No. S076169

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GERALD PARKER,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of Death of the Superior Court for the County of Orange

Honorable Francisco P. Briseño, Judge

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INTRODUCTION

Appellant argued in his opening brief that the following errors in his trial require reversal of the judgment of conviction, the special circumstance findings, and the death sentence:

1) The prosecutor's exclusion of both African-American prospective jurors and the trial judge's refusal to require him to provide reasons for the challenges deprived appellant of his right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and his right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (AOB 105-170.); [1]

2) The trial judge's refusal to exclude evidence of admissions made after appellant had repeatedly invoked his right to silence and the jury's consideration of evidence of the unlawful interrogations violated his right to remain silent under the Fifth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (AOB 171-191.);

3) The trial judge's failure to instruct on the complete defense of unconsciousness prevented appellant from arguing that he lacked the requisite intent because he was unconscious, effectively removed his defense from the jury's consideration, and enhanced the risk of an unwarranted conviction, thereby diminishing the reliability of the jury's sentencing determination in violation of his Sixth Amendment right to a jury trial (Cal.

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[1] In this brief, unless otherwise noted all statutory references are to California codes. "AOB" refers to appellant's opening brief; "RB" refers to respondent's brief; "CT" refers to the clerk's transcript; "CTHS" refers to the clerk's transcript of exhibits 1-9 (hardship applications); "CTJQ" refers to the clerk's transcript of exhibits 12 & 13 (juror questionnaires); and "RT" refers to the reporter's transcript.

Const., art. 1, § 16), his Fourteenth Amendment right to due process (Cal. Const., art. 1, § 7), and his Eighth Amendment right to a reliable guilt determination. (Cal. Const., art. 1, § 17.) (AOB 191-202.);

4) The trial judge's admission of irrelevant and inflammatory victim-impact testimony diverted the jury's attention from its proper role, invited an irrational, purely subjective response, rendered the trial fundamentally unfair, and deprived appellant of his rights to a fair and a reliable capital sentencing hearing and a penalty determination based on reason rather than emotion in violation of the Sixth, Eighth, and Fourteenth Amendments to and the Ex Post Facto Clause of article I, section 9 of the United States Constitution and article 1, sections 7, 9, 15 & 17 of the California Constitution. (AOB 203-212.);

5) The trial judge's arbitrary and erroneous restriction of penalty phase argument concerning the issue of future dangerousness deprived appellant of his right to present a defense and violated his right to an individualized penalty determination, his right to due process, and his right to present a closing argument in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. (AOB 213-223.)

6) California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 224-238.);

7) The cumulative effect of the errors undermined the fundamental fairness of the trial and the reliability of the judgment. (AOB 239-240.)

Respondent contends that:

1) Appellant failed to make the requisite prima facie showing of racial discrimination. (RB 46-74.);

2) Appellant impliedly waived his *Miranda* [2] rights before speaking with Detectives Giesler and Redmond, never invoked his right to counsel or to silence during subsequent custodial interviews with Orange County investigators, and suffered no prejudice even if the admission of his statements was erroneous. (RB 75-101.);

3) No substantial evidence was presented to the jury supporting a defense of unconsciousness and, even assuming the trial court's refusal to instruct on the defense was erroneous, appellant suffered no prejudice because the jury rejected, under proper instructions, any suggestion that appellant was impaired at the time of the murders. (RB 102-116.);

4) The trial court did not abuse its discretion in finding that the victim-impact evidence was not unduly prejudicial, and its admission violated neither appellant's rights to a fair and reliable penalty determination and due process, nor the proscription on ex post facto laws. (RB 117-137.);

5) Even assuming the trial court curtailed defense argument on the issue of future dangerousness, appellant was not prejudiced because the only conceivable point regarding lack of future dangerousness supported by the evidence was in fact argued by defense counsel and the evidence in aggravation overwhelmingly outweighed any evidence in mitigation. (RB 137-148.);

6) California's death penalty statute and the standard jury instructions regarding the jury's penalty determination are constitutional. (RB 148-159.);

7) There was no error, and thus no effect from errors to accumulate, and the alleged errors could not have affected the outcome of the trial. (RB 159.)

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436

Respondent's contentions are meritless. Accordingly, for the reasons stated herein and in appellant's opening brief, his conviction and sentence must be reversed.

ARGUMENT [3]

I. THE TRIAL COURT'S DETERMINATION THAT APPELLANT FAILED TO MAKE A PRIMA FACIE SHOWING OF DISCRIMINATION WAS ERRONEOUS

The prosecutor exercised peremptory challenges against Prospective Juror Nos. 719 and 213, the only prospective jurors who appeared to be African-American. Respondent contends that the trial court properly denied appellant's *Wheeler-Batson* [4] motion because appellant failed to make the requisite prima facie showing of racial discrimination. (RB 46.)

The trial court found that an inference of racial discrimination could not be drawn because a good prosecutor likely would have challenged a juror who had responded in the same manner as Prospective Juror No. 719 (RB 55; 5 RT 936) and, at the time, appellant had "not been denied the opportunity to have other black jurors serve." (5 RT 1001-1002.) The demeanor and facial expressions of Prospective Juror No. 213 when his availability was inquired into, plus some of the other information that was disclosed to the deputy district attorney upon further inquiry, indicated "it's going to be extremely difficult." Thus, there was no basis for concluding that "the district attorney is engaging in misconduct, that he systematically is excluding all Afro-Americans from serving as jurors on this case or is systematically excluding any other minority group from serving on this

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[3] Appellant does not reply in this brief to arguments which are adequately addressed in his opening brief. Appellant's decision to not reassert a point or to not reply to respondent's argument does not signify a concession, abandonment or waiver (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects his view that the issue has been adequately presented and that the positions of the parties are fully joined.

[4] *People v. Wheeler* (1978) 22 Cal.3d 25, 276-277; *Batson v. Kentucky* (1985) 476 U.S. 79.

particular case." (RB 60-61; 6 RT 1117-1118.)

A defendant makes a prima facie showing at *Batson's* first step merely by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson v. Finn* (2011) 665 F.3d 1063, 1068.) "[T]he burden of proof required of the defendant is small, especially because proceeding to the second step of the *Batson* test puts only a slight burden on the government." (*United States v. Collins* (2009) 551 F.3d 914, 920.) "'This is a burden of production, not a burden of persuasion.' *Green v. Lamarque*, 532 F.3d 1028, 1029 (9th Cir.2008); accord *Johnson v. California*, 545 U.S. 162, 170-71, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005)." (*Id.* at p. 919.) "We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." (*Johnson v. California, supra*, 545 U.S. at p, 170.)

