robbery to express an opinion that they appeared on

the videotape. (*Id.* at p. 119.) While the officer testified that he had viewed the surveillance video "hundreds of times" before trial, the appellate court found that this exposure did not make up for the lack of substantial contact with the defendant before the robbery occurred. (*Id.* at pp. 115, 118-119.)

Respondent argues that even assuming that the trial court erred in admitting Detective Oppelt's testimony, any error was harmless because the evidence of Mr. Leon's guilt was overwhelming. In making this prejudice argument, respondent aggregates all of the evidence presented by the prosecution to prove the ten robberies and two murders charged in this case. This assessment of prejudice is incorrect. In determining whether the admission of Oppelt's identification testimony was prejudicial, one must look to the evidence presented on the counts related to the Valley Market robbery and the Sun Valley Shell Gas Station robbery/murder, the only incidents which involved videotapes about which Oppelt testified.

The evidence that appellant participated in the Valley Market robbery was not overwhelming. Joon Kim, who was working at Valley Market on the day of the robbery, testified that three men entered the store. One of them pointed a black revolver at Kim's face and asked for money from the cash register; the man then reached over the counter and grabbed it. (21 RT 1212-1203, 1208.)

Right after the robbery, Mr. Kim told the police that the robber was "black." (21 RT 1208-1209.) In court, Kim did not describe Mr. Leon as black but as ethnically mixed, and not white. (21 RT 1208-1216.) While Kim selected Mr. Leon from a photo six-pack, noting that the photo "looked like" the suspect (People's Exhibit 58, 21 RT 2104), he did not identify Mr. Leon at a live line-up. (7 CT 1745.) Kim said that all of the participants in the line-up looked alike to him. (21 RT 1207.) He testified that police had

shown him video footage several times, but he was not certain how many times he had viewed the video between the time of the robbery, the time he made a photo line-up identification, and the preliminary hearing. (21 RT 1211-1215.)

Similarly, the evidence regarding the Sun Valley Shell Gas Station robbery and homicide was not overwhelming. One witness, Raffi Rassam, testified that he saw the robbery when he was outside attempting to pump gas. When he went toward the station store, he heard coins falling on the floor of the store and saw Norair Akhverian, who was facing Rassam, and another man, who had his back to him. (28 RT 1907.) Rassam saw this man jump from behind the counter and then turn and shoot Akhverdian. (28 RT 1909-1911.) At the time of the incident, another clerk, Nick Kirakosyan, had been working in a back room of the store. He never saw the suspect and did not recognize the person depicted in the videotape of the robbery.

Rassam testified that he could not remember if he had been showed photographs or video footage between the time of the incident and the time he identified suspects in line-ups. He remembered that a few weeks after the incident the police shown him videotapes of other robberies. Rassam testified that he "may have" formed an opinion that the man who was depicted in those videotapes was the same one who robbed the Sun Valley Shell station and killed Mr. Akhverdian. In photo line-ups, Rassam identified two photos, one of which was of appellant. He noted that both suspects "resembled the type of face build" as the robber. He also identified appellant in a live line-up but said "it looked like he was scruffier." (People's Exhibit 134, 28 RT 1917-1918.)

This Court should reject respondent's argument that it aggregate all of the evidence from ten robberies and two felony murders to assess the

prejudice created by Detective Oppelt's identification testimony concerning two of these incidents. Rather, the Court should focus on the fact that it was likely that the jurors would be influenced by the fact that Oppelt was a police officer and would give his testimony special deference.

Another source of undue prejudice was the prosecutor's reliance on the videotapes in making her case for appellant's guilt. Indeed, the prosecutor arranged to have the tapes shown in the jury deliberation room. (30 RT 2164.) She played one of the tapes, People's Exhibit 9, for the jury during her closing argument at the guilt phase. (30 RT 2165.) In narrating the tape, she pointed to one of the people depicted and stated "you have heard testimony that this is the defendant." (30 RT 2166-2167.) Not only did Oppelt's testimony identifying appellant in the tapes become a cornerstone of her argument regarding those two robberies, she used the tapes to support her "theme" that all the crimes in this case were exceptionally cruel:

> The defendant, you can see from some of the videos of the robbery, it's more than the way he looks. He has an attitude, a strut about him as he robs people. It is excessive, if you will, because if you look at , for instance, a good example of that is the video that we have of the Su or the Chan's Shell. The way he comes in he is displaying the gun in a very outward position. He is up on the guy's neck. I mean he turns what could be rather routine robbery into a very frightening and intimidating experience. And in that respect has left an indelible impression on those victims such that even today, some three and a half years later, they can come in, they can take the oath, and they can look over at this man and he can shave that mustache off his face. He can gain weight. He can undo the ponytail like he has done today. And they are sure he is the man. They can identify (sic) as the man.

(30 RT 2181-2182.)

For all of the foregoing reasons and those stated in appellant's opening brief, Mr. Leon's convictions and death sentence should be reversed.

* * *

V.

THE TESTIMONY ABOUT THE AUTOPSY OF NORAIR AKHVERDIAN VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

In this case, Dr. Eugene Carpenter, a medical examiner in the Los Angeles Coroner's Office, testified as a prosecution witness about the autopsy of the body of Norair Akhverdian, which was conducted by another medical examiner, Dr. James Wegner. (26 RT 1720-1740.) Argument V of appellant's opening brief sets forth in detail why this testimony was improper and violated Mr. Leon's Sixth Amendment rights to confrontation, under the principles discussed in the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305. (AOB at pp. 126-142.) This brief will address points raised in respondent's brief as well as recent decisions of this Court and the United States Supreme Court.

A. Appellant has not Forfeited this Claim by Failing to Object at Trial

Respondent urges the Court to find that appellant waived this claim on appeal because he did not raise it at trial. Although this Court has held that challenges to the admission of evidence normally are forfeited if not timely raised in the trial court, "this is not so when the pertinent law later changes so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (*People v. Black* (2007) 41 Cal.4th 799, 810-811, quoting *People v. Turner* (1990) 50 Cal.3d 668,703; see also *People v. Chavez* (1980) 26 Cal.3d 334, 350, n. 5.)

Mr. Leon's trial took place in 1996. In 1992, this Court held that the testimony of a pathologist regarding the contents of an autopsy report

prepared by another pathologist, who had since passed away, did not violate the Confrontation Clause because it was admitted "under a firmly rooted exception to the hearsay rule that carries sufficient indicia of reliability to satisfy the requirements of the confrontation clause." (*People v. Clark* (1992) 3 Cal. 4th 41, 158, see also *People v. Beeler* (1995) 9 Cal. 4th 953, 979 [testimony of prosecution witness regarding autopsy findings of another pathologist did not violate confrontation clause].)

It was not until 2004 that the United States Supreme Court issued its seminal decision in *Crawford v. Washington, supra,* 541 U.S. 36. *Crawford* "abandoned" the indicia-of-reliability standard used by this Court in *People v. Clark.* (*People v. Geier* (2007) 41 Cal. 4th 555, 597.) Because of this wholesale change in the law, courts have held that a *Crawford* claim is not waived or forfeited by the failure to make a Sixth Amendment objection in the trial court. (*People v. Saffold* (2005) 127 Cal. App. 4th 979, 984 ["Any objection would have been unavailing under pre-*Crawford* law"]; *People v. Johnson* (2004) 121 Cal. App. 4th 1409, 1411 n. 2 ["the failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].) Accordingly, the Court should decide the merits of Mr. Leon's claim.

B. Despite this Court's Decision in *People v. Dungo*, the Court Should Find that the Autopsy Report in this Case was Testimonial

In *Crawford v. Washington, supra,* 541 U.S. at p. 68 ("*Crawford*"), the United States Supreme Court held that admission of out-of-court testimonial evidence violates the Confrontation Clause of the Sixth Amendment unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination. The Court, however, did not spell

out a definition of "testimonial evidence," leaving the exact parameters of its decision open. (*Ibid.*) Since its decision in *Crawford, supra*, the High Court has issued several opinions[21] wrestling with the definition. None of these decisions, however, has provided a clear statement of the meaning of "testimonial."

As this Court has observed, the "widely divergent views expressed by the justices of the United States Supreme Court" about the Sixth Amendment confrontation right in these decisions has made resolving the issue in individual cases very difficult. (*People v. Dungo* (2012) 55 Cal.4th 608, 616.) In particular, the High Court's decision in *Williams v. Illinois* (2012) 557 U.S.___, 132 S.Ct. 2221, a case involving DNA collected in a rape case, is confusing. Chicago police sent an evidence sample, a vaginal swab from the victim of a rape, to Cellmark for analysis. From these swabs, Cellmark reported a DNA profile which matched defendant Sandy Williams. At Williams' bench trial, the analyst who generated the Cellmark report did not testify; instead, a prosecution expert testified that the DNA profile produced by Cellmark from the victim's vaginal swabs matched a DNA profile generated by the state police laboratory from a sample of the defendant's blood. In a splintered decision with no majority opinion, the United States Supreme Court ruled that the expert's testimony concerning the Cellmark DNA profile did not violate the defendant's Sixth Amendment right of confrontation.

The plurality opinion authored by Justice Alito and joined only by Justices Roberts, Breyer, and Kennedy, reached its conclusion that the

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[21] The most recent and relevant are: *Melendez-Diaz v. Massachusetts, supra*; *Bullcoming v. New Mexico* (2011) 564 U.S.___, 131 S.Ct. 2705; and *Williams v. Illinois* (2012) 557 U.S.___, 132 S.Ct. 2221.

expert testimony did not violate the defendant's right to confront witnesses on two different grounds: (1) the evidence had not been admitted for its truth, but rather for the non-hearsay purpose of explaining the basis of the testifying expert's opinion, and (2) even if the Cellmark lab report had been introduced for its truth, the evidence was not "testimonial" because its primary purpose was not to accuse petitioner or to create evidence for use at trial. (*Id.*, 132 S.Ct. at p. 2228, 2243.)

However, five Justices - the four dissenters and Justice Thomas, who wrote a separate opinion, concurring in the result but not the reasoning of Justice Alito's plurality opinion - expressly disagreed with the plurality's conclusion that the evidence concerning the DNA sample was not admitted for its truth. Justice Thomas reasoned that "statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose," and "[t]here is no meaningful distinction between disclosing an out-of-court statement so that a factfinder may evaluate the expert's opinion and disclosing that statement for its truth." (*Id.* at p. 2257 [Thomas, J., concurring in the judgment].)

