IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DONALD RAY DEBOSE, JR.,** Defendant and Appellant.	**Case No. S080837** (Los Angeles Superior Court No. YA035529)

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
HONORABLE JAMES R. BRANDLIN, JUDGE, PRESIDING

APPELLANT'S REPLY BRIEF

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Under Appointment by the Supreme
Court of California

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APPELLANT'S REPLY BRIEF

Appellant submits the following points and authorities in support of his Reply Brief. Appellant has not replied to some of respondent's arguments where appellant believes the issue was fully addressed in the Appellant's Opening Brief. However, the absence of a reply on any issue is not a concession on the merits of that issue.

POINTS AND AUTHORITIES

I.

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE SPECIAL CIRCUMSTANCE OF ARSON MURDER AND APPELLANT'S DEATH SENTENCE MUST BE REVERSED

A. Introduction

Appellant argues in his opening brief that there is insufficient evidence to support the arson-murder special circumstance finding because the arson was not of an inhabited dwelling as required under Penal Code section 190.2, subdivision (a)(17)(H) since no evidence was presented to establish that the victim's car was an inhabited dwelling. (AOB 49-51.)

Respondent agrees that the arson-murder special circumstance must be stricken. (RB 37.) According to both appellant and respondent, because no evidence was produced at trial that the victim used her car for dwelling

purposes, there was insufficient evidence to establish that the arson was of an inhabited structure or property. (RB 37.)

However, while appellant and respondent agree that the arson-murder special circumstance must be stricken, respondent disagrees that the penalty verdict, which relied on the inapplicable arson-murder special circumstance, must be reversed. (RB 38-40.) As detailed below, respondent is incorrect.

B. Appellant's Death Sentence Must Be Reversed

Respondent claims that the penalty verdict need not be reversed despite the fact that the jury relied on the invalid arson-murder special circumstance as a factor in aggravation. (RB 38-40.) Respondent is wrong. As explained in appellant's opening brief, appellant's penalty verdict must be reversed because during the penalty trail, the jury was told, pursuant to CALJIC 8.85, that it could consider the arson-murder special circumstance as a factor in aggravation. (AOB 54-56; CT 847; RT 412.)

While respondent concedes that the jury's finding that the arson-murder special circumstance was true must be reversed because it is inapplicable to the instant case, respondent asserts that the penalty verdict need not be reversed because per *Brown v. Sanders* (2006) 546 U.S. 212, the jury was allowed to consider the underlying facts and circumstances under the "circumstances of the crime" aggravating factor. (RB 38-40.)

As set out in Appellant's Opening Brief, appellant's case is distinguishable from *Brown v. Sanders* (2006) 546 U.S. 212, because in that case the invalidity of one special circumstance was found not to be prejudicial where two valid special circumstances remained, whereas here, only the robber-murder special circumstance remains.

Further, as appellant explains in his Opening Brief (AOB 55), the evidence in aggravation against appellant was not as strong as that introduced against the co-defendants, each of whom received a sentence of LWOP. Appellant had no prior criminal convictions, whereas co-defendant Flagg had committed multiple prior robberies at gunpoint and Higgins was previously convicted of voluntary manslaughter that included a gang attack on one victim, who was stomped and shot to death. (RT 3914-3916, 3934-3935, 3950-3954, 3983, 3990, 4014-4015, 4061, 4073-4076, 4309, 4316, 4320-4321, 4112, 4115.)

Further, there was no direct evidence and scant indirect evidence to indicate that appellant was the ringleader or the person who shot Ms. Kim. Equally compelling is that fact that this was a very close penalty case as evidence by the fact that the jury reported that it was hopelessly deadlocked after taking several ballots. (See Argument VIII, *post.*) Because of these

factors, the invalidity of the arson-murder special circumstance compels reversal of appellant's death sentence.

II.

THE MERGER DOCTRINE PROHIBITS THE APPLICATION OF THE SPECIAL CIRCUMSTANCE OF ARSON-MURDER IN APPELLANT'S CASE

A. Introduction

Appellant argues in his opening brief that the arson-murder special circumstance is invalid under the merger doctrine. (AOB 57-62.) Respondent concedes that the arson-murder special circumstance must be stricken as inapplicable but argues that in the event this Court finds the arson-murder special circumstance valid, the merger doctrine does not invalidate it. (RB 40-44.) Respondent is incorrect that the merger doctrine does not apply to the instant case.