Respondent asserts that Prospective Juror Nos. 719 and 213 were not the only African-Americans among the venire. (RB 61.) The record, however, clearly establishes that the prosecutor peremptorily challenged all the prospective jurors who appeared to be African-American. Both of appellant's attorneys stated their belief that there were only two African-American prospective jurors among the venire. (5 RT 929, 934, 1003; 6 RT 1116 [Mr. Enright]; 5 RT 934; 6 RT 1116 [Mr. Zimmerman].) The prosecutor's silence in the face of these representations might not afford a sufficient basis for an inference of adoption, as respondent argues, but it does furnish ample ground for an inference of consciousness of their truth. (*Tibbet v. Sue* (1899) 125 C. 544, 546; *Estate of Snowball* (1910) 157 Cal. 301, 311; *Baldarachi v. Leach* (1919) 44 Cal.App. 603, 606; *Los Robles*

Motor Lodge v. Department of Alcoholic Beverage Control (1966) 246 Cal.App.2d 198, 205.)

The trial court acknowledged that counsel "looked at the jury pool that's out there and you saw two or three people that you thought were African American" (6 RT 1117), but was "reluctant to make any generalization as to the ethnic background of any prospective juror simply from my looking at the appearance of a person." (5 RT 1003.) "[Y]ou folks keep saying there's only three [sic] out there. And I don't know that that's the case." (6 RT 1117; see also 6 RT 1204.) These statements establish that the trial court distinguished prospective jurors who appeared to be African-American from those who might be of African-American heritage. Thus, while there could have been other prospective jurors of African-American descent, Prospective Juror Nos. 719 and 213 were the only prospective jurors who *appeared* to be African-American. "[D]iscrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case under *Wheeler*. (*People v. Motton* (1985) 39 Cal.3d 596, 604.)

Respondent contends that it is "impossible to draw an inference of discrimination from the challenge of one potential juror," and that "as a practical matter, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion." (RB 63.) "A pattern of striking panel members from a cognizable racial group is probative of discriminatory intent, but a prima facie case does not require a pattern because 'the Constitution forbids striking even a single prospective juror for a discriminatory purpose.' *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *accord United States v. Esparza-Gonzalez*, 422 F.3d 897, 904

(9th Cir. 2005) (holding that a prima facie case was shown where the prosecutor struck the only Latino prospective juror as well as the only Latino potential alternate juror)." (*United States v. Collins, supra*, 551 F.3d at p. 919.) Furthermore, respondent overlooks the many cases where excusal of the only minority prospective jurors established a prima facie case of racial discrimination.

In *Crittenden v. Ayers* (9th Cir. 2010) 624 F. 3d 943, 950, the only African-American prospective juror was excused. In *United States v. Collins, supra,* 551 F.3d at p. 918, the only remaining African-American member on the panel was challenged. In *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1176, the prosecutor used two peremptory challenges to strike the only African-Americans in the jury pool. In *Johnson v. California, supra,* 545 U.S. at p. 173, all three African-American prospective jurors were removed. In *People v. Long* (2010) 189 Cal.App.4th 826, 839-840, all three Vietnamese prospective jurors were challenged. And in *People v Williams* (2006) 40 Cal.4th 287, 309-310, two of at least three Hispanic prospective jurors were challenged. In each of these cases, the challenge of the only minority prospective jurors was found to be sufficient to support an inference of discrimination under the totality of the circumstances.

In *Johnson v. Finn, supra*, 665 F.3d 1063, the prosecutor peremptorily challenged all three African–Americans in the jury pool. The Ninth Circuit observed:

> The fact that "three of the prosecution's peremptory challenges were exercised against the only three African–Americans in the jury pool," is enough to establish a prima facie case of racial discrimination. In multiple cases, we have held that a prima facie showing of racial discrimination had been made where prosecutors had stricken a lesser proportion of the racial minorities in a venire pool. See, e.g., *Paulino*, 371 F.3d at 1091

(finding a prima facie showing where "the prosecution had struck five out of six possible black jurors"); *Fernandez*, 286 F.3d at 1078 (finding a prima facie showing where "[t]he prosecutor [had] struck four out of seven Hispanics" and "the only two prospective African–American jurors"); *Turner v. Marshall*, 63 F.3d 807, 812 (9th Cir.1995), overruled on other grounds by *Tolbert v. Page*, 182 F.3d 677, 681 (9th Cir.1999) (en banc) (finding a prima facie showing where "the prosecutor had used peremptory challenges to exclude five African–Americans out of a possible nine African–American venirepersons"). As the Supreme Court observed in *Miller–El v. Cockrell*, 537 U.S. 322 (2003), in which the prosecutor had exercised peremptory strikes against ten out of the eleven black jurors not removed by strikes for cause or by agreement, "[s]heer happenstance is unlikely to produce this disparity." *Id.* at 342. *The same is true where the prosecutor used peremptory strikes to remove all of the black jurors from the venire pool.*

(*Johnson v. Finn, supra*, 665 F.3d at p. 1070, emphasis added.)

The cases respondent cites for this proposition are distinguishable. In *People* [illegible]) 48 Cal.4th 574, this Court held "That the prosecutor [illegible] African-American prospective juror, without more, does [illegible] support the inference the excusal was based on race, especially given [illegible] and the judgment during the hearing that another [illegible] African woman then was seated on the jury. (*Id.* at p. 614.) Unlike *Taylor* [illegible] African-American persons served as jurors in this case. Similarly, in *People v. Cornwell* (2005) 37 Cal.4th 50, the prosecutor exercised a peremptory challenge against one of two African-American prospective jurors in the venire. The prosecutor repeatedly passed the other African-American prospective juror, and the individual served on the jury. (*Id.* at pp. 69-70.) And in *People v. Hamilton* (2009) 45 Cal.4th 863, "[t]he court . . . correctly rejected defendant's argument that the challenge of the only Black person subject to challenge was sufficient in and of itself to

suggest a pattern," but the court did find a prima facie case of discrimination when the prosecutor excused the second African-American prospective juror. (*Id.* at p.899.)