Justice Kagan, in a dissent joined by Justices Scalia, Ginsburg, and Sotomayor, wrote that five Justices agreed in two opinions[22] that the expert's statements about the Cellmark report were admitted for their truth. (*Id.* at p. 2268.) She explained that the utility of an out-of-court statement admitted as the basis for an expert's opinion "is . . . . dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it

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[22] The two opinions referred to by Justice Kagan were Justice Thomas's concurring opinion and her dissenting opinion.

relies." (*Ibid.*)

Justice Kagan, joined by three other dissenting Justices, made this final critique of the *Williams* plurality decision:

> Before today's decision, a prosecutor wishing to admit the results of forensic testing had to produce the technician responsible for the analysis. That was the result of not one, but two decisions this Court issued in the last three years. But that clear rule is clear no longer. The five Justices who control the outcome of today's case agree on very little. Among them, though, they can boast of two accomplishments. First, they have approved the introduction of testimony at Williams's trial that the Confrontation Clause, rightly understood, clearly prohibits. Second, they have left significant confusion in their wake. What comes out of four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is – to be frank – who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.

(*Id.* at p. 2277.)

In *Dungo, supra*, this Court addressed the question of whether the testimony of a prosecution expert, who had not conducted the autopsy of the victim but who testified about the cause of death, violated the defendant's Sixth Amendment's right to confront evidence against him. In *Dungo*, focusing on the issue of whether the autopsy report and photographs were "testimonial" and therefore subject to the Confrontation Clause, the Court did not find a violation. On the issue of whether the evidence was testimonial, the Court considered whether it was made with the necessary degree of formality or solemnity and whether its primary purpose pertained to a criminal prosecution. (*People v. Dungo, supra*, 55 Cal.4th at p. 619.)

In *Dungo*, the Court found that the autopsy report of the non-testifying pathologist in that case was not sufficiently formal. That determination was based on the fact that the expert only testified about the statements in the report which were the pathologist's anatomical and physiological observations about the condition of the body. He did not testify about the conclusions in the autopsy report about the cause of the victim's death. (*Id.* at p. 619.) The *Dungo* majority opinion deemed these "observations of objective fact" to be less formal and therefore not "testimonial" in nature. (*Ibid.*)

Although the Court concluded under the facts of the *Dungo* case that the autopsy report and photographs did not amount to "testimonial" evidence, the facts presented in Mr. Leon's case are distinguishable in significant ways. The first crucial distinction is that in *Dungo*, unlike in this case, neither the autopsy report nor the autopsy photographs were introduced into evidence. (*Id.* at p. 612.) [23] It is undisputed that in this case, the prosecution introduced both the autopsy report written by Dr. Wegner and the photographs that were taken during the autopsy. (29 RT 2024-2025; 8 CT 1970.) Another important difference is that in the *Dungo* case the Court emphasized that the pathologist testified only about the objective facts concerning the condition of the body as stated in the autopsy report and shown in the photographs but did not testify about the conclusions in the report. (*Dungo, supra*, 55 Cal.4th at p. 619.)

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[23] In *Dungo*, the autopsy report of the non-testifying pathologist, Dr. Bolduc, was not introduced into evidence. The Court found that significant: ". . . here (unlike in the companion case of *People v. Lopez* [citation omitted]), Dr. Bolduc's autopsy report was not introduced into evidence. Thus, we need not decide whether that entire report is testimonial in nature." (*People v. Dungo, supra*, 55 Cal.4th at pp. 618-619.)

By contrast, in Mr. Leon's case, Dr. Carpenter essentially parroted what was contained in the autopsy report authored by Dr. Wegner, who actually performed the autopsy, thereby adopting Wegner's conclusions about the cause of death as his own. (26 RT 1726-1731.) The only time Carpenter was asked to express his own opinion regarding the autopsy of Norair Akhverdian was about the location of the entry wound on the diagram which was part of Wegner's report. The prosecutor noted that the location of the bullet wound seemed to be lower than where the heart would be, and Dr. Carpenter described lay misconceptions about the location of the heart and explained how the breathing process lowers and rises the position of the heart. (26 RT 1732-1734.) On cross-examination, Carpenter agreed that he could not know, because it was not stated in the autopsy report, whether Mr. Ahkverdian was breathing in or out at the time the bullet hit him. (26 RT 1737.) Therefore, on these facts, Mr. Leon's case is distinguishable from *Dungo*.

The other factor leading the Court in *Dungo* to find that the testimony by an expert about an autopsy done by someone else was not "testimonial" for purposes of the Sixth Amendment right to confrontation was the Court's determination that the primary purpose of the statements in the report was not for purposes of a criminal prosecution. (*Id.* at p. 621.) In support of this conclusion that the primary purpose of an autopsy is not for criminal investigation, the majority opinion in *Dungo* observed:

> The usefulness of autopsy reports, including the one at issue here, is not limited to criminal investigation and prosecution; such reports serve many other equally important purposes. For example, the decedent's relatives may use an autopsy report in determining whether to file an action for wrongful death. And an insurance company may use an autopsy report in determining whether a particular is covered by one of its

> policies. Also, in certain cases an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when (as here) the death was reported in the local media. In addition, an autopsy report may proved answers to grieving family members.

(*Ibid.*)

Mr. Leon asks the Court to reconsider the emphasis it placed in *Dungo* on the formality or solemnity aspect of evidence since it is Justice Thomas alone among the Supreme Court Justices who has placed such importance on this factor. As Justice Kagan noted in her dissenting opinion (joined by Justices Scalia, Ginsberg and Sotomayer) in *Williams v. Illinois, supra*, 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 earlier decision in *Bullcoming v. New Mexico, supra.* (*Williams, supra*, 132 S.Ct. 2221, 2275-2276.)

Mr. Leon also requests that the Court re-examine its finding in the *Dungo* case that an autopsy report is not testimonial because "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of Pina's body " and "criminal investigation was not the primary purpose for recording the facts in question." (*Dungo, supra*, 55 Cal.4th at pp. 620-621.) As Justice Corrigan points out in her dissent in the *Dungo* case, the idea that a statement is not testimonial unless it was prepared for the primary purpose of accusing a targeted individual has never garnered a majority of the justices of the United States Supreme Court. (*Id.* at pp. 642-644.) While the plurality opinion, authored by Justice Alito, in the *Williams* decision adopted this test, it was rejected by five other Justices. In his separate concurring opinion, Justice Thomas criticized this concept because it "lacks any grounding in constitutional text, in history, or in logic." (*Williams, supra*, 132 S.Ct. at p. 2262.) Justice Kagan's dissent,

joined by three other Justices, also rejected the accusatory statement theory, describing the proper test as "whether a statement was made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution' — in other words, for the purpose of providing evidence." (*Id.* at p. 2273, quoting *Davis v. Washington* (2006) 547 U.S. 813, 822.)

As noted in the opening brief in this case, under California law, the coroner's function of conducting autopsies is a law enforcement function. Under California statutory law, a coroner is a "peace officer." (Cal. Pen. Code § 830.30; Cal. Govt. Code § 27419.) Detective Oppelt, one of the investigating officer in this case, attended the autopsy. (4 CT 872.) The autopsy report and the photographs taken in conjunction with it were entered into evidence and were clearly offered for their truth. In this case, this evidence qualified as "testimonial" evidence covered by the Sixth Amendment right to confrontation, and the principles stated in *Crawford v. Washington, supra*, 541 U.S. at p. 68; *Melendez-Diaz v. Massachusetts, supra*; 557 U.S. at p. 310; and *Bullcoming v. New Mexico, supra,* 131 S.Ct. at p. 2717, apply.

Respondent argues that any error involved in admitting the autopsy report of Dr. Wegner and allowing Dr. Carpenter to testify about the cause of death in this case was harmless because there was so much other evidence showing that Mr. Akhverdian died of a gunshot wound. Under this hypothesis, the prosecution would never be required to offer expert evidence regarding the cause of death in a homicide case; indeed, the prosecution would not need to conduct autopsies if there was eyewitness evidence about how the killing at issue took place. The Court should reject this argument. Even if the prosecution's case is strong and the defendant's case is weak, that does not mean that evidence which should not have been

admitted is unimportant. (*People v. Scott* (1978) 21 Cal.3d 284, 295-296.)

The prosecution must prove this Sixth Amendment error harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) Moreover, in applying *Chapman* to this Confrontation Clause error, a reviewing court must assume "that the damaging potential of the cross-examination were fully realized," and then ask whether the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684; see also *Coy v. Iowa* (1988) 487 U.S. 1012, 1021-1022.) Even if "the case in which this occurred presented a reasonably strong 'circumstantial web of evidence" (as in *Chapman v. California, supra,* 386 U.S. at p. 25), it cannot be said that there is no reasonable possibility that the error in this case contributed to the verdict. Accordingly, Mr. Leon's conviction for the murder of Norair Akhverdian, the finding of a multiple murder special circumstance and the death sentence must be reversed.

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VI.

THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT AT THE GUILT PHASE CONSTITUTED REVERSIBLE ERROR

A. Appellant's Misconduct Claim was not Forfeited

Respondent erroneously argues that Mr. Leon waived his right to challenge statements in the prosecutor's closing argument at the guilt phase trial as misconduct because he did not object to each of these statements or request an admonition. (RB at 123-124.) It is true that as a general rule a defendant may not complain on appeal of prosecutorial misconduct unless at trial, the defendant objected and requested that the jury be advised to disregard the impropriety. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

The rationale for the objection/admonition rule is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692, citation and internal quotation marks omitted.) But as the *Hill* opinion explained, the requirement of an objection to preserve appellate arguments is only a "general rule." (*People v. Hill, supra*, 17 Cal.4th at p. 820.) For example, a defendant will be "excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*Ibid.*) Similarly, failure to request that the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct. (*Ibid.*) Indeed, strict compliance with the objection/admonition rule has not been required, and courts have not found forfeiture when there has been "substantial compliance" by defense counsel. (*People v. Pitts,*

supra, 223 Cal.App.3d at p. 692 fn. 22, citing *People v. Bonin* (1988) 46 Cal.3d 659, 689.)

In this case, defense counsel did object to the prosecutor's improper appeal to emotion during her guilt phase closing argument to the jury. This objection occurred at the beginning of the prosecutor's argument when she was discussing Julio Cube's disability and small stature and her claim that his robbery was an example of the robber's "excessive violence" and "unnecessary cruelty towards the victims." (30 RT 2149.) Two robbery counts regarding Mr. Cube had been dismissed from the Information in this case, but, over the defense's objection, the prosecutor was allowed to call him as witness. Defense counsel objected, stating that this argument about Mr. Cube's physical characteristics and appellant's alleged excessive violence and cruelty

> . . .is simply appealing to the passion of the jury. It's not relevant to any of the other points that the People have to prove or to argue. Whether it is more or less violent has nothing to do with whether Mr. Leon is guilty of this. And to go on at length just simply describing the atrocity and violence, this argument is improper appealing to the passions of the jury.