B. The Arson-Murder Special Circumstance is Invalid Under the Merger Doctrine Because There is No Independent Purpose for the Arson Separate from or Concurrent to the Purpose to Commit Murder.

The central issue in determining whether the merger doctrine precludes application of a felony murder special circumstance turns on whether the arson-murder was integral to the homicide or whether there was an independent felonious purpose for it. (*People v. Burton* (1971) 6 Cal.3d 375, 386-387 (overruled on other grounds in *People v. Lessie* (2010) 47 Cal. 4th

1152); *People v. Green* (1980) 27 Cal.3d 1, 61-62 (overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225.) Unless a defendant has a purpose for committing an underlying felony separate and apart from the purpose of committing murder, the merger doctrine precludes application of the felony-murder special circumstance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.)

Respondent cites cases holding that a concurrent intent both to commit murder and to commit another felonious act will support a felony-murder special circumstance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 183; *People v. Clark* (1990) 50 Cal.3d 583, 608; *People v. Barnett* (1998) 17 Cal.4th 1044, 1157; *People v. Raley* (1992) 2 Cal.4th 870, 903.) Respondent's argument fails because in appellant's case there is no concurrent intent and the law is clear that when the underlying felony is merely incidental to the murder, as here, the merger doctrine applies. (*People v. Mendoza, supra*, at p. 182.)

The cases cited by respondent holding that the merger doctrine does not apply are all factually distinguishable from appellant's case in that here there is a complete absence of evidence of a concurrent intent to commit arson for a separate, independent felonious purpose. Respondent speculates that in the instant case appellant and the codefendants committed the arson not only to kill the victim but also to conceal sexual assaults and robbery of her, to avoid

detection, and/or to inflict additional pain and suffering upon her but offers no evidence to support these contentions. (RB 42.) Respondent is unable to cite to any evidence supporting the theory that appellant committed the arson not only to kill the victim but also to conceal his crimes and avoid detection because no such evidence exists. In contrast, evidence of concurrent intent to commit the underlying felonies is present in all of the cases cited by respondent.

In *Mendoza*, the court found that a rational trier of fact could have concluded that defendant had a purpose for the arson apart from the murder. The testimony of the arson investigator supported the conclusion that defendant harbored independent, albeit concurrent, goals. The court found that Mendoza intended not only to kill the victim, but also to destroy evidence of the rape (such as the victim's torn clothing or bruises on her body) as well as evidence of his presence (such as fingerprints). (*People v. Mendoza*, 24 Cal.4th at p. 183.) Of significance is the fact that Mendoza had run away from the police earlier that day when they confronted him about the theft of his girlfriend's father's guns, and the police were in hot pursuit of Mendoza around the time of the rape/arson. Here, unlike Mendoza, appellant was not being pursued at the time of the crime, and thus the inference in *Mendoza* that the arson was designed to cover the defendant's tracks and avoid the police

from discovering his whereabouts is not present in the instant case. Thus, here, unlike in *Mendoza*, there was no evidence that the fire was for the purposes of concealment of the crime rather than for the purpose of killing the victim.

Similarly, in *People v. Barnett*, the defendant was convicted of murder with a kidnap-murder special circumstance. On appeal, this Court determined that there was evidence that the kidnapping was committed before the defendant decided to kill the victim, and that therefore the kidnapping was not merely incidental to the murder. (*People v. Barnett*, 17 Cal.4th at p. 1158.) Here, in contrast, there was no evidence that the arson was not incidental to the murder, or that the arson occurred separate from and/or before the defendants decided to commit the murder. In fact, the shooting of the victim preceded the arson. (7 RT 1227, 1231, 1234.).