In *People v. Bonilla* (2007) 41 Cal.4th 313, the defendant was Hispanic, not African-American. The prosecutor did not challenge any Hispanic males, and a Hispanic man sat on the jury. Nor did the defendant contend, as appellant does here, that the prosecutor's questioning of the only two African-American prospective jurors was cursory or materially different from the questioning of non-African-American prospective jurors. (*Id.* at p. 344.) In *People v Howard* (2008) 42 Cal.4th 1000, the jury as sworn, including alternates, was comprised of eight African-Americans, five Hispanics, three Caucasians, one Asian-American, and one person of mixed race. The panel was largely comprised of ethnic minorities. Thus, any peremptory challenges would likely be made to minorities. (*Id.* at p. 1017.) In *People v. Bell* (2007) 40 Cal.4th 582, the defendant was not a member of the group allegedly excluded. The prosecutor had challenged only one of the three African-Americans currently on the jury panel, with four more remaining in the group still subject to peremptory challenge. Three African-American men served on the jury. The defendant did not contend, as appellant does here, that the excused African-American prospective jurors shared only the characteristic of being African-American women and were otherwise as heterogeneous as the community as a whole. Nor did he assert that the prosecutor engaged these prospective jurors in particularly desultory questioning on voir dire. (*Id.* at pp. 594-599.)

Respondent's attempts to distinguish *Williams v Runnels* (9th Cir. 2006) 432 F.3rd 1102 fall short. In that case, the prosecutor initially accepted the jury without making any peremptory challenges. On review, the court

inferred a discriminatory purpose from his subsequent challenge of three of four African-American prospective jurors based on a statistical disparity alone. It found, having presented a statistical disparity to the trial court based on the information then known to him, a defendant cannot be charged, prior to the prosecutor's explanation of his challenges, with developing a record that might refute the prosecutor's possible explanations. If there are other relevant circumstances that might dispel the inference created by that statistical disparity, it is the state's responsibility to create a record that dispels the inference. (*Id.* at p. 1103.) Appellant presented a statistical disparity, excusal of 100% of the African-American prospective jurors. As in *Williams*, it is sufficient to raise an inference of discrimination.

Respondent argues there were "obvious race-neutral reasons" for challenging both African-American prospective jurors. (RB 65-67, 70.) Indeed, the trial court found there was no prima facie case of discrimination because it believed there was "ample reason" to excuse the prospective jurors "other than dealing with race." (RB 61; 6 RT 1119.) It may be reasonable to conclude that the record supports race-neutral grounds for peremptory challenges, but "the Supreme Court's clarification of *Batson* in *Johnson,* and its review of the record in *Miller-El,* lead to the conclusion that this approach [does] not adequately protect [appellant's] rights under the Equal Protection Clause of the Fourteenth Amendment or 'public confidence in the fairness of our system of justice.'" *Johnson,* 125 S.Ct. at 2418 (quoting *Batson,* 476 U.S. at 87, 106 S.Ct. 1712); *see also Miller-El,* 125 S.Ct. at 2323-24." (*Williams v Runnels, supra*, 432 F.3^{d} at p. 1108.)

While the existence of legitimate race-neutral reasons for a peremptory strike can rebut at *Batson*'s second and third steps the prima facie showing of racial discrimination that has been made at the first step, it

cannot negate the existence of a prima facie showing in the first instance, or else the Supreme Court's repeated guidance about the minimal burden of such a showing would be rendered meaningless. (*Johnson v. Finn, supra*, 665 F.3d at p 1071.) The pertinent question is whether "other relevant circumstances" erode the premises of a defendant's allegations of discrimination. (*Id.* at p. 1109.) The trial court addressed a different issue, whether the record could support race-neutral grounds for the prosecutor's peremptory challenges.

> This . . . does not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges. *Johnson,* 125 S.Ct. at 2418; *see also Miller-El,* 125 S.Ct. at 2332 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.").

(*Id.* at p. 1109.)

Respondent contends that comparative juror analysis is inappropriate in a first-stage *Wheeler-Batson* case because it fails to give the prosecutor the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers. (RB 67-69.) "Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case." (*Boyd v. Newland* (9th Cir.2006) 467 F.3rd 1139, 1149.) "An inference of discrimination may arise when two or more potential jurors share the same relevant attributes but the prosecutor has challenged only the minority juror." (*United States v. Collins, supra,* 551 F.3d at p. 922.) Comparative juror analysis may therefore be employed at step one to determine whether a defendant has established a prima facie case of discrimination. (*Crittenden v. Ayers, supra,* 624 F.3d at p. 956.) Such an analysis does not deprive a prosecutor of the opportunity to explain any differences he perceived in jurors. Since it is only used at step

one of the inquiry to raise an inference of discriminatory purpose, the prosecutor remains free to explain any differences he perceived among the prospective jurors at step two.

Respondent argues that neither the questioning of the prospective jurors (RB 65) nor a comparative analysis (RB 67) supports an inference of discrimination. Prospective Juror No. 719 had religious objections to the death penalty because of her religious beliefs and favored life without possibility of parole over a sentence of death, but she did not lean strongly against it. Although she would have a difficult time imposing a death sentence, she would consider the evidence and apply the law in an evenhanded manner. When the prosecutor suggested she would "certainly be leaning against the death penalty strongly because of your religious beliefs," she said, "I won't say that's a true statement because I have to look at the evidence. Depend on the evidence." (5 RT 929-934.) The prosecutor did not explore the depth of her religious convictions or how they might affect her ability to consider and impose a sentence of death. His challenge for cause on these grounds was denied. (5 RT 923-934)

Prospective Juror No. 719 is no different than the only African-American prospective juror in *Crittenden v. Ayers*, Ms. Casey, who noted on her jury questionnaire "I don't like to see anyone put to death." During voir dire she said she was "against death—being put to death" and "against killing people." Her feelings concerning the death penalty would not cause her to vote against a first degree murder conviction or special circumstances, if proven, but she did not know if they might impair her ability to fairly evaluate all of the evidence and make a decision regarding the death penalty. (*Crittenden v. Ayers, supra*, 624 F.3^{d} at p. 950.) The prosecutor's challenge for cause was denied. Thereafter, he used a peremptory challenge to excuse

Ms. Casey. The white juror who took her place was demographically similar apart from race and also expressed general opposition to the death penalty and some hesitancy about its imposition. And, although there were some differences in another white juror's voir dire responses, she was demographicly similar and shared "somewhat analogous views on the death penalty." (*Id.* at p. 956.) Like the trial court here, the court found that the defense had not established a prima facie case of discriminatory purpose because of the "abundant . . . reasons why I would have expected a peremptory challenge on this particular matter." (*Id.* at p. 951.) The Ninth Circuit determined, to the contrary, that excusal of the only African-American prospective juror and a comparative juror analysis were sufficient to establish a prima facie showing of discrimination. (*Id.* at p. 957.)