(30 RT 2149.)

Despite its merit, this objection fell on deaf ears. The trial judge rejected it with the terse comment, "[i]t is proper argument." (30 RT 2149.)

The record in this case makes clear that any further objections would been futile since the trial judge had overruled this objection. The contemporaneous objection rule is not applicable where any objection by defense counsel would almost certainly have been overruled. *(People v. Pitts, supra*, 223 Cal.App.3d at p. 692; see also *People v. Hamilton* (1989)

48 Cal.3d 1142, 1184, fn. 27; *People v. Rios* (1985) 163 Cal.App.3d 852, 868.)

Respondent argues that "the basis for counsel's first objection was different than the basis for the claims now raised here, and further objections should have been interposed to preserve them on appeal." (RB at 124.) It is not entirely clear what this statement means, but if respondent is claiming that there was a different basis for Mr. Leon's objection to the prosecutor's remarks about the use of unnecessary violence and the particular vulnerability of Julio Cube, that is not true. As explained in appellant's opening brief, this was the theme of the prosecutor's closing argument at the guilt phase in this case: that appellant was an unusually cruel criminal who often picked on vulnerable victims. Improper comments about Julio Cube, which appeared at the beginning of the prosecutor's closing argument, reflected that theme, as did the subsequent improper comments in her argument, which Mr. Leon has challenged in this argument.

Moreover, a request for admonition in this case would have been equally futile. The absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (*People v. Green* (1980) 27 Cal. 3d 1, 35 fn. 19; *People v. Pitts, supra*, 223 Cal. App. 3d at p. 692; *People v. Lindsey* (1988) 205 Cal. App. 3d 112, 116 fn. 1; see also *People v. Hill, supra*, 17 Cal. 4th at pp. 820-821.)

The simple reality is that many lawyers are loath to make multiple objections during the opposition's closing argument to the jury, particularly if they do not believe the judge is likely to sustain such objections, because

it may prejudice the jurors against their clients. As this Court noted in *People v. Bolton* (1979) 23 Cal.2d 208, "[m]erely to raise an objection to [improper] testimony – and more, to have the judge tell the jury to ignore it – often serves but to rub it in." (*Id.* at pp. 215-216, fn. 5.)

Because there were numerous instances of improper and prejudicial comments in the prosecutor's guilt phase closing argument, it would have been futile for defense counsel to object to all of instances, and multiple objections potentially would have prejudiced Mr. Leon in the eyes of the jury. The decision not to make multiple objections was a reasonable tactical decision by trial counsel, and appellate consideration of Mr. Leon's objection to the prosecutor's misconduct should not fall victim to a dubious claim of forfeiture.

B. The Prosecutor's Comments were Improper and Prejudicial

Respondent argues that it was "fair comment" by the prosecutor (RB at 124-125) when she urged the jurors to consider what the prosecutor called the particular vulnerability of some of the victims in this case; that is, two women working alone as well as Mr. Cube, whom the prosecutor described as disabled. (30 RT 2149-2150.) Respondent also defends the prosecutor's comments about the robbers as being assaultive and using unnecessary force and violence. (30 RT 2151.)

The prosecutor's statements were not fair comment. Her remarks went well beyond fair comment about the evidence and how it purportedly showed that appellant was guilty of the robberies and two murders with which he was charged. The point of her argument was to persuade the jurors that Mr. Leon's alleged conduct was worse than a regular robber:

> . . . having an attitude, a strut about him as he robs people. It is excessive. I mean he turns what could be a rather routine robbery into a very frightening and intimidating experience.

(31 RT 2181.)

Or, in the case of the robber of Chan's Shell and Valley Market:

> You see a very assaultive robber, not just show the gun or open his jacket and say give me the money. You see him reaching over, pointing at these people, gesturing, posturing with such arrogance, with arrogance he robs these people.

(30 RT 2151.)

Or, in the case of the robbery and murder at Jack's Liquor, the prosecutor rhetorically asks: "It seems to me if you are after the money do you really need to shoot a person in the back?" (30 RT 2151.) In describing the alleged robberies of Mr. Cube:

> Same thing with Mr. Cube, the violence in that case is so unnecessary. . . examples of excessive violence in this case. Unnecessary cruelty towards the victims.

(30 RT 2149.)

The prosecutor's theme was that Mr. Leon was not your ordinary robber and murderer; he was something far worse. The murders in this case were tried as felony murders. The jurors were not asked to determine Mr. Leon's intent beyond the question of whether he had the intent to commit the underlying robberies. The issue of whether or not Mr. Leon used unnecessary violence or cruelty towards any of the victims was not relevant at the guilt phase of the trial, and the prosecutor's argument constituted misconduct because she employed a reprehensible method to attempt to persuade the jurors to find Mr. Leon guilty.

Respondent also asserts it was proper for the prosecutor to make the following argument about one of the murder victims:

> And this guy [Akhverdian], see how pathetic this is, this guy stands there and he is probably thinking okay, it's over. I

> have done things right. The robber is leaving, he is over the table and he turns and he shoots this man...What could Mr. Akhverdian have done to cause a person to do that?

(30 RT 2152.)

Mr. Leon argued in his opening brief that this plea to the jurors to put themselves in Mr. Akhveridian's shoes or to see through the eyes of the victim was improper argument. (AOB at p. 148.) Respondent counters by stating: "Contrary to appellant's contentions, the prosecutor did not invite the jury to imagine Akhverdian's suffering in the final moments of his life. There is, in fact, no mention of Akhverdian's suffering or any comment of pain he many have endured as a result of being shot by appellant." (RB at p. 128.)

Respondent has misconstrued Mr. Leon's claim regarding the impropriety of this portion of the prosecutor's closing argument. There is no requirement that the prosecutor specifically importune the jurors to imagine the suffering of the victim; the harm is to ask them to view the crime through the eyes of the victim. (See, e.g., *People v. Stansbury* (1993) 4 Cal.4th 1012, reversed on other grounds in *Stansbury v. California* (1994) 511 U.S. 318.) This type of argument is known as the Golden Rule argument. As the Court of Appeal observed in a recent decision, *People v. Vance* (2010) 188 Cal.App.4th 1182, 1198-1199:

> The condemnation of Golden Rule arguments in both civil and criminal cases, by both state and federal courts, is so widespread that it is characterized as "universal." [citations below in footnote][24] And as already shown, California joins

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[24] The cases cited in *People v. Vance, supra*, for the proposition that the prohibition against the Golden Rule argument is universal are as (continued...)

> with the nation in generally prohibiting Golden Rule arguments by counsel in criminal trials —a near-categorical prohibition attributable to the unusually potent prejudicial impact of the crime on the victim's family.

In describing the rationale behind the prohibition of Golden Rule arguments, Justice Sims opined:

> The appeal to a juror to exercise his subjective judgment rather than an impartial judgment on the evidence cannot be condoned. It tends to denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence. (Citation omitted.) Moreover, it in effect asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence.

(*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484-485.)

The prosecutor's comments about Mr. Akhverdian were improper Golden Rule argument and thus constituted prosecutorial misconduct.

C. This Error was not Harmless

Respondent claims that even if the prosecutor's argument in this case amounted to error, it was harmless. (RB at 127.) In particular, respondent asserts that "no fewer than 16 witnesses identified appellant as the perpetrator of the 10 robberies and murders." (*Ibid.*) Respondent misrepresents the state of the record. (See description of the evidence

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[24] (...continued)
follows: *State v. Bell* (Conn. 2007) 931 A.2d 198, 214; *Peterson v. State* (Fla.Ct.App.1979) 376 So.2d 1230, 1233; *Granfield v. CSX Transp.Inc.*(1st Cir. 2010) 597 F.3d 474, 491; *Ivy v. Security Barge Lines, Inc.* (5th Cir. 1978) 585 F.2d 732, 741; *United States v. Teslim* (7th Cir. 1989) 869 F.2d 316, 328; *Joan W. v. City of Chicago* (7th Cir. 1985) 771 F.2d 1020, 1022; *Lovett ex. rel. Lovett v. Union Pacific R. Co.* (8th Cir. 2000) 201 F.3d 1074, 1083; *Blevins v. Cesna Aircraft Co.* (10th Cir. 1984) 728 F.2d 1576, 1580.

presented concerning the robberies and robbery/murders set forth in the AOB at 5-21.) At most, there were 13 people who identified Mr. Leon at one time or another as one of the robbers involved in these cases; however, with the exception of Yossi Dina in the Ben's Jewelry Store robbery, Mei Chai in the Seven Star Motel Robbery, Maria Guadalupe Medina in the Rocky's Video robbery, and Hunan Ganzyan and Aslanyan Vardkes in the H & R Pawn Shop robbery, all of these witnesses expressed some hesitation or equivocation in their identification of Mr. Leon as a participant in the robbery in which each was involved.

For example, Mr. Su testified about the Chan's Service Station robbery, and he had trouble picking out Mr. Leon's photo from the six-pack array, writing on the report that he was not sure of his identification. (17 RT 740-741.) Similarly, in the Ben's Jewelry robbery case, Shant Broutian chose two photos (one of which was of Mr. Leon) in the photo array, and he couldn't definitively select Mr. Leon in the live line-up. (18 RT 822-824; 7 CT 1756.) He stated that "he could never be a hundred percent sure." (18 RT 824.) In the Sun Valley Gas Station robbery and homicide, Raffi Rassam was not certain about his identification of Mr. Leon both in the photo array and in the live lineup. (28 RT 1915-1918.) Of the three witnesses at the scene in the Jack's Liquor Store robbery, only one identified Mr. Leon. The two other witnesses, Anthony Schilling and Gordon Keller, who were on a roof of a nearby building, heard shots and saw one man come out of the store and another who met him on the street, did not identify Mr. Leon. ((30 RT 2083, 2126.) Mr. Joon Kim, who was working at the Valley Market when it was robbed, selected Mr. Leon's photograph from the photo array, but he was uncertain about his selection. (21 RT 2104.) Also, he did not identify Mr. Leon at the live line-up. (21

RT 1207.) There were only two witnesses to the Original Blooming Design robbery. Only one of them testified at trial, and he never identified Mr. Leon as a participant in the robbery. The other witness, Homer Vela, identified Mr. Leon at the preliminary hearing, but he gave only a tentative identification of his photo and did not identify him at the live line-up. (7 CT 1747; 22 RT 1291; 22 1318-1322.)

As outlined above, the identification evidence in this case was not "overwhelming" as respondent claims.