The defendant in *People v. Raley* kidnapped two teenage girls, sexually assaulted them, beat them with a club and stabbed them with a knife multiple times, and then dumped them in a ravine. One of the girls survived and the other died from the wounds. (*People v. Raley*, *supra*, 2 Cal.4th at pp. 881-885.) On appeal, Raley argued that the kidnap-murder special circumstance was invalid because the kidnapping was incidental to the murder. (*Id.* at p. 902.) This Court held that the evidence was sufficient to support the jury's

finding that Raley had a purpose for the kidnapping apart from the murder. Central to the Court's decision was the fact that, "Raley did not immediately dispose of his victims once he had them in the trunk of his car, but brought them to his home. He may have been undecided as to their fate at that point. It could reasonably be inferred that defendant formed the intent to kill after the asportation, so that the kidnapping could not be said to be merely incidental to the murder." (*Id.* at p. 903.)

Unlike in *Raley* and *Barnett*, there is no evidence by which the jury could reasonably infer that appellant informed the intent to kill *after* committing the arson. Nor was there any evidence by which to infer that the arson was committed for the purpose of concealing evidence, as in *Mendoza*. Rather, the arson in the instant case was incidental to the murder and, therefore, the arson-murder special circumstance must be stricken.

III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DISMISSED JUROR NUMBER TWO

A. Dismissal of Juror Number Two was an Abuse of Discretion Under Penal Code Section 1089

Appellant argues in his Opening Brief that the trial court abused its

discretion in dismissing juror number two because there was not good cause to find that the juror was unable to perform her duties as a juror. (AOB 69-75.) In response, respondent claims that there was good cause to dismiss the juror. (RB 51-58.) Respondent's contentions are without merit.

Respondent fails to cite any case law refuting appellant's claim that the trial court has a very limited discretion to dismiss a juror, that the purported good cause must be such that it renders the juror unable to perform his or her duty, and that "[t]he court must not presume the worst." (AOB 71; *People v. Franklin* (1976) 56 Cal.App.3d 18, 26.) Nor could respondent cite any contrary law because the law as cited by appellant is unequivocal.

Instead, respondent misinterprets the facts and speculates as to the inferences that the trial court might have made to justify its erroneous decision to dismiss juror two. For example, while respondent admits that the record does not reflect "the extent to which Ms. Campbell intended to influence juror two," respondent nonetheless claims that the court was entitled to find actual bias on the part of juror two based on the fact that Ms. Campbell exerted an indirect if not direct negative influence over her. Respondent's speculation is incorrect. Moreover, regardless of Ms. Campbell's intentions, juror two declared unequivocally that she was not

influenced. Most important, juror number two was acquainted with neither victims nor defendants in this case.

First, the trial judge's only explanation as to why it dismissed juror two was that the determination of good cause that a juror is unable to perform his or her duties is an objective standard and that, based on juror two's relationship with Ms. Campbell and Ms. Campbell's relationship with Tynesha Coleman and the defendant [Flagg], the court found good cause under Penal Code section 1089 to dismiss the juror. (RT 1708-1709.) What the trial court failed to establish was any relationship between juror two and Tynesha Coleman; the trial court failed to demonstrate that juror two was even aware of any relationship between Ms. Campbell and Ms. Coleman, let alone the relationship between Ms. Coleman and defendant Flagg.

Second, contrary to what respondent implies, the trial court never espoused a belief that Ms. Campbell negatively influenced juror two, and in fact there is absolutely no evidence that Ms. Campbell exerted any influence over juror two. On the contrary, juror two was emphatic that she had not discussed the case with Ms. Campbell and stated that the fact that Ms. Campbell was present in court would in no way influence her as a juror. (RT 1654-1655.) She further stated that she had never really spoken

with Ms. Campbell the few times she had seen her and would not be at all influenced by Ms. Campbell or Ms. Campbell's relationship to any of the co-defendants. (RT 1672.) In fact, until it came up during questioning, there was nothing to suggest that juror two even knew there was a connection between Ms. Campbell and Ms. Coleman.

The cases that respondent cites do not support the respondent's position. As noted above, juror number two was acquainted with neither victims nor defendants in this case. Even in cases where there was an acknowledged acquaintance, the juror was determined to be fit to serve. Here the court did not have even that on which to base its decision.