Like *Crittenden v. Ayers*, several sitting non-African-American jurors in this case found the death penalty just as problematic as Prospective Juror No. 719, but they were not questioned at all about their views. Juror No. 11 believed imposing the death penalty "would be difficult, I agree with that. But, it would be based on the evidence." (5 RT 845.) Despite her misgivings, the prosecutor did not challenge her. Juror No. 2 believed, "There are cases where [the death penalty] is appropriate, and IF appropriate, I would have some reservations, but I would be willing to make such a decision." (1 CTJQ 49.) The prosecutor did not ask this juror any questions about the nature or extent of her reservations about the death penalty. (6 RT 1105-1109.) Juror No. 5 believed the death penalty was imposed randomly (1 CTJQ 120), as did Juror No. 10. (1 CTJQ 160 ["Cannot understand how one case can be judged so differently than another case when they are almost identical."].) Neither of these jurors were questioned about how their views might impact their ability to sit as jurors in the case. (5 RT 994-997, 968-971.) Given the

responses of these sitting non-African-American jurors and the holding in *Crittenden v. Ayers*, the prosecutor's challenge of Prospective Juror No. 719 raises an inference of discrimination. Her views about the death penalty do not serve to rebut that inference.

Prospective Juror No. 213 was a proponent of the death penalty. He reported a favorable experience with a psychologist in high school. He had testified as a character witness in a friend's murder trial, and he had served as the foreman of a jury that reached a verdict in a murder trial. Finally, he was the head coach of his high school basketball team and its practices and games presented a possible conflict with jury service, but he was confident that the game schedule did not present any problems and that practices could be moved to later in the evening. He was questioned by the prosecutor about his commitment to his basketball team (6 RT 1082-1087; 1091-1093); about his prior experience in the criminal justice system (6 RT 1089-1090); about his psychological and/or psychiatric treatment (6 RT 1090-1091); and about his views concerning the death penalty. (6 RT 1093-1096.)

Several sitting, non-African-American jurors reported similar experiences but went unquestioned by the prosecutor about those matters. Juror No. 1 reported in his questionnaire that he or someone close to him had been seen or treated by a psychologist or psychiatrist. (1 CTJQ 8.) The prosecutor asked him no questions about his psychological and/or psychiatric treatment. (6 RT 1031-1034.) Juror No. 4 reported that he had been treated by a psychologist or psychiatrist and was hospitalized in a psychiatric facility for a brief time in 1970 following his mother's death in a drunk-driving accident. (1 CTJQ 25.) The prosecutor asked no questions concerning his psychological and/or psychiatric treatment, his hospitalization, or the impact it might have on his ability to consider the

case. (6 RT 1133-1137.) Respondent claims that a prosecutor could be "concerned over a juror who had received psychological counseling as a young man," (RB 67), but fails to address the prosecutor's lack of concern about the psychological/psychiatric experiences of these non-African-American jurors. The failure to explore the matter with these jurors raises an inference of discrimination.

Juror No. 7, like Prospective Juror No. 213, had potential scheduling problems. She had purchased non-refundable airline tickets for a vacation from November 23 to December 2, 1998. (1 CTJQ 189.) Her hardship application on these grounds was denied (1 CTHS 139; 5 RT 873), like Prospective Juror No. 213, but the prosecutor asked her no questions about how this pre-planned vacation and potential scheduling problems might affect her consideration of the case. (5 RT 797-802, 838-839, 844.) In contrast Prospective Juror No. 213 was questioned at length about the potential scheduling problems coaching his basketball team might present. (6 RT 1082-1087, 1091-1093.)

The jury foreman, Juror No. 12, (9 RT 1968), had served six years earlier on a jury that reached a verdict in a criminal trial involving possession of guns and weapons. (1 CTJQ 93; 6 RT 1027-1028.) The only question the prosecutor asked him about his prior service was, "The other trial you served on, that was back in '92?" (6 RT 1028.) Juror No. 4 had been a ward of the Oakland County Michigan court for a few years when he was a minor due to "status" offenses (running away from home and school truancy). He spent about two weeks in the "Children's Village" juvenile detention facility. During that time he was assigned a probation/case worker and he testified in court. (1 CTJQ 21, 23.) The prosecutor asked no questions of this juror about any of these experiences or how they might impact his

consideration of the case. (6 RT 1133-1137.) Respondent's claim that Prospective Juror No. 213's testimony for a friend who was accused of murder was a race-neutral ground for excusing him (RB 67) is belied by the prosecutor's failure to explore Juror No. 4's personal experience with the criminal justice system and his testimony.

"[P]otential jurors are not products of a set of cookie cutters." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 247, fn. 6.) "A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable." (*Ibid.*) These non-African-American jurors were similar enough to Prospective Juror No. 213 that an inference of discrimination can and should be drawn from the fact that the prosecutor questioned Prospective Juror No. 213 in depth but did not ask them any questions about markedly similar responses.

Nor does Prospective Juror No. 213's demeanor provide a basis for determining that appellant did not make a prima facie case of discrimination. The trial court observed:

> Yesterday when we broke in the evening one of the first prospective jurors to come up to the bailiff to get a hardship form was (juror 213). As you know, I emptied the courtroom so nobody could return anything at that time, so we got (juror 213's) request today. And then I had (juror 213) step out into the courtroom waiting whether there was going to be a stipulation or not. So, when I came back out and advised him what, that he needed to go take the jury seat, there was an audible groan and facial expression consistent with that as he moved from the clerk's area over to the chair. And just watching his demeanor, his facial expressions when he was inquired about his availability, I thought he was indicating that it's going to be extremely difficult.

(6 RT 1118.) The court did not inquire about this demeanor (6 RT 1082-1086) and there is no evidence that the prosecutor observed it. "This . . .does

not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges. *Johnson,* 125 S.Ct. at 2418; *see also Miller-El,* 125 S.Ct. at 2332 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.") (*Williams v Runnels, supra,* 432 F.3^{d} at p. 1109.) This "judicial speculation" is too imprecise to rely on to resolve plausible claims of discrimination. (*Johnson v. California, supra,* 545 U.S. at p. 173.) Moreover, even if the speculation is accurate, reluctance to serve is not a basis for excluding the prospective juror.

The prosecutor asked only one question about Prospective Juror No. 213's demeanor: "I take from it some things you said and the way you walked to the jury box, you're not thrilled; is that a bad way to state it?" Prospective Juror No. 213 responded, "That's a bad way to state it," and indicated that he knew he would be a good juror but was torn between his responsibilities as a juror and to the high school basketball team he coached. He explained, "If we can work out, if I can get it so they're both on different keels, it's fine with me. Because I don't have to worry about anything. I don't have to worry until I get to the game." (6 RT 1092-1093.) The trial court acknowledged, "he did opine that if actually selected, he will find a way to make his job work consistent with the nature of the jury duty." (6 RT 1118.) Given Prospective Juror No. 213's explanation of his demeanor, an audible groan and consistent facial expression is neither an indication that he was unwilling to serve as a juror on the case nor a valid race-neutral ground for the exercise of a peremptory challenge. Even if it were, as previously noted, the existence of race-neutral grounds upon which to base a peremptory challenge does not negate the existence of a prima facie case of discrimination.