Citing *People v. Carter* (2003) 30 Cal.4th 1166, 1196, respondent asserts that "[a]ppellant's claim of federal constitutional error must also fail because it is predicated entirely on his claim of state law error." (RB at 127.) Respondent's reliance on the *Carter* decision is misplaced. That decision involved the admission of gang evidence offered by the prosecution as relevant to the issues of motive, intent and identity. This Court analyzed whether the trial judge abused his discretion when he admitted this evidence over defendant's objection that it was both irrelevant and prejudicial. Finding that the gang evidence was significant to disputed issues and was not cumulative, the Court held that the trial judge had not abused his discretion and that appellant Carter's claims of federal constitutional error also failed because they were entirely dependent on his state evidentiary error. (*Id.* at pp. 1194-1195.)

By contrast, a claim of prosecutorial misconduct is not necessarily predicated on state law. As stated in the opening brief, prosecutorial misconduct violates the United States Constitution when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) The standard under California law for determining the existence vel non of

prosecutorial misconduct is different; the question is whether the conduct involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury" even if such action does not render the trial fundamentally unfair. (*People v. Cook* (2006) 39 Cal.4th 566, 606.)

In any event, as discussed in the opening brief, the prosecutor's conduct in this case violated the state law standard for prosecutorial misconduct because the prosecutor's arguments to the jury in the guilt phase were deceptive and reprehensible. Improper appeals to the passions and prejudices of jurors, including asking them to view the crime through the eyes of the victims or focusing on the particular vulnerabilities of the victims when that is not relevant to any element of the crime charged, are deceptive and reprehensible. (See, e.g., *People v. Kipp* (2001) 26 Cal.4th 1100, 1130; *People v. Fields* (1984) 35 Cal.3d 329, 362.)

Not only was the prosecutor's improper guilt phase argument prejudicial under state law, it amounted to prejudicial misconduct in violation of appellant's federal constitutional rights to due process. The burden rests squarely on the prosecution to establish that the prosecutor's improper remarks were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent has not and cannot carry that burden; accordingly, Mr. Leon's convictions and death sentence must be reversed.

* * *

VII.

THE TRIAL JUDGE ERRED WHEN HE INSTRUCTED THE JURY WITH CALJIC NO. 2.52 AT APPELLANT'S GUILT PHASE TRIAL

In his opening brief, Mr. Leon argued that his convictions and death sentence must be reversed because the trial judge, over his objection, instructed the jurors that they could infer that he was guilty of the charged crimes because on the day he was arrested, which occurred some time after the offenses with which he had been charged, he had fled from the police. (AOB at 154-169.) This instruction, CALJIC No. 2.52,[25] was unnecessary and argumentative, improperly favored the prosecution's case and permitted the jurors to draw irrational inferences against Mr. Leon. The effect was to lessen the prosecution's burden of proof in violation of Mr.Leon's rights to due process, a fair jury trial, equal protection, and reliable jury determinations on guilt, special circumstances, and penalty. (U.S. Const., 6th, 8th & 14th Amends.; Cal.Const., art. I, §§ 7, 15, 16 & 17.)

Respondent claims that the instruction was in fact proper, or, in the alternative, if it were not, the use of the instruction in this case constituted

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[25] The instruction given at appellant's guilt phase trial reads as follows:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact, which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(31 RT 2310; 9 CT 2011.)

harmless error. (RB at pp. 130-141.) For all of the reasons set forth in the opening brief and for the reasons that follow, respondent's argument should be rejected. Instructing the jury pursuant to CALJIC No. 2.52 was error which prejudiced Mr. Leon.

A. Respondent Fails to Counter Appellant's Claim that CALJIC No. 2.52 is Impermissibly Partisan and Argumentative

Argumentative jury instructions are those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Argumentative instructions present the jury with a partisan argument disguised as a neutral and authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Instructions which ask the jury to consider the impact of specific evidence, or imply a conclusion to be drawn from the evidence are argumentative and should not be given. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105 fn. 9; *People v. Daniels* (1991) 52 Cal.3d 815, 870-871.) Appellant's opening brief explains why CALJIC No. 2.52 constitutes an impermissible argumentative jury instruction. (AOB at 159-163.)

The response to this claim in respondent's brief is completely inadequate. (RB at 135.) It cites several decisions of this Court but does not explain how they refute Mr. Leon's argument that CALJIC No. 2.52 is an argumentative jury instruction. In particular, respondent ignores the discussion in the opening brief about how other state appellate courts have criticized of the use of similar "consciousness of guilt" jury instructions. Not only have the courts of nine states, cited in the opening brief (AOB at 161-163), found that such instructions unfairly highlight isolated evidence,

but other courts have questioned the worth of flight instructions such as CALJIC No. 2.52. In *Wong Sun v. United States* (1963) 371 U.S. 471, 483, fn. 10, the United States Supreme Court noted that it "we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." (See also *United States v. Williams* (7th Cir 1994) 33 F.3d 876, 879 ["There is a danger that a flight instruction will isolate and give undue weight to evidence."]

The facts of *State v. Latney* (N.J. App.Div. 2010) 1 A.3d 741, a recent decision of the appellate division of the New Jersey Superior Court, are similar to those presented here. In *Latney*, the appellate court reversed and remanded for a new trial on the ground that the trial court erred in admitting evidence of the defendant's flight and in instructing the jury on flight as evidence of consciousness of guilt.

Latney was charged and convicted of armed robbery. Prosecution evidence showed that a police officer had followed a speeding Jaguar car, which defendant Latney was driving and which had been reported stolen in an incident unrelated to the charged robbery. During the chase defendant crashed into a police car and was arrested. (*State v. Latney, supra*, 1 A.3d at p.744.) The jurors hearing the robbery case were instructed that they could consider Latney's flight from the police as probative of his consciousness of guilt of the robbery on the theory that he was fleeing to avoid apprehension for that crime.

The New Jersey appellate court held that both admitting this evidence of flight and instructing the jury that it could be used as evidence against Latney on the robbery charge was prejudicial error as it was as likely that Latney had been trying to elude the police because he knew the Jaguar was stolen as it was that he was concerned that the police were

pursuing him because of the unrelated robbery. (*Id.* at p. 747.)

In this case, as in the *Latney* case, it was impossible to know why Mr. Leon chose to flee the police car. The police chase did not occur right after any of the charged crimes in this case. Given these facts, flight from police officers which did not involve flight from a crime scene, it is entirely speculative that the "consciousness of guilt," which was allegedly the basis of the flight, was related to Mr. Leon's concern that the police were after him because of the crimes charged against him in this case. This is one of the reasons so many jurisdictions have forbidden the use of flight instructions to juries; the probative value of such evidence and instructions which call attention to this evidence is outweighed by the potential for undue prejudice. Accordingly, the trial judge erred in instructing Mr. Leon's jury pursuant to CALJIC No. 2.52 because it was impermissibly argumentative and partisan.

Moreover, the instruction violated Mr. Leon's equal protection and due process rights. Instructions which highlight the prosecution's version of the facts to the detriment of the defendant deprive his or her due process right to a fair trial. (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474.) Instructions slanted in favor of the prosecution also violate due process by lessening the prosecution's burden of proof. (*In re Winship* (1979) 397 U.S. 358, 364.)

Respondent's brief argues that Penal Code section 1127c compels a trial court to instruct pursuant to CALJIC No. 2.52 whenever evidence of flight of a defendant is relied upon to show guilt. (RB at p. 132.) While it is true that section 1127c does so state, that provision violates Mr. Leon's constitutional rights to due process and a fair trial. Section 1127c improperly requires an instruction which is argumentative, improperly

favors the prosecution's case and permits jurors to draw irrational inferences against Mr. Leon, thus lessening the prosecution's burden of proof in violation of his rights to due process, a fair jury trial, equal protection, and reliable jury determinations on guilt, special circumstances, and penalty. (U.S. Const., 6th, 8th & 14th Amends.; Cal.Const., art. I, §§ 7, 15, 16 & 17.)

B. The Error of Instructing Pursuant to CALJIC No. 2.52 was not Harmless

Respondent argues that even if the trial court erred in giving the flight instruction, the error was harmless because of the "extremely strong evidence of guilt." (RB at p. 140.) Identity of the perpetrator or perpetrators of the robberies and murders charged in this case was the crucial issue, and respondent claims that numerous witnesses identified Mr. Leon. In fact, a review of the record, reveals that there were inconsistencies in many of those identifications. For example, in the Chan's Shell Station robbery, the principal witness showed uncertainty in his pre-trial identification of Mr. Leon. (17 RT 726-728, 733, 740-741.) The other witness did not identify Mr. Leon in a photo six-pack, a lineup or in court. (17 RT 763, 766-767.) Similarly, in the Ben's Jewelry robbery, there were several witnesses who testified, and they did not all identify Mr. Leon. (See description of this identification testimony at page 9 of the AOB.) In the Jack's Liquor Store robbery and murder case, eyewitnesses gave contradictory descriptions and identifications of the perpetrators. Of the four witnesses who testified, only one positively identified Mr. Leon as being present at the crime scene. (AOB at pp. 14-15.) Homer Vela, who was not available to testify, but whose preliminary hearing testimony was admitted at trial, gave conflicting identifications of the three men he claimed robbed him at the flower shop,

Original Blooming Design. (AOB at pp. 20-21.) The record showed that in pre-trial lineups, he did not identify Mr. Leon, and at one of these line-ups, he chose someone other than Mr. Leon as the person with the gun who took the money from the cash register. (AOB at p. 21.) The record in this case belies respondent's claim that the evidence against Mr. Leon was overwhelming.

Giving the consciousness-of-guilt instruction was an error of federal constitutional magnitude. Accordingly, Mr. Leon's murder and robbery convictions as well as the two special circumstance findings must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

Moreover, since Mr. Leon's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the erroneous instruction (*Sullivan v. Louisiana* (1993) 508 U.S. at p. 279), the death sentence was obtained in violation of Mr. Leon's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. at p. 590; *Beck v. Alabama* (1998) 447 U.S. 625, 638; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

For all of the foregoing reasons and for the reasons set forth in Mr. Leon's opening brief, his convictions and death sentence must be reversed.

VIII.

THE TRIAL JUDGE'S REFUSAL TO GRANT APPELLANT'S MOTION TO CONTINUE WAS AN ABUSE OF DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Before the commencement of the penalty phase in his case, Mr. Leon filed a motion requesting a continuance of two to three weeks. (10 CT 2280-2283.) The basis of this motion was that he had not received adequate notice to prepare to cross-examine Bryan Soh and Christopher Anders, prosecution witnesses to alleged jailhouse incidents which the prosecution planned to offer as aggravating evidence under Penal Code section 190.3, subdivision (b) ("factor b"). Because this evidence related to the penalty phase case against Mr. Leon, defense counsel argued that denial of this continuance would violate his constitutional rights, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under California constitutional and statutory law, to effective assistance of counsel, to cross-examine key witnesses against him and to prepare rebuttal evidence. (10 CT 2280.)