The case of *People v. Ray*, cited by respondent, is actually strikingly similar to the instant case and supports appellant's argument. (*People v. Ray* (1996) 13 Cal.4th 313.) In that case, the juror in question knew the daughter of the victim because the juror worked at the high school the daughter attended. (*Id.* at 342.) The trial court did not excuse the juror, and this Court found no error in the trial court's action, including the failure to question the juror to determine whether he was biased.

In the instant case, the potential for bias is even less, in that juror number two knew of, but was not formally acquainted with, Ms. Campbell, who happened to be the aunt of appellant's co-defendant's ex-girlfriend.

Juror number two was in no way directly connected to nor did she know either Ms. Campbell's niece or the co-defendant - The prosecutor questioned juror two if she could be fair and objective if she knew that her boyfriend's granddaughter or step granddaughter was dating one of the defendants, and she said that she could absolutely be fair and that she did not even know them. (11 RT 1673.)

However, the prosecutor was jumping to conclusions as there was no evidence that Ms. Coleman was Ernie Campbell's granddaughter or step granddaughter. While Ms. Coleman was admittedly Mr. Campbell's niece, that does not necessarily make her related to Ernie Coleman, whom juror number two was dating. For example, if Ms. Campbell is Ernie Campbell's only child as Ms. Campbell testified (11 RT 1694), then Ms. Coleman cannot be his granddaughter, and whether or not she is his step granddaughter is pure speculation. It is entirely possible that Mr. Campbell's mother had a child with someone other than Mr. Campbell, and that that child's child is Ms. Coleman, who would therefore be no relation to Mr. Campbell.

Further, in *People v. Ray*, a factor the court considered in finding that the trial court was not required to hold a hearing to determine whether there was good cause to dismiss the juror was the fact that the victim's

daughter had never talked with the juror about the case. Here, too, the juror and Ms. Campbell had never discussed the case. (RT 1654-1655, 1672.)

Finally, the Court in *Ray* explained that, "[a] juror who is acquainted with the victim's family as the result of a business or professional relationship is not necessarily incompetent to serve in a capital case." (*People v. Ray*, 13 Cal.4th at p. 344.) In order to perform the duties of a juror, an individual can be no more biased toward the victim or the prosecution as she or he can be toward the defense. Therefore, it can be inferred that if a juror acquainted with the victim's family is not necessarily incompetent to serve, then a juror acquainted with a defendant's family would also not necessarily be incompetent to serve. Even if that were not the case, here, as noted above, juror number two was acquainted with neither victims nor defendants in this case.

Respondent's contention that the instant case is distinguishable from the facts in the case of *People v. McPeters* (1992) 2 Cal. 4th 1148 (superseded on other grounds in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116) is incorrect. (RB 55-56.) In *McPeters*, this Court emphasized the fact that the juror's initial failure to disclose that he knew the victim's husband was "inadvertent" and stated that while intentional concealment of material information by a potential juror may constitute implied bias

justifying his or her disqualification or removal, "mere inadvertent or unintentional failures to disclose are not accorded the same effect." (*Id.* at p. 1175.) The Court goes on to distinguish unintentional from intentional concealment, citing the case of *People v. Diaz* (1984) 152 Cal.App.3d 926, in which the jury foreperson failed to disclose that she was assaulted with a knife during an attempted rape and had pursued and stabbed her assailant, despite specific voir dire questions asking whether she had been a victim of a crime or involved in a knife fight. (*McPeters, supra*, at p. 1176.)

The *McPeters* Court explained that, "[i]n view of the traumatic nature of the event and the specificity of the questions, it is highly unlikely the foreperson's nondisclosure was inadvertent." (*Ibid.*) Unlike the juror in *Diaz*, in the instant case, juror number two was entirely forthcoming when asked about whether she knew Ms. Campbell, and did not previously bring this to the court's attention because she did not believe it was relevant. (RT 1655, 1658.) There were no questions that prompted disclosure; potential jurors are routinely asked whether they know anyone on the witness list, but not whether they recognize anyone among the spectators. Ms. Campbell was not on the witness list. Ms. Coleman was, but juror two did not know her. The trial court's and prosecutor's conclusion that juror two was not truthful were unfounded. (RT 1657, 1671-1673.) While juror two did

originally represent that she had hardly spoken to Ms. Campbell and then later mentioned that she had asked Ms. Campbell what she was doing in court, this is because juror two did not originally see a problem with Ms. Campbell being in court but rather that she was just curious as to what Ms. Campbell was doing there. If there was dishonesty, it was on the part of Ms. Campbell, not juror two. That Ms. Campbell had a hidden purpose does not make juror two part of a conspiracy.