Several factors lead to the conclusion that appellant produced evidence sufficient to draw an inference that discrimination occurred. The lack of diversity in the panel, along with the removal of each African-American prospective juror, justifies close scrutiny of the challenges. (*United States v. Collins, supra*, 551 F.3d at p. 921, citing *United States v. Chinchilla* (9th Cir.1989) 874 F.2d 695, 698 n.5 [although the striking of one or two members of the same racial group may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury].) Such scrutiny is particularly important in this case given its interracial sexual aspects. Appellant, an African-American man, is charged with raping and killing young white women. Black defendants are disproportionately sentenced to death when the victim is a white woman and the evidence suggests she was raped. (See, e.g., Crocker, *Is the Death Penalty Good for Women* 4 Buff. Crim.L.Rev. 917 (2001) ; Crocker, *Crossing the Line: Rape-Murder and the Death Penalty* 26 Ohio N.U. L. Rev. 689 (2000); King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions* 92 Mich. L. Rev.63, 81-82 (1993) [summarizing studies].).[5] If the prosecutor's

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[5] See also *Commonwealth v. Mathews* (Mass.1991) 581 N.E.2d 1304 ["[T]he interracial sexual aspect of the crime involved is a factor to be considered. . . . That factor made it highly possible that racial prejudice would play a part in the jury process."]; *Williams v. Chrans* (7th Cir.1991) 945 F.2nd 926, 944 (cert. denied (1992) 505 U.S. 1208 ["In a case where the defendant is Black and the victim is White, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many White jurors as possible in order to enlist any racial fears or hatred those White jurors might possess."]; *Mahaffey v. Page* (7th Cir.1998) 162 F.3d 481, 484 ["And lest we forget, the crimes at issue in this case were obviously racially-sensitive – *Mahaffey*, a young African-American male

challenge of the sole African-Americans is not examined closely, it would be impossible for a defendant in appellant's position to establish a case of prima facie discrimination. (*United States v. Collins, supra,* 551 F.3d at p. 921.)

Although it arguably does not by itself raise an inference of discrimination, the prosecutor's use of peremptory strikes against both African-American prospective juror is a relevant consideration. (*Crittenden v. Ayers, supra*, 624 F.3d at p. 955.) The African-American prospective jurors shared only two characteristics - their race and age - and in all other respects were as heterogeneous as the community as a whole. The manner in which the prosecutor questioned them raises an inference of discriminatory purpose. Additional evidence is provided by way of comparative juror analysis. Accordingly, under the totality of the circumstances, appellant met his "small" burden of proof of producing evidence sufficient to permit the trial judge to draw an inference that discrimination occurred. (*Johnson v. Finn, supra*, 665 F.3d at p. 1068; *United States v. Collins, supra*, 551 F.3d at p. 920.) The trial court's determination to the contrary is erroneous.

Respondent contends that, should this Court conclude that appellant made the requisite prima facie showing of discrimination, remand rather than reversal is the appropriate remedy. (RB 71-74.) The voir dire examination in this case occurred well over thirteen years ago and at least a few more years will likely pass before this appeal is finally decided. As noted in appellant's

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from Chicago's South side, was charged with murdering a White couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to *Mahaffey's* defense at trial, as well as to his arguments in mitigation at the capital sentencing phase.]; and *Jones v. Ryan* (3d Cir.1993) 987 F.2d 960, 971 [taking account that defendant was charged with a violent offense against a white victim in finding a prima facie case].)

opening brief, one of appellant's trial counsel, Mr. Zimmerman, is deceased. (http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch?FreeText=david+zimmerman&x=0&y=0&SoundsLike=false; AOB 169.) The other, Mr. Enright, has since retired and has been on inactive status with the California Bar Association since November 11, 2009. (http://members.calbar.ca.gov/fal/Member/Detail/30480.) The prosecutor has resigned from the Orange County District Attorney's office and is in private practice. (http://members.calbar.ca.gov/fal/Member/Detail/61603.) Under these circumstances, it is unrealistic to believe the prosecutor could recall in detail his reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor examined the venire and exercised his other challenges. (*People v. Snow* (1987) 44 Cal.3^{d} 216, 226.) The is no realistic possibility "that this subtle question of causation could be profitably explored further on remand." (*Snyder v. Louisiana* (2008) 552 U.S. 472, 481.) Accordingly, should the Court conclude that appellant made the requisite prima facie showing of discrimination, as it must, reversal and not remand is the appropriate remedy.

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO EXCLUDE EVIDENCE OF HIS ADMISSIONS WAS PREJUDICIALLY ERRONEOUS

Both the prosecutor below and respondent acknowledge that the interrogations of appellant were custodial and that *Miranda* warnings were required. (3 CT 954; RB 76.) The United States Supreme Court recently held, "our decisions do not clearly establish that a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison." (*Howes v. Fields* (2012) __ U.S. __, 132 S.Ct. 1181, 1188-1189.) Nothing in this decision detracts from the conclusion that appellant was in custody within the meaning of *Miranda*.

The defendant in *Howes* was serving a sentence in a Michigan jail when he was questioned about allegations that he had engaged in sexual conduct with a 12-year-old boy before he came to prison. He was told at the beginning of the interview that he was free to leave and return to his cell. He was told during the interview that he could leave whenever he wanted. He remained free of handcuffs and other restraints. He said several times during the interview that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell prior to the end of the interview. He eventually confessed to engaging in sex acts with the boy. His motion to suppress his confession was denied and, over his objection, one of the interviewing deputies testified at trial about his admissions. (*Howes v. Fields, supra*, 132 S.Ct. at pp. 1185-1186.) The high court determined, "'An inmate who is removed from the general prison population for questioning and is "thereafter . . . subjected to treatment" in connection with the interrogation "that renders him 'in custody' for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer*, 468 U. S.,

at 440.'" However, "Taking into account all of the circumstances of the questioning - including especially the undisputed fact that respondent was told that he was free to end the questioning and to return to his cell - we hold that respondent was not in custody within the meaning of *Miranda*." *Miranda* warnings were therefore not required. (*Howes v. Fields, supra*, 132 S.Ct at p. 1194.)