Respondent's response to this claim is not persuasive.

A. Respondent's Brief Presents an Inaccurate Picture of the Facts

1. There was no Evidence Mr. Leon "Attacked" Bryan Soh

The rendition of the facts in respondent's brief about the motion to continue is incomplete and in part inaccurate. For example, respondent states that Bryan Soh's testimony involved "an incident wherein appellant and another inmate attacked and robbed Soh while in jail." (RB at p. 142.) There was absolutely no evidence suggesting that Mr. Leon "attacked" Soh.

The only evidence [26] ultimately offered about this alleged incident was the testimony of Deputy Sheriff Hutchinson, who testified that he did not see any physical contact between Leon and Soh. (34 RT 2656.) He did see Soh and Tony Bryant, another inmate, touch hands. (34 RT 2641, 2656.)

At trial, Hutchinson gave the following description of what he saw in the Los Angeles County Jail (North County Correctional Facility) on July 27, 1994. Mr. Leon and fellow inmate Bryant followed inmate Soh into the day room; they were about 15 feet behind Soh. After they called to him, Soh turned around. Bryant and Mr. Leon approached Soh and started talking to him. Hutchinson claimed that Soh "looked to be somewhat frightened." (34 RT 2640.) Although he could only see the side of Mr. Leon's face, Hutchinson testified that he looked angry. (34 RT 2641.) On cross-examination, Hutchinson conceded that he had not written in his report on the incident anything about Mr. Leon appearing angry; the report stated that he appeared "very upset." (34 RT 2651.) According to Hutchinson, Soh reached into his pocket and gave something to Bryant. (34 RT 2641.)

After Bryant and Mr. Leon left the day room, Hutchinson stopped them and directed them to face a wall, ten feet away from each. Deputy Hutchinson asked Mr. Leon whether he had received anything from Soh, and he said that he had not. (34 RT 2643-2644.) Hutchinson then talked to Soh, who was still in the day room. Soh claimed that Leon and Bryant had made him to give them a $20 bill. When Hutchinson returned to where Mr. Leon and Bryant were standing, he found a crumpled $20 bill at the feet of

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[26] Deputy Hutchinson was the only witness who testified about the incident involving Bryan Soh because the trial judge excluded Soh from testifying at appellant's penalty phase trial.

appellant. Mr. Leon denied knowing anything about the money. (34 RT 2646.) Deputy Hutchinson testified that he had the impression that Soh was mentally handicapped. (34 RT 2647.)

2. Mr. Leon Provided Compelling Reasons for a Continuance

Trial counsel's affidavit filed in support of his motion for a continuance as well as his argument at the July 8th hearing on that motion explained why he needed additional time to prepare to cross-examine Mr. Soh and Mr. Anders, fellow inmates of Mr. Leon in county jail and supposed victims of crimes allegedly committed by Mr. Leon while he was incarcerated in that facility and awaiting trial in this case. Soh's voluminous medical records from several mental hospitals, records trial counsel obtained just days before the start of the penalty phase trial, cast doubt on Soh's competence to be a witness and revealed Soh's history of dishonesty and manipulative conduct. (33 RT 2417.)

Trial counsel did not learn of Mr. Soh's felony history until after a hearing that occurred on June 26, 1996.[27] (33 RT 2419-2420.) He was not given a rap sheet for Mr. Anders until June 28. Because that rap sheet turned out to be incorrect, it was not until July 2 that defense counsel received the correct information about Anders' felony history. (10 CT 2267.) At that time, defense counsel learned that Anders had been represented previously by counsel's office, the Los Angeles County Public Defender, complicating counsel's ability to prepare to impeach Anders as a penalty phase witness against Mr. Leon. (33 RT 2422-2425.)

California law requires that a criminal defendant be afforded a

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[27] The penalty phase was scheduled to begin on July 8, 1996. (9 CT 2127-2128.) It actually started on July 9, 1996. (10 CT 2295-2296.)

continuance of a proceeding upon a sufficient showing of good cause. (Pen.Code §1050, subd. (e).) The determination of whether good cause exists rests within the "sound discretion " of the trial judge. (*People v. Sakarias* (2002) 22 Cal.4th 596, 646.) In *People v. Courts* (1985) 37 Cal.3d 784, this Court identified four factors to be considered by trial courts when a continuance is requested: (1) the diligence of the defendant; (2) the usefulness of a continuance; (3) the inconvenience to the court; and (4) the prejudice to the defendant if the continuance is not granted. (*Id.* at pp. 791-795; see also *Owens v. Superior Court of Los Angeles County* (1980) 28 Cal.3d 238, 251; *United States v. Flynt* (9th Cir. 1985) 756 F.2d 1352,1359.)

In this case, the only basis for the prosecutor's "strenuous" opposition to the defense motion for continuance was the alleged lack of of diligence of defense counsel. At the hearing on July 8, 1996, the prosecutor argued at length that Mr. Leon was not entitled to a continuance because his trial counsel actually had plenty of time to prepare to cross-examine prosecution witnesses Soh and Anders. (33 RT 2427-2429.) First, the prosecutor argued that since defense counsel had notice as of April 1, 1996, that Bryan Soh and Christopher Anders were potential witnesses, he had plenty of time to locate them and prepare to cross-examine them at the penalty phase trial. (33 RT 2427-2428.) The prosecutor, however, did concede that she didn't actually provide the defense with information about the felony convictions of Soh and Anders and their rap sheets until June 25, 1996. (33 RT 2428-2429.) The prosecutor did argue, quite illogically, that because the defense had obtained medical records on Mr. Soh's various stays in mental hospitals that a continuance was not necessary because the

defense actually had more information about Soh [28] than did the prosecution. (33 RT 2431.) Of course, the prosecutor had no need to cross-examine Bryan Soh, and apparently was not concerned about how his psychiatric history would affect his ability to be a competent, reliable and truthful witness.

The record in this case does not support the prosecutor's claim of lack of diligence on the part of Mr. Leon or his counsel. First, in determining whether a defendant has acted diligently, the court must focus on the conduct of the defendant, not defense counsel. (*People v. Robinson* (1954) 42 Cal.2d 741, 748 [defendant's personal efforts to retain counsel were sufficient to render denial of continuance an abuse of discretion]; see also *United States v. Pope* (9th Cir. 1988) 841 F.2d 954, 956-957 [although defendant conceded his counsel was not diligent, court found the denial of continuance to be improper because defendant had not acted dilatorily]; *United States v. Fessel* (5th Cir. 1976) 531 F.2d 1275, 1280 [same].) There is nothing in the record in this case suggesting that Mr. Leon did anything to delay the preparation for his penalty phase trial.

Moreover, the record supports defense counsel's claim that he acted diligently to prepare to cross-examine potential witnesses Soh and Anders. While he had received the names of these two men as potential penalty prosecution witnesses, the prosecutor told defense counsel several times during the ensuing months that she had not been able to locate either man. (10 CT 2281.) The prosecutor did not deny this claim:

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[28] Because the Los Angeles Public Defender's Office had previously represented Mr. Anders in some criminal cases, the prosecutor argued that the defense had more access to potential impeachment material than the prosecution did. (33 RT 2432.) Ethically, defense counsel could not use such evidence to impeach Anders.

> It's true he [defense counsel Lezin] asked me all along if we had the witnesses, and he says I told him that we did not locate them. But I – I believe I never left him with the impression we weren't looking for them. In other words, we found out about these incidents and we were looking for them.

(33 RT 2427-2428.)

Not only did the prosecutor fail to show that defense counsel had not diligently attempted to prepare to defend against the allegations of prosecution witnesses Soh and Anders, she never argued that his request for a continuance would inconvenience the court, the jury, the witnesses or her. As noted previously, inconvenience to the court is one of the factors identified in *People v. Courts, supra,* to be considered in ruling on a motion to continue. Moreover, in discussing his reasons for denying appellant's request for a continuance, the trial judge never mentioned how anyone, including him, would be inconvenienced if the commencement of the penalty phase was deferred for two or three weeks. The judge gave the following reasons for denying the continuance request:

> At this time I do not find good cause to continue this matter. What I am going to do at this time, we are going to proceed with other motions. I may preclude the testimony of the witnesses Soh and Anders. We will go forward with the trial. I find that you are adequately representing your client under both [the] U.S. and state constitutions. But I will go forward with the other matter we have before us before I make a final determination regarding Anders and Soh.

(33 RT 2434.)

Later in the hearing, the trial judge stated:

> . . .there is probably sufficient items in counsel's possession right now for adequate cross-examination and for adequate impeachment. The fact that he is requesting a continuance so that he can get more items regarding what occurred in various

> state hospitals, although the items probably would come in and would come in under the business records exception, this would not add to the impeachment. I am just considering this in my denial of the motion to continue.

(33 RT 2436.)

B. The Trial Judge Abused his Discretion in Denying the Request for a Continuance

Ultimately, the trial court decided that the prosecutor could not call Bryan Soh as a witness, but that she could use the incident involving him as factor b aggravating evidence. (33 RT 2445.) The only evidence the prosecution had to prove that the incident amounted to a crime for purposes of section 190.3, subdivision (b) was the testimony of Deputy Hutchinson about, nter alia, a statement made to him by Soh.

In determining whether the denial of a continuance constitutes an abuse of discretion, California courts consider the inconvenience to the court and the prejudice to the opposing party. (See *People v. Byoune* (1966) 65 Cal.2d 345, 348 [any prejudice or inconvenience must be evident from the record on appeal].) These concerns are balanced against the importance of the continuance to this defendant. (See *United States v. Pope, supra*, 841 F.2d at p. 957 ["[balanced against the importance to Pope's defense of a psychiatric evaluation, the inconvenience of a request for continuance made on the day trial was scheduled to commence did not justify the denial"].) The prejudice must be "serious" in order to justify a denial. (*People v. Courts, supra*, 37 Cal.3d at p. 794.) The record before the Court in this case does not contain any evidence that the prosecutor argued or that the trial judge considered that the short continuance appellant requested would inconvenience any party.

Accordingly, the trial judge in this case did not exercise sound discretion in denying Mr. Leon's request for a short continuation to prepare

to cross-examine two witnesses who claimed that he had stolen from them both and assaulted one of them, Mr. Anders. As defense counsel argued when he moved for the continuance, at a penalty phase of a capital trial, there is "nothing more serious than a witness coming up here and saying [appellant] was violent in custody." (33 RT 2433.)