Respondent also cites *People v. Green*, in which the Court of Appeal upheld the trial court's decision to remove a juror where the trial court found that the juror had contact with members of the defendant's family. (RB 56; *People v. Green* (1995) 31 Cal.App.4th 1001, 1012.) Respondent claims that the instant case is similar in that juror two had contact with the defendant's family or, at the very least, people associated with the defendant's family. (RB 56.) Respondent misstates the evidence. The trial court never asserted that it based its decision to remove juror number two on the fact that she associated with defendant's family, nor could the court have done so given that there was no evidence to support this fact. On the contrary, as noted above, any connection between juror two and co-defendant Flagg was highly attenuated and further, juror two was emphatic that she barely knew Ms. Campbell (and Ms. Campbell confirmed this was

indeed the case), and did not know Ms. Campbell's niece, Tynesha, who is the person connected with co-defendant Flagg. (RT 1655, 1660, 1671-1673.)

People v. Green is further distinguishable in that the juror in question gave false denials to the court, and from her untruthfulness the court was entitled to infer that she could not be impartial. (*Green, supra*, at p. 1012.) Respondent argues that juror two was similarly untruthful, but fails to cite any evidence to support this accusation. (RB 57.) In fact, as noted above, juror number two was entirely forthcoming with the court and there was no evidence or accusations by the court that she was untruthful. (RT 1655, 1658.) Again, to the extent juror number two did not originally mention asking Ms. Campbell why she was in court, her failure to mention it evidences the fact that she did not understand it was an issue and did not think it important or relevant.

Respondent unfairly attributes the alleged lack of candor on the part of Ms. Campbell regarding her connection to Ms. Coleman to juror number two. (RB 57.) Juror number two was entirely forthright with the court, and since she barely knew Ms. Campbell and could not control what Ms. Campbell did or did not do, any alleged lack of directness on Ms. Campbell's part cannot be attributed to juror number two.

Finally, respondent cites several additional cases to support its argument that a juror's interaction with members of a defendant's family may render the juror unable to perform his or her duties. (RB 58.) While this may be the case, respondent ignores the fact that in the instant case, juror number two did *not* interact in any way or to any extent with any member of co-defendant Flagg's family, or any family members of any of the defendant's in the instant case. Juror number two's attenuated connection with Ms. Campbell does not in any fashion equate to "interacting" with a defendant's family.

B. Dismissal of Juror Number Two Violated Appellant's Rights Under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution

In his Opening Brief, appellant argues that the dismissal of juror number two violated his constitutional rights to due process and a fair trial. (AOB 76-79.) Respondent attempts to refute appellant's argument by summarily dismissing the cases cited by appellant on the basis that decisions of intermediate federal appellate courts are not binding on state courts, even when they interpret federal law. (RB 59, citing *People v. Zapien* (1993) 4 Cal.4th 929, 989.) However, respondent ignores the fact that such decisions "are persuasive and entitled to great weight." (*People v. Bradley* (1969) 1 Cal. 3d 80, 86.)

Respondent further ignores the decision of this Court in *People v. Barnwell*, saying only that appellant's reliance on it is misplaced because the trial court need not perform the "demonstrable reality test." (RB 60; *People v. Barnwell* (2007) 41 Cal.4th 1038.) Respondent's position is curious considering that respondent earlier states that the trial court must make a reasonable inquiry to determine whether the juror in question is able to perform the duties of a juror; if no inquiry is made, the trial court must explain, on the record, as a "'demonstrable reality'" that the juror is unable to perform those duties. (RB 52, citing *People v. Millwee* (1998) 61 Cal.App.4th 282, 287, citing *People v. Holt* (1997) 15 Cal.4th 619, 659.)