Like the defendant in *Howes*, appellant was questioned while he was in custody about allegations that arose from conduct before he was imprisoned. Appellant, though, remained handcuffed throughout the interviews and was never told he was free to leave. (3 CT 952-953; 1 RT 133-136, 145-148, 172-174.) These objective facts are inconsistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave. (*Howes v. Fields, supra*, 132 S.Ct at p. 1193.) Accordingly, appellant was in custody within the meaning of *Miranda*.

Respondent concedes that if appellant invoked his right to remain silent at any time during his interview with Detectives Redmond and Giesler, it was erroneous for Detective Tarpley to interview appellant unless appellant initiated the contact. (RB 99.) Respondent contends, though, that appellant clearly understood and impliedly waived his *Miranda* rights before speaking with Detectives Giesler and Redmond and never invoked his right to silence during that and subsequent custodial interviews. (RB 75-76.)

Because the charged crimes took place prior to the effective date of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)), respondent must prove effectiveness of appellant's waiver beyond a reasonable doubt. (*People v. Jackson* (1980) 28 Cal.3^{d} 264, cert. den. (1980) 450 U.S. 1035; *People v. Jiminez* (1978) 21 Cal.3^{d} 595; see *People v. Smith* (1983) 34 Cal.3^{d} 251.)

"Ambiguous statements are to be construed as invocations." (*People v. Duran* (1983) 140 Cal.App.3d 485, 492, citing *People v. Randall* (1970) 1 Cal.3d 948, 955.) If a suspect's waiver of his *Miranda* rights is equivocal, the officers may continue their questioning for the limited purpose of determining whether he is waiving or asserting those rights. (*People v. Johnson* (1993) 6 Cal.4th 1, 27, disapproved on other grounds in *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526-527; *People v. Russo* (1983) 148 Cal.App.3d 1172, 1177.)

After advising appellant of his *Miranda* rights, Detective Redmond asked appellant, "Do you want to talk to us about anything that might have occurred back in '79, '80?" Appellant asked Redmond, "'79, '80, why, why would I want to talk to you about something that occurred back then?" Redmond said, "Well some things have come up and, ah, we need to talk to you about them, you can stop talking at any time." Appellant responded, "I can't, like I said, I can't imagine why I would want to talk with the Costa Mesa Police Department." Redmond explained that "your DNA came up on a couple of Costa Mesa homicides back in 1979." Appellant told him, "I never lived in Costa Mesa." Redmond then began to question appellant about his life in Orange County in the late 1970's. (5 CT 1547-1549; 1 RT 134-135.)

Appellant's statements do not show, as respondent asserts, "a clear understanding that he fully understood it was his choice whether or not he wanted to speak with the detectives," and that he "displayed no reluctance in speaking with the detectives and instead willingly engaged in discussions to find out what information they had regarding him and the crimes in their cities." (RB 93.) The statement "I can't imagine why I would want to talk with the Costa Mesa Police Department" is, at best, an equivocal, ambiguous

response that must be construed as an invocation. (*People v. Duran* (1983) 140 Cal.App.3^{d} 485, 492, citing *People v. Randall* (1970) 1 Cal.3^{d} 948, 955.) Respondent has not proved appellant's waiver beyond a reasonable doubt. Detective Redmond's failure to continue questioning for the limited purpose of determining whether appellant was waiving or asserting his *Miranda* rights rendered appellant's statements inadmissible. (*People v. Johnson, upra*, 6 C[illegible].4th at p.27; *People v. Russo, supra*, 148 Cal.App.3^{d} 1177.)

R[illegible]spondent argues that appellant's reliance on *People v. Johnson* and *People v. Russo* is "misplaced" and "unavailing." (RB 96.) In *Johnson*, the [illegible]fendant's intent to continue the interview was confirmed by his failure to [illegible] to the immediate inquiry as to whether he wanted an attorne[illegible] and by h[illegible] request to "Tell me what you have and I might make you a [illegible]roposition." (*People v. Johnson, supra*, 6 Cal.4th at p.28.) In *Russo*, the [illegible]rmined [illegible] statement "I don't know if I should have a lawyer here [illegible] was reasonably inconsistent with a present willingn[illegible]s to [illegible] case fr[illegible] com[illegible]ly. (*Peop[illegible] v. Russo, supra*, 148 [illegible] 117[illegible] [illegible]ed in C[illegible] Mesa" is [illegible] from [illegible] an[illegible] [illegible]position[illegible] *People v.* [illegible] Ca[illegible] at [illegible] In [illegible] w[illegible] [illegible]e statement reflect an [illegible] th[illegible] [illegible] appellant's responses are like those [illegible]ne d[illegible] *Russ*[illegible] kno[illegible] if I s[illegible] [illegible] a lawyer here [illegible]r what, . . . [illegible] v. *R[illegible], supra*, 148 [illegible]p. 1[illegible] 177.)

[illegible]ent's cl[illegible] that appellant [illegible]pressed no r[illegible]ance to speak with Detecti[illegible] at any ti[illegible] (RB [illegible]) is belied by the rec[illegible]. Appellant invoked h[illegible]s right to sile[illegible] the beginning of [illegible]d rep[illegible] throughout his interrogation by [illegible] When Giesler asked, "17 years is long enough, I think it's time [illegible]

don't you? [¶] Why don't you tell us what happened?" appellant responded, "I will reserve the right to speak at another time." (5 CT 1610.) Reserving the right to speak at another time evidences a reluctance to speak. Giesler's statement, "I'm not going to do anything to violate your rights Gerald, I mean we read you your rights and, I'm not going to step on your toes" (*Ibid.*) makes it clear that she understood appellant had just invoked his right to remain silent. Thereafter, appellant repeatedly asserted his right to silence. He showed his reluctance to speak with his questioners when he said, "[T]he day is not today . . . I can't take it" (5 CT 1612) and "Yeah, but there's also a reason for wanting to wait too." (5 CT 1615.) These statements can only be viewed as "reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.)

In response to appellant's statement, "[L]ike I say, once again, there's, there's I think for me, there's a time, and a place for saying what I have to say, and, in reference to what happened, I, there's nothing else that I can tell you" (5 CT 1616-2617), Giesler said, "I don't understand what you're saying to me, are you saying, okay Lynda, when I get back to Orange County, come and see me? . . . Are you saying, Lynda, I don't want to talk to you?" (5 CT 1619.) Appellant explained, "I just need some time to call upon myself, to bring, to draw upon some strength. . . . To say what I have to say. . . . When they take me down there [Orange County Jail], yes, you can come back." (5 CT 1620.) Giesler clarified appellant's intent: "[A]re you serious, when you get down to Orange County, I can come see you again?" (5 CT 1622.) Appellant asked to turn the tape recorder off, but Giesler explained that it was for his protection. When she asked "Can I leave it on?", appellant told her, "Like I said, I think I should wait for, you may, you can come to Orange County." (5 CT 1622-1623.)