C. The Denial of the Continuance Motion Prejudiced Appellant

Respondent argues that because the trial court precluded Bryan Soh from testifying, Mr. Leon did not suffer any prejudice from the denial of the motion to continue. (RB at p. 144.) However, since the trial judge allowed the prosecutor to present a hearsay statement of Soh via the testimony of Deputy Hutchinson,[29] the decision to preclude Soh as a witness was actually more prejudicial than had Soh testified.

At the hearing about whether Soh's statements to Deputy Hutchinson should be admitted as "spontaneous" statements, the trial judge offered this explanation of why he precluded Soh from testifying:

> The reason Soh was precluded from testifying is that I accepted what you had to say regarding the preparation. Although I do feel you were fully prepared for full and effective cross-examination of the witness by [sic] the basis of the records you had before you. I also agree that should the statement come in you are not precluded from impeaching the witness by those very same records. Your argument is circuitous in that you argue on the one hand that the witness should be allowed to testify fully and completely and on the other that he should be precluded from testifying.

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[29] Argument XI of appellant's opening brief as well as Argument XI of this reply brief *post* address the impropriety of the trial court's decision to allow Deputy Hutchinson to testify about what Bryan Soh told him about the incident involving Mr. Leon and Tony Bryant in the Los Angeles County Jail.

(33 RT 2515.)

During this hearing, defense counsel pointed out that he did not request the court to preclude Soh as a witness. He requested a continuance so that if Soh did testify, he would be prepared to cross-examine him effectively. By allowing Deputy Hutchinson to testify about what Soh said about the incident, the trial judge denied the defense the opportunity of such cross-examination. Thus, the trial judge's decision to permit Hutchinson to testify about Soh's out-of-court statement that Mr. Leon and Bryant had told him to give them all his money denied appellant the opportunity to challenge the credibility of Soh as a witness. While the court did allow the defense to introduce Soh's hospital records as business records, this evidence could not and did not substitute for cross-examination of Soh.

The trial court's response to defense counsel's argument that this unfairly and unconstitutionally denied him his rights to cross-examination and to present a defense revealed the problems caused by the court's determination to avoid a short continuance at appellant's expense. The trial judge went so far as to suggest that if the defense was not satisfied with his ruling, it could call Mr. Soh as a defense witness. (33 RT 2523.) Defense counsel reacted to this bizarre suggestion by stating:

> That puts Mr. Leon at a distinct disadvantage. Mr. Leon should not be required to call a liar because the court has precluded him. I have simply done what I feel is appropriate as Mr. Leon's attorney. The People have presented a witness. I said I could not cross-examine him. I need more time in order to do that. If the court wishes to make a finding that I'm not entitled to a continuance based on that record, the court could have done that, and so be it, and forced me to meet the evidence with what I have. But the court didn't. The court precluded the offer of the evidence and then allows the hearsay to come in and I believe puts Mr. Leon at a serious disadvantage because the court —the jury now, other

> than by calling Mr. Soh as almost a atrocity of my calling Mr. Soh as a mitigation witness. That's what we are talking about here. This is penalty phase. We are not talking about even though the People are putting on this as aggravation. I don't want to be calling the likes of Mr. Soh as mitigation and using the jury's attention to do that, nor should I be forced to.

(33 RT 2523-2524.)

While the trial judge stated that "you are not precluded from impeaching the witness by those very same records," that was not accurate. (33 RT 2515.) Because Mr. Soh did not testify, there was no witness to impeach with his hospital and criminal records. Certainly it would not have been proper to try to impeach Deputy Hutchinson using Soh's records. The defendant did introduce those records as exhibits, but they were voluminous. (36 RT 2776; Defense Exhibits P and Q.) It is not reasonable to conclude that such evidence was as effective in impeaching the credibility of Mr. Soh's account of the incident as cross-examination would have been.

Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." (5 John H. Wigmore, Evidence § 1367, at 32 (3d ed. 1974).) The trial judge improperly denied Mr. Leon the right to cross-examine Soh, a crucial witness against him, under the fiction that allowing the defense to enter into evidence Soh's mental health records provided appellant an equivalent vehicle to impeach Soh's credibility. In an analogous situation, courts have routinely found that neither a court nor the defendant can force the prosecution to accept stipulations that soften the impact of the prosecution's evidence in its entirety. (See, e.g., *People v. Cajina* (2005) 127 Cal.App.4th 929, 933.) "[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." (*Old Chief v. United States* (1997) 519

U.S. 172, 186-187; see also *People v. Thornton* (2000) 85 Cal.App .4th 44 [defendant's failure to contest an element of the drug charge he was facing did not preclude the prosecution from presenting evidence as to that element].) By the same token, it was improper and unfair for the trial judge in this case to assert that the defense could introduce into evidence Soh's mental health records as a substitute for cross-examining Soh.

For all of the foregoing reasons as well as for the reasons set forth in Argument VIII of the opening brief, Mr. Leon's constitutional rights to confrontation, to due process and to a fair and reliable penalty phase trial were violated when the trial judge denied his reasonable request for a short continuance. Because respondent cannot prove beyond a reasonable doubt that the denial of the continuance and the resulting admission of out-of-court statements by Bryan Soh against Mr. Leon did not adversely affect the jury's penalty phase verdict in this case, appellant's death sentence must be reversed.

* * *

X.

THE TRIAL JUDGE ERRED WHEN HE REFUSED TO GIVE APPELLANT'S PROPOSED INSTRUCTIONS ON MERCY AT THE PENALTY PHASE

At trial, defense counsel requested two instructions [30] explaining to the jurors that they could elect to exercise mercy toward Mr. Leon in determining whether to sentence him to death or life without the possibility of parole. (10 CT 2352, 2363.) The trial court refused these instructions. (40 RT 3224, 3226.) In so doing, the court violated Mr. Leon's rights under the Eighth and Fourteenth Amendments of the United States Constitution.

The Eighth Amendment requires that capital sentencing "reflect a reasoned moral response to the defendant's background, character, and crime." (*Roper v. Simmons* (2005) 543 U.S. 551, 602-603, quoting

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[30] The two instructions proposed by appellant stated:

> An appeal to the sympathy or passions of a jury is inappropriate at the guilt phase of a trial. However, at the penalty phase, you may consider sympathy, pity, compassion or mercy for the defendant that has been raised by any aspect of the offense or of the defendant's background or character in determining the appropriate punishment. You are not be governed by conjecture, prejudice, public opinion or public feeling. You many decide that a sentence of life without the possibility of parole is appropriate for the defendant based upon the sympathy, pity, compassion and mercy you felt as a result of the evidence adduced during the penalty phase. (10 CT 2352.)
>
> In determining whether to sentence the defendant to life without the possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant. (10 CT 2363.)

California v. Brown (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.).) The life and death determination "is not simply a finding of facts which resolves the penalty decision;" it is " a "moral assessment of those facts as they reflect on whether defendant should be put to death " (*People v. Brown* (1985) 40 Cal.3d 512, 540.) In determining whether to sentence a defendant to death, the jurors may apply their own moral standards to the evidence and may reject death if persuaded to do so on the basis of any constitutionally relevant evidence or observation. (*People v. Allen* (1986) 42 Cal.3d 1222, 1287.)

Mercy, as a discretionary act of leniency, applies with special force to the life and death decision capital sentencing jurors must make. (See generally Cobb, *Reviving Mercy in the Structure of Capital Punishment* (1989) 99 Yale L.J. 389.) Mercy does not necessarily spring from sympathy or compassion for its recipient. (*People v. Andrews* (1989) 49 Cal.3d 200, 236 (dis. opn. of Mosk, J.) [mercy "is obviously not synonymous with or reducible to sympathy"].) Mercy is "one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life." (*Drake v. Kemp* (11th Cir. 1985) 762 F.2d 1449, 1460.) As Portia advises Shylock in Shakespeare's *The Merchant of Venice*, mercy "is an attribute to God himself, and earthly power doth then show likest God's when mercy seasons justice." (Act IV, scene 1, lines 194-196.)

Moreover, mercy is an acceptable part of the guided discretion afforded to jurors in capital cases. In *Gregg v. Georgia*, the United States Supreme Court noted that "[n]othing in any of our cases suggests that the isolated decision of a jury to afford mercy violates the Constitution." (*Gregg v. Georgia* (1976) 428 U.S. 153, 203 (joint opinion of Stewart, Powell, and Stevens, JJ.).) In his concurring opinion in the *Gregg* case,

Justice White noted that the Georgia statute guide[d] the jury in the exercise of its discretion, while at the same time permit[ted] the jury to dispense mercy on the basis of factors too intangible to write into a statute." (*Gregg v. Georgia, supra*, 428 U.S. at p. 222 (conc. opn. of White, J.).) While discretion exercised in a guided fashion may be required to single out a particular person for the ultimate penalty, the decision to spare a life need not be so reasoned:

> [D]iscretion to grant mercy -- perhaps capriciously -- is not curtailed. The sentencing authority can assign what it deems the appropriate weight to particular mitigating circumstances. Moreover, with unbridled consideration of mitigating circumstances the sentencing authority may consider something to be mitigating that others would consider to be aggravating.

(*Moore v. Balkcom* (11th Cir. 1983) 716 F.2d 1511, 1521.)

That is, though the death penalty may be imposed constitutionally only if based on the evidence adduced during the penalty trial, the decision to vote for life is not so restricted: a juror may extend mercy even if the evidence he or she heard might otherwise weigh heavily for the death penalty.

According to respondent, because the jury in Mr. Leon's case were instructed with CALJIC No. 8.85 and CALJIC No. 8.88, there was no need for the mercy instructions requested by him. Citing various decisions of the Court, respondent argues that these two instructions "are sufficient, in and of themselves, to convey to the jury that they may consider mercy and compassion for the defendant in determining the appropriate penalty." (RB at 148.) In particular, respondent cites the portion of CALJIC No. 8.85 that states that the jury can consider "any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death,"

and the language in CALJIC No. 8.88 which tells the jurors "[y]ou are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (RB at 148.)

Respondent is wrong; these instructions are insufficient. There is no other way to argue for mercy other than by invoking that specific concept, because mercy is not synomous with sympathy, compassion, or pity. Those concepts have very different connotations and do not individually or in the aggregate substitute for a clear directive that the jury may extend mercy to a defendant in deciding whether to sentence him or her to death. It is entirely conceivable that a jury could feel *no sympathy* whatsoever because of the heinousness of the capital murder, could feel *no compassion* whatsoever for the defendant because of a lack of remorse, and could feel *no pity* for the defendant because the defendant committed the murder with full volition. At the same time, the jury could be moved to extend mercy because of prior wrongs inflicted on the defendant, such as child abuse, which likely played a role in turning the defendant into the unsympathetic, cold, and remorseless adult whom they convicted of capital murder.

Mercy is a juror's "moral response" to the evidence, through the imposition of a penalty that is less than what is perceived to be deserved in light of the balance between statutory factors in aggravation and mitigation. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 779 ["the sentencing function is inherently moral and normative, not factual"].) In this sense, mercy is a consideration that does not involve the balancing of statutory factors in aggravation against those in mitigation in order to determine whether death is the appropriate penalty. Mercy offers a vehicle for the jurors to deliver a life verdict even if they find that the aggravating factors

outweigh the mitigating factors, or fail to find any mitigating factors. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 [a juror may determine that the evidence is insufficient to warrant death even in the absence of mitigating circumstances].)

As a discretionary act of leniency, mercy is not only allowed at capital sentencing proceedings, it may not be forbidden: "a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.' " (*McCleskey v. Kemp* (1987) 481 U.S. 279, 312, citing *Gregg v. Georgia, supra*, 428 U.S., at p. 200, fn. 50; see also *Maxwell v. Pennsylvania* (1984) 469 U.S. 971 (Marshall, J., dissenting from denial of certiorari) ["[m]ercy [is] a necessary component of capital decision making"].) Forbidding a request for mercy is incompatible with the fundamental respect for humanity underlying the Eighth Amendment, and with the capital sentencing requirements imposed by the Eighth and Fourteenth Amendments. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305.)

The refusal to give the one or both of Mr. Leon's requested instructions directing the jurors that they could exercise mercy in deciding whether to sentence him to death or life imprisonment without the possibility of parole prejudiced Mr. Leon. The prosecutor specifically argued to the jurors that they should not show any mercy:

> I am troubled by the fact that nowhere throughout this trial has the defendant any remorse for the crimes he committed. Because I think unless the ability or the capacity to have remorse for the evil you have done to someone, how can we truly say that you will be rehabilitated or we should give you mercy? How can you expect a jury to give mercy when you have no remorse?

(41 RT 3273.)

This argument by the prosecutor, which alluded not so subtly to the fact that appellant did not testify at his trial, violated appellant's Fifth Amendment right to silence. (*Griffin v. California* (1965) 380 U.S. 609.) Moreover, it created a false prerequisite; that is, that the jury should show mercy only if appellant had expressed remorse. Mercy is given not earned. As Portia in *The Merchant of Venice* observed: "The quality of mercy is not strain'd. It droppeth as the gentle rain from heaven upon the place beneath. It is twice blest: It blesseth him that gives and him that takes. (act IV, scene 1, lines 180-187.) Or as the Book of Micah asks: "What doth the LORD require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?" (Micah, Book 6, verse 8, King James version.) The exercise of mercy is not based on the merit or worth of the recipient; rather, it is a moral act of the person who grants it. This Court has made clear, as is consonant with the death penalty jurisprudence of the United States Supreme Court, that the juror at capital penalty phase trial must make a moral and normative decision about punishment. (See, e.g., *People v. Rodriguez, supra*, 42 Cal. 3d at p. 779.)

For all of the reasons set forth above and in appellant's opening brief, Mr. Leon's death sentence must be vacated because, despite the defense requests for instructions regarding mercy, the jurors were never directly informed that they had the option of extending mercy to him in deciding whether they should sentence him to death or life without the possibility of parole.

* * *

XI.

THE TRIAL JUDGE ERRED IN ALLOWING HEARSAY EVIDENCE REGARDING AN INCIDENT IN THE COUNTY JAIL INVOLVING APPELLANT

The prosecutor introduced as aggravating evidence under subdivision (b) of Penal Code section 190.3 an incident occurring in the Los Angeles County Jail on June 27, 1994, involving Mr. Leon and two other inmates. The incident involved an alleged robbery of inmate Bryan Soh by Mr. Leon and Tony Bryant, another inmate. The prosecutor offered the testimony of a jailhouse guard, Los Angeles County Deputy Sheriff Jeffrey Hutchinson, who observed this alleged robbery. As explained in Argument VIII, *ante*, in order to avoid having to grant a two to three week continuance to the defense, the trial judge ruled that the alleged victim, Bryan Soh, could not testify but that Deputy Hutchinson could testify to hearsay statements of Soh. In so doing, the court violated California's rules regarding admission of hearsay as well as Mr. Leon's constitutional rights under the Sixth and Fourteenth Amendments and to a fair and reliable penalty phase determination under the Eighth Amendment.

At issue were statements by Soh, in response to questions by Deputy Hutchinson, that Mr. Leon and Bryant had taken $20 from Soh by threatening him. At the 402 hearing, Hutchinson testified that Soh told him that he gave him the money because "it felt like they were going to beat the crap out of [me]." (33 RT 2490.) At trial, Hutchinson testified that Soh said: "They [appellant and Bryant] just made me give them all my money." (34 RT 2645.)

Before the penalty phase began, defense counsel objected that this proposed testimony was inadmissible hearsay and its introduction would

violate Mr. Leon's right to confrontation under the Sixth Amendment and to due process under the Fourteenth Amendment. (33 RT 2508-2512; 2642-2643.) The prosecutor claimed that Hutchinson's testimony about Soh's statement to him was admissible as a "spontaneous statement" under Evidence Code section 1240. She argued that the statement "was made at or about when the event occurred and that it was made spontaneously while Soh was still under the stress of what happened in this particular incident." (33 RT 2597.)

Citing several decisions of this Court and of the United States Supreme Court, the trial judge overruled Mr. Leon's objection to this testimony, finding that Soh's statement was spontaneous and its admission did not violate appellant's confrontation rights. (33 RT 2525-2517.) The trial erred in permitting this testimony.

A. Soh's Statement to Deputy Hutchinson did not Qualify as a Spontaneous Statement under Evidence Code section 1240

With certain limited exceptions, out-of-court statements are not admissible as evidence. (Evid.Code, § 1200.) One of those exceptions is set forth in Evidence Code section 1240, which states:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perceptions.

In *People v. Poggi* (1988) 45 Cal. 3d 306, 318, this Court noted that whether the requirements of this hearsay exception are met in a specific case is a question of fact for the court, not the jury. The trial court's determination will be upheld if supported by substantial evidence. (*People*

v. Ramirez (2006) 143 Cal.App.4th 1512, 1523.)

A spontaneous statement is one made without deliberation or reflection. As the Court has observed:

> [T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief."

(*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724.)

"The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is. . . the mental state of the speaker." (*People v. Raley* (1992) 2 Cal.4th 870, 892.) As the Court stated in *People v. Farmer, supra*, 47 Cal. 3d at pp. 903-904,

> [t]he nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant.

Citing *People v. Clark* (2011) 52 Cal.4th 856, 925 and Evidence Code section 1240, respondent argues that Soh's statement was admissible as a spontaneous statement because he made it within "seconds" after Mr. Leon and Bryant demanded his money and this experience of a "jailhouse robbery was startling enough to Soh to render his statements about appellant and Bryan . . . 'spontaneous and unreflecting.'" (RB at 151-152.)

In fact, the record in this case does not support a finding that this incident was "startling" or stressful enough to make this hearsay a spontaneous statement under the California Evidence Code The encounter among Soh, Bryant and appellant Leon took place in the day room of the

Los Angeles North County Correctional Facility, a very public area which Deputy Hutchinson described as "a secure room that you are to stage inmates in when you need a place to put them." (33 RT 2486.) The day room was in full view of the sheriff's staff station. (*Ibid.*) Accordingly, it was not an ideal place to commit a robbery, a fact that would be obvious to virtually all of the inmates of the Los Angeles County Jail.

Moreover, Hutchinson did not see any physical contact between Mr. Leon and Mr. Soh. The only contact, and it was just the touching of hands, occurred between Soh and Bryant. (34 RT 2656.) Hutchinson did not report seeing any actions by Mr. Leon and Bryant which could be described as threatening or menacing. He did testify that he could see but not hear Leon and Bryant say something to Soh. (33 RT 2493.) Hutchinson testified, however, that he could not remember whether he saw Mr. Leon or Bryant or both of them move their mouths. (*Ibid.*) He also testified that Soh "looked to be somewhat frightened" while Mr. Leon looked to be angry, although Hutchinson only saw the side of his face. (34 RT 2640-2641.)

Respondent cites several decisions where this Court has upheld a trial court's admission of hearsay as spontaneous statements. In all of those cases, the declarants faced truly startling and stressful circumstances when they made the disputed statements. In *People v. Clark, supra,* at issue were statements to an emergency room doctor by a prosecution witness, Angie. When the doctor asked Angie if she had been threatened with harm, Angie told her "that the person who injured her would kill them if not quiet (sic)." (*Id.*, 52 Cal.4th at p. 925.) The record in the *Clark* case showed that over the course of a six-hour period Angie heard and saw her best friend being injured by defendant. During this time, defendant also severely beat Angie and later placed her, with her wrists bound, in the front seat of his car and

drove around for several hours, and then left her for dead after strangling her. Obviously, the facts of the *Clark* easily met the requirement that there must be some occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting. This Court found:

> Although Angie's statement came two to seven hours after the shocking and disturbing events, it retained its spontaneity because, as the evidence showed, her mental and physical condition prevented her from reflecting on and fabricating her account of what had happened.

(*Id.*, 52 Cal.4th at p. 926.)

The facts of other cases cited by respondent contrast with the facts of the Soh incident because they showed truly startling or even traumatic circumstances which would cause the suspension of reflective faculties making it likely that the hearsay statements were instinctive and uninhibited expressions of the speaker's actual impressions and belief. A summary of the relevant facts of these cases follow:

People v. Raley (1992) 2 Cal.4th 870, 893-894 [The murder victim, while still alive, was rescued by a good Samaritan nearly 18 hours after the fatal attack. While waiting for medical assistance, the victim made statements regarding the sexual nature of the attack.]

People v. Brown (2003) 31 C.4th 518, 526, 541, 3 C.R.3d 145, 73 P.3d 1137 [Witness's testimony that she heard her brother-in-law say, "I know [defendant] shot her. I know she is hurt bad," was properly admitted even though statement was made 2½ hours after crime, where brother-in-law was crying and shaking when he spoke.]

People v. Smith (2005) 135 Cal. App. 4th 914, 923 [Witness testified about statements made about six hours after the murder by her boyfriend, one of the co-defendants in the case. She described him as appearing very

"distraught" and "very anxious, not knowing what to do with himself." He had a completely blank look on his face, a look she had never seen him before.]