Giesler terminated the interview at this point because she clearly understood that appellant had asserted his right to remain silent. Having asserted this right, all questioning of appellant should have ceased at this point. Unless he initiated a subsequent conversation, officers were prohibited from questioning him at any time, whether they were aware of the *Miranda* invocation or not and regardless of whether fresh *Miranda* warnings were given. (*People v. Fioritto* (1968) 68 Cal.2d 714, 719; *People v. Pettingill* (1978) 21 Cal.3d 231, 242, 246.) Appellant did not initiate any contact with Detective Tarpley or with any other law enforcement officer. Accordingly, his statements to Detectives Redmond and Giesler and all subsequent statements to Tarpley and other law enforcement officers were inadmissible.

Respondent contends that, in view of DNA evidence, appellant was not prejudiced by evidence of his admissions and he would have been convicted even if his statements to the police were excluded. (RB 100-101.) This argument overlooks the fact that the state, not appellant, must establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The admissions were unarguably central to appellant's conviction. In Marolyn Carleton's case, they were the only evidence of his guilt. The other cases were built solely on circumstantial evidence. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.' *Bruton v. United States*, 391 U.S., at 139 -140 (WHITE J.,

dissenting). See also *Cruz v. New York*, 481 U.S., at 195 (WHITE, J., dissenting) (citing *Bruton*). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296.)

Under the circumstances, it simply cannot be said that words from appellant's own mouth admitting his responsibility for the homicides did not contribute to the jury's willingness to accept the validity of the DNA evidence. Absent appellant's admissions, it cannot be said that at least one juror would have discounted the circumstantial evidence and voted to acquit. Thus, it cannot be said that the guilty verdict was surely unattributable to the erroneous admission of appellant's statements. Respondent cannot show that evidence of appellant's admissions did not contribute to his conviction. The conviction must therefore be reversed.

III. THE TRIAL COURT'S REFUSAL TO PERMIT APPELLANT TO ARGUE HIS LACK OF FUTURE DANGEROUSNESS WAS PREJUDICIALLY ERRONEOUS

Respondent contends that, even assuming that the trial court curtailed defense argument on the subject of future dangerousness, appellant was not prejudiced. (RB 137.) On the contrary, the trial court made a conscious decision to disregard this Court's holding in *People v. Davenport* (1995) 11 Cal.4th 1171 and prohibited appellant's counsel from arguing the issue of future dangerousness, and the error was prejudicial.

Respondent argues that it is not clear the trial court ruled the defense could not argue lack of future danger. (RB 138-139.) The court addressed the issue before closing argument by stating that the defense, in its cross-examination of a prosecution witness, had "touched on what might be classified as future dangerousness. I don't believe either side is permitted to introduce evidence on that subject, let alone comment during the course of your argument." (11 RT 2507.) "I believe the law precludes the parties commenting about future possibilities." (11 RT 2508.)

Understanding the court's statements to be a restriction on closing argument, appellant's counsel asked:

> [I]s your *ruling* taking into account the fact that we plan on mentioning the use of the psychotropic drugs that he is under now? I'm not going to use the word "danger," but I think it's imminently apparent to anybody in the room when he is under these drugs he is a lot less a danger to himself and others. I won't use the word "danger," but I would be talking about the drugs, and their availability in the state prison system. That's been going on since the beginning of the trial.

(11 RT 2508-2509, emphasis added.) The court responded, "I don't want you trying to do indirectly what you cannot do directly. So, I need to know the substance of what you want to say, in that regard." (11 RT 2509.)

Counsel indicated that he intended to argue that appellant "could be continued [sic] to be medicated, the same way he is in county jail right now, and the way he was in state prison before he was brought to the county jail. . . . I don't see how that could be irrelevant in light of the testimony we've had on that point." (*Ibid.*)

The next day, the prosecutor stated "both sides have presented evidence on that issue [future danger]" and advised the court that his research had revealed *People v. Davenport*, which permitted either side to argue the issue. (12 RT 2534-2535.) The court acknowledged that the prosecutor had "introduced evidence into that issue," but expressed concern about "*Daveport* holding the day in the future." It questioned the prosecutor's "need to talk about that given the evidence that you have going to the jury" and cautioned if "what you're asking for is guidance about argument, don't get into it" because "I just think that you're skating on thin ice if you get on that topic." (12 RT 2535.)

The court refused to lift its limitations on the defense arguing future dangerousness: "I'm more concerned about counsel for defendant . . . I want to make sure they don't get into the topic. (12 RT 2535-1236.) Defense counsel stated, "My plan is to do exactly what I told you yesterday and you said this was all right. I can discuss psychotropic medication." The court responded, "That's fine. . . . What I'm saying is I think everything I've looked at on that topic is that it's not a given as to what the appellate court would do on that issue, and I see no need for either side to get into this particular subject on this case." (12 RT 2536.) One can only conclude from this interchange that the trial court decided to and did ignore this Court's holding in *Davenport* and, with the exception of appellant's use of psychotropic medication, prohibited appellant's counsel from arguing the

issue of future dangerousness.

Respondent contends that the prosecutor did not argue appellant's future dangerousness as a basis for returning a death verdict and that, "The excerpts of the prosecutor's argument that [appellant] relies on to claim the prosecutor argued future dangerousness relate to explaining that [appellant's] recent mental problems were not worthy of the jury's sympathy and did not mitigate his moral culpability for his crimes." (RB 140, 142.)

The prosecutor argued:

> I think what the argument the defense will make is that since his present condition has deteriorated to the point where he has to be prescribed medication to suppress these symptoms and his aggression, that he's now somehow a changed man and somehow because of this fact he deserves your mercy. There's a few problems with this logic in the facts, and I'll just hit on it briefly.
>
> As you recall from the evidence and the records before you, in the 1970's and 1980, when these crimes were committed, Mr. Parker exhibited no symptoms that would indicate he needed psychiatric evaluation. And you'll see up until -- in the records up until 1997 he had no substantial problems whatsoever.
>
> And maybe the main point about all this, and some of you may have been thinking it yesterday when we went through -- not yesterday, two days ago when the two psychiatrists were testifying, none of these so-called mental problems, whatever they are, okay, none of them manifest themselves by violence or aggression. That's not a symptom of these problems. Remember, whatever these voices are, they're noncommand, they don't tell him to commit crimes, okay.
>
> And why is that significant?
>
> Well, where does the violence come from, okay? Where is the -- it comes from him. Now, you can sedate him, you can tranquilize him, but you can't change him. The violence comes

> from Mr. Parker. . . . None of the problems, these so-called problems, interfere with his ability to make choices and distinguish right from wrong.
>
> When he made the decision to rape and murder, he made it on his own free will in all instances. Nothing that has to do with any -- anything with mental problems now even impairs him today as far as making those decisions.

(12 RT 2551-2552.)

The prosecutor then discussed the testimony of Dr. Dietz, his psychiatric expert:

> The antisocial personality, which Dr. Dietz talked about briefly and the criteria for which Mr. Parker easily satisfies, he does what makes him feel happy. Remember that? That's what the antisocial personality does. He does what makes him feel happy, and he does it without conscience. If Mr. Parker needs drugs or alcohol to feel happy, he'll do It. If he needs to rape and murder, he'll do it.
>
> That's the antisocial personality that Dr. Dietz was talking about.
>
> How did he do well in the Boys' Republic and in the Marine Corps? As pointed out on cross, how could he do so well if he has this antisocial personality? That's easy. The key is structure. The key is structure.
>
> As Dr. Dietz pointed out, if you give him structure in the Marine Corps, in the Boys' Republic, if you give him rules, he will adapt, he will learn to thrive.
>
> The problem is when he gets outside of the structure, then society is going to pay for what he needs to do to be happy.

(12 RT 2553.)

This is not an argument, as respondent asserts, that appellant's "moral culpability for his crimes was unrelated to, and therefore not mitigated by,

any mental problems." (RB 140.) Instead, as he expressly informed the jury, the prosecutor was addressing an argument he believed defense counsel would make, an argument that appellant did not present a future danger. His argument was clearly that, even if medicated, appellant posed a danger to society, and it placed future dangerousness "in issue." Future dangerousness is placed "in issue" where jurors are presented with evidence "of a defendant's demonstrated propensity for violence" or of a defendant's "dangerous character." (*Kelly v. South Carolina* (2002) 534 U.S. 246, 253-254.) Jurors presented with such evidence "reasonably will conclude that [a defendant] presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee." (*Ibid.*) The prosecutor's argument placed future dangerousness in issue by urging the jury to find that appellant had both a demonstrated propensity for violence and a dangerous character. Appellant was entitled to present argument on the subject to meet and rebut the argument made by the prosecution. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 161 (plur. opn.); *People v. Frye* (1998) 18 Cal.4th 894, 1017.)

Respondent contends that appellant was not denied the opportunity to meet and rebut the prosecutor's argument and that "the facts did not lend themselves to convincing anyone that someone as violent as [appellant] would not pose a danger in the future." (RB 142-144.) Appellant's entire case was devoted to attempting to secure a sentence of life in prison without possibility of parole. He rested without presenting any guilt phase evidence. (9 CT 2876; 8 RT 1778.) His penalty phase case was aimed primarily at establishing his undiagnosed mentally illness at the time of the crimes and that, after being diagnosed and medicated, he did not present a danger to others. In keeping with the court's restriction on his argument, defense

counsel argued only that "this man was not diagnosed for his own mental illness twenty years ago, no one diagnosed him, no one sedated him, no one medicated him. . . . The prison authorities . . . put him on psychotropic medication. . . . The jail psychiatric team . . . did the same thing. . . . And when he's medicated, what happens? The violent tendencies are gone. . . . It's not the same man." (12 RT 2558.) "If you decide not to kill him, he's going to go to prison for the rest of his life without a possibility of parole. He's going nowhere. They're going to medicate him, and he's going to stay there." (12 RT 2559.) In closing, the prosecutor argued again that appellant remained a danger and should be put to death because the medication only "hides the same guy . . . . who did all these rapes and murders." (12 RT 2561.)

The trial court's decision to disregard *Davenport* prevented appellant's counsel from adequately presenting his future good conduct as a circumstance tending to make appellant less deserving of the death penalty. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) Had counsel not been prohibited from arguing future dangerousness, they could have said more than merely that appellant did not have violent tendencies when he was medicated. They could have elaborated on Dr. Blair's assessment that appellant would not be a danger to others if he was in a controlled environment in prison and being treated with psychotropic drugs. "Fear of what a defendant might do in the future overshadows all else and works as a powerful advocate on the side of death." (Garvey, *"As The Gentle Rain From Heaven": Mercy in Capital Sentencing* 89 Cornell L.Rev. 989, 1030-1031 (1996).) By suggesting that a sentence of life without the possibility of parole would adequately protect society, defense counsels' arguments, would have mitigated the sentencing

jurors' fear that appellant might be released. (See *People v. Pride* (1995) 3 Cal.4th 195, 268.)

Respondent argues that appellant was not prejudiced by the error because "[t]he prosecutor would have been free to argue from [appellant's] past conduct that he will be a danger in prison" (RB 146) and appellant obtained an "undeniable benefit" from the prosecutor foregoing argument on the subject of future dangerousness. (RB 145.) This argument misses the point. "Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 263-264; *People v. Brown* (2003) 31 Cal.4th 518, 576.) The test is not whether the jury would have surely returned a guilty verdict, but whether the guilty verdict was surely unattributable to the erroneous restriction of argument. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-279.) It is impossible to say beyond a reasonable doubt that precluding defense argument on the issue of appellant's future dangerousness did not influence the sentencing jury. Had the jurors been presented with an unrestricted appeal to spare appellant's life, a single juror might have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 536-538; *Chapman v. California, supra*, 386 U.S. at p. 24.) Accordingly, the sentence must be reversed.

CONCLUSION

For the foregoing reasons, as well as those stated in appellant's opening brief, the judgment must be reversed.

DATED: April 11, 2012

Respectfully submitted,

JEFFREY J. GALE
Attorney at Law

Attorney for Appellant

CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.630(b))

I certify that appellant's reply brief uses a 13 point Times New Roman font and excluding the cover, tables, signature blocks, and this certificate contains 10,269 words.

DATED: April 11, 2012

Jeffrey J. Gale
Attorney for Appellant

DECLARATION OF SERVICE

Re: PEOPLE V. PARKER

No. S076169

I, Jeffrey J. Gale, declare that I am over 18 years of age, and not a party to the within cause; my business address is 5714 Folsom Blvd., No. 212, Sacramento, CA 95819. I served a copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

GERALD PARKER
(To be personally served
pursuant to rule 8.630(g),
Cal. Rules of Court)

HOLLY D. WILKENS
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SCOTT KAUFFMAN
California Appellate Project
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Each said envelope was then, on April 11, 2012, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 11, 2012, at Sacramento, California.

JEFFREY J. GALE