People v. Riva (2003) 112 Cal. App. 4th 981, 994-995 [Statement by the driver of a van, who had witnessed the crime and was never seen again, told the victim at the scene about a minute after the shooting, "he was trying to shoot us, but we ducked." The victim testified that the driver acted "real excited" and spoke quickly and in a high-pitched tone which she demonstrated for the court.]

In the two other cases cited by respondent, *People v. Lynch* (2010) 50 Cal.4th 693, 753-754, and *People v. Gutierrez* (2009) 45 Cal.4th 789, this Court actually found the trial courts had erred in admitting the hearsay statements under section 1240.

There is simply insufficient evidence that the circumstances surrounding the alleged robbery of Bryan Soh by Mr. Leon and Tony Bryant were sufficiently startling, stressful or exciting to cause the suspension of Soh's reflective faculties and to demonstrate that his statements to Deputy Hutchinson were "instinctive and uninhibited expressions of [Soh's] actual impressions and belief." (*People v. Farmer, supra,* 47 Cal.3d at p. 903.) Accordingly, the trial judge abused his discretion in admitting this evidence as a "spontaneous statement" under Evidence Code section 1240.

B. Admission of the Testimony about Soh's Hearsay Statements Violated Appellant's Sixth Amendment Rights

Respondent argues that the admission of this evidence did not violate appellant's Sixth Amendment right to confront witnesses against him because Mr. Soh's statements were not "testimonial," as defined by the

United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36, 53-54 and *Davis v. Washington* (2006) 547 U.S. 813, 822. (RB at pp. 153-156.)

In support of this claim that Soh's statements were not testimonial, respondent argues:

> In viewing the totality of the circumstances, the primary purpose of Deputy Hutchinson's conversation with Soh was to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial. Deputy Hutchinson spoke with Soh in order to appropriately assess and respond to the ongoing situation involving appellant and Bryant, since it was unclear to him as to what had been said, what Soh had handed over, and why Soh appeared frightened. As the primary purpose of obtaining Soh's statements was to "apprehend" the suspects in an emergency situation, the statements were non-testimonial.

(RB at p. 155.)

This argument is not persuasive because respondent's characterization of the facts is not accurate.

As discussed in appellant's opening brief, the Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him. (*Michigan v. Bryant* (2011) 562 U.S.___, 131 S.Ct.1143, 1152.) It applies to the states under the Due Process Clause of the Fourteenth Amendment. (*Ibid.*) In *Crawford v. Washington, supra*, the United States Supreme Court announced a new standard for determining whether hearsay evidence against a criminal defendant violates the Confrontation Clause when the declarant neither testifies at trial or is otherwise unavailable for cross-examination by the defense. The Court held that the Sixth Amendment applies only to hearsay that is "testimonial." (*Id.* at p. 68.)

While the *Crawford* decision did not provide a comprehensive definition of "testimonial," it did observe that statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial would be deemed testimonial. (*Id.* at p. 52.)

Subsequent decisions have elaborated on the meaning of "testimonial," including the decisions in *Davis v. Washington* (2006) 547 U.S. 813 and *Hammon v. Indiana*, which was consolidated in the *Davis* opinion. These decisions are discussed and analyzed at length in appellant's opening brief. (AOB at 205-207.) Most recently, in *Michigan v. Bryant, supra*, the Court has examined the meaning of "testimonial" in the context of confrontation rights under the Sixth Amendment. In *Bryant*, the Supreme Court found the hearsay statements of the victim to the police were not testimonial. The police had responded to a 911 call for a man with a gunshot wound found in a gas station parking lot. In response to police questioning, the victim, who died of his wounds several hours later, said that Bryant had shot him through Bryant's back door. The victim recognized Bryant's voice behind the door, and as he turned to leave, the victim was shot. The Court found that, because the case involved a gun and a perpetrator who had not yet been apprehended, the statements were non-testimonial:

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

(*Id.* at p. 1154.)

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The *Bryant* opinion emphasized that making a determination of whether an emergency situation occurred involves an objective evaluation of the circumstances under which the hearsay statements were made and is a "highly contextual-dependent inquiry." (*Id.* at pp. 1156, 1158.) In determining whether the statements were made during an ongoing emergency, the focus must be on the primary purpose of both the officer and the declarant, both of whom may have mixed motives. Even when responding to an emergency, the officer remains an investigator and, thus, is not indifferent to the gathering of evidence. Similarly, victims and other declarants may or may not want to see a perpetrator ultimately prosecuted. (*Id.* at p. 1161.)

The *Bryant* decision recognizes that factors other than whether there had been an ongoing emergency must be considered in determining whether the hearsay was testimonial. These factors include: the type of weapon used, whether an armed assailant remained at large and could be an ongoing threat to public safety, and the medical condition of the declarant. (*Id.* at pp. 1157-1160.) The Court found that the statements of the victim in *Bryant* were not testimonial because there was an "ongoing emergency" and there was a potential threat to the responding police and the public from an armed suspect at large. (*Id.* at pp. 1162-1166.)

The facts of this case differ significantly from those present in *Michigan v. Bryant, supra.* In this case, there was no "ongoing emergency" when Officer Hutchinson spoke to Bryan Soh about his encounter with appellant and inmate Bryant in the jail day room. Hutchinson had already stopped and contained Mr. Leon and Bryant in another room before he questioned Soh. Also, no one had touched Soh; he was not injured; and he did not need any medical attention. There was no weapon of any sort

involved, and therefore, there were not no danger to others in the jail. The only reason for Hutchinson to question Soh was investigative. Indeed, based alone on Hutchinson's observation of the incident, he was not certain if anything improper had occurred among Mr. Leon, Bryant and Soh until he questioned Soh. Respondent's assertion that "the primary purpose of obtaining Soh's statements was to 'apprehend' the suspects in an emergency situation" (RB at 155) simply is not supported by the record.

Respondent cited this Court's decision in *People v. Cage* (2007) 40 Cal.4th 965, 984 (RB at 154-156); however, that decision is not helpful to the prosecution in this case. Indeed, it supports Mr. Leon's claim that Deputy Hutchinson's testimony about Soh's alleged statement amounted to testimonial hearsay. In *Cage*, the defendant was charged with assault with force likely to produce great bodily injury against his son. (*Id.* at p. 971.) In response to a call about a fight, a police officer went to the defendant's residence where he saw the defendant picking up broken glass and spots of blood on the floor. (*Ibid.*) The officer later located the victim, who had a large cut on his face, a mile or two away; an ambulance took the victim to the hospital. (*Ibid.*) In the hospital waiting room, the officer asked the victim "what had happened between [him] and the defendant." (*Id.* at p. 972.) The victim replied that during a family argument, the defendant had cut him with a piece of broken glass. (*Ibid.*)

The victim did not testify at trial, and the victim's statement to the officer at the hospital was admitted over defense objection. (*People v. Cage, supra*, 40 Cal.4th at p. 974.) This Court found that "[u]nder these principles [derived from *Davis v. Washington, supra*,] it seems manifest that [the victim's] response to [the officer's] question in the hospital waiting room was *testimonial*." (*Id.* at p. 984; emphasis added.) Although the court

noted that the victim still required medical treatment, and thus to that extent there was an "ongoing emergency," the objective circumstances showed that the officer did not play a role in providing medical treatment to the victim. (*Id.* at pp. 984-985.) The incident that caused the injury was already over; the assailant and the victim were "geographically separated;" and the victim was "in no danger of further violence as to which contemporaneous police intervention might be required." (*Ibid.*) Accordingly, the officer's "clear purpose in coming to speak with [the victim] at this juncture was not to deal with a present emergency, but to obtain a fresh account of past events involving defendant as part of an inquiry into possible criminal activity." (*Id.* at p. 985.) The victim's statements to the officer were therefore testimonial. (*Ibid.*)

The facts of *People v. Cage, supra*, involving the hearsay statements in that case resemble those found in the instant case. Just as in *Cage*, Officer Hutchinson's questioning of Bryan Soh was not part of an "ongoing emergency, " and at that point Mr. Leon and Bryant did not pose any risk to either to Soh or to others. Therefore, Soh's statements were testimonial for purposes of the Sixth Amendment right of confrontation.

C. The Admission of Soh's Hearsay Statements Prejudiced Appellant

In arguing against the trial court's decision to deny Mr. Leon's request for a continuance to allow adequate time to prepare to cross-examine Bryan Soh, defense counsel observed that in a penalty phase trial: "Nothing is more serious than a witness coming up here and saying [appellant] was violent in custody." (33 RT 2433.) The prosecutor's closing argument to the jury at penalty underscored the validity of the defense's concern. In support of her claim that Mr. Leon had been violent

all of his life, she asserted that "[t]his is a man who in prison is not deterred." (41 RT 3277.) The prosecutor further argued that if the jurors chose to sentence appellant to life without the possibility of parole rather than death,

> . . . you need to understand this is going to continue. He is always going to be taking something from someone. . . It makes no sense to keep this man in prison when he is so at home there such that he is still committing crimes.

(*Ibid.*)

Without the testimony of Officer Hutchinson about Soh's statement that Mr. Leon and Bryan "made me give them all my money,"[31] there would not have been sufficient evidence to support admitting this incident as an uncharged robbery under section 190.3 (b). (34 RT 2645.)

Because the erroneous admission of this evidence not only violated California law regarding the admission of hearsay evidence but also violated Mr. Leon's rights to confrontation under the Sixth and Fourteenth Amendments and to a fair and reliable penalty determination under the Eighth Amendment, respondent must establish beyond a reasonable doubt that the error did not prejudice him. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The prosecution cannot meet this burden, and therefore Mr. Leon's death sentence must be reversed.

* * *

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[31] At the *Frank/Phillips* hearing about the evidence which the prosecution proposed to use as aggravating evidence, Deputy Hutchinson gave a different account of what Soh had told him about why he had given his money to Mr. Leon and Bryant: "it felt like they were going to beat the crap out of [me]." (33 RT 2490.)

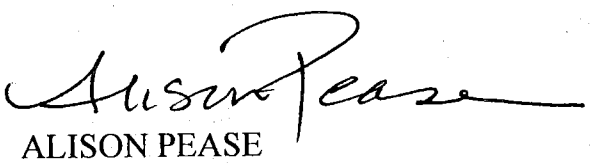
CONCLUSION

For all of the foregoing reasons as well as those reasons set forth in appellant's opening brief, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: June 26, 2013

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.360(b)(1))

I, Alison Pease, am the Senior Deputy State Public Defender assigned to represent appellant, Richard Leon, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 35,734 words in length excluding the tables and certificates.

Dated: June 26, 2013

Alison Pease

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Case Number: **Superior Court No. Crim. PA012903**
Supreme Court No. S056766

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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 June 26, 2013, at Sacramento, California.

Saundra Alvarez

Saundra Alvarez