In fact, this Court has clarified that, "to dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*People v. Barnwell, supra*, 41 Cal.4th at p. 1052.) Thus, the *Barnwell* decision is crystal clear that "[r]emoving a juror is, of course, a serious matter, implicating the constitutional protections defendant invokes," including his Sixth Amendment and Fourteenth Amendment rights. (*People v. Barnwell, supra*, 41 Cal.4th at p. 1052.)

Respondent contends that the trial court's findings met the demonstrable reality test. However, respondent is clearly wrong. The trial court's findings were based on speculation and unsupported conclusions. The court was concerned that juror number two had not brought to its attention her relationship with Ms. Campbell, although this is easily explained by the fact that juror number two did not recognize it to be an issue until the court brought it up, after which time she *was* forthcoming. Further, the court speculated that it did not make sense that juror number two claimed to be comfortable with deciding the guilt or innocence or punishment of a defendant who was dating the granddaughter or step granddaughter of her boyfriend. (11 RT 1705-1706.) However, as noted above, there was no evidence that Ms. Coleman was related to juror number two's boyfriend, and juror number two clearly had no connection whatsoever to Ms. Coleman.

Finally, the court made the wholly unsubstantiated leap that because of juror number two's tenuous connection to Ms. Campbell, she would be unable to perform her services as a juror, despite juror number two's assurances to the contrary. The trial court offered no observations of demeanor or behavior not apparent on the record supporting a conclusion that juror number two's reassurances could not be believed.

The recently decided case of *People v. Martinez* in instructive. In that case, the juror who ultimately became the foreperson, upon questioning during voir dire, stated that it would be difficult for her to serve on the jury because she knew the defendant. (*People v. Martinez* (2010) 47 Cal.4th 911, 940. This juror was a lead clerk in the Santa Barbara County Probation Department at Santa Maria's juvenile hall and had worked there for 20 years. She was aware of that the defendant had been at juvenile hall and that he had an extensive juvenile record, but said that she did not think it would affect her ability to be impartial. (*Id.* at pp. 939-940.) In addition, after being seated as a juror but before trial started, while working in her capacity at juvenile hall, she had a conversation with the prosecutor's investigator, who was trying to obtain the defendant's records, during which she asked if he could have her removed from serving as a juror. (*Id.* at p. 940.) Despite the juror's connections to the defendant the trial court found no cause to dismiss this juror, and this Court found affirmed that decision. (*Id.* at pp. 941-943.)

Finally, respondent dismisses out of hand appellant's citation to *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed2d 392], saying that the *Beck* decision relates to the failure of a trial court to provide a lesser included offense option and so is inapplicable to the instant case. (RB 61.)

However, appellant cites *Beck* not for its narrow holding with respect to lesser included offenses but rather for its broader ruling regarding the necessity for heightened reliability in capital cases, which was undermined in the instant case by the improper discharge of juror number two. Specifically, the *Beck* Court held that there is a significant constitutional difference between the death penalty and lesser punishments, explaining that:

> "[Death] is a different kind of punishment from any other which may be imposed in this country. . . . It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. *Beck v. Alabama, supra,* 447 U.S. at p. 638, quoting *Gardner v. Florida*, 430 U.S. 349, 357-358 (opinion of Stevens, J.).

Under the heightened reliability requirement set forth in *Beck*, the trial court's dismissal of juror number two was error.

C. The Error Was Prejudicial

Appellant argues in his Opening Brief that automatic reversal is required because of the violation of appellant's Sixth, Eighth, and Fourteenth Amendment rights as it cannot be shown to be harmless. (AOB 80.) Appellant further argues that even under the harmless error analysis of

Chapman v. California (1967) 386 U.S. 18, reversal is required since the prosecution cannot establish that the discharge of the juror did not result in prejudice to appellant. (*Ibid.*) Respondent contends the *Watson* standard applies here, but does offer any reason why this would be the case. (RB 62; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Respondent is wrong. The error in dismissing juror number two violated appellant's constitutional rights, requiring automatic reversal under *Sander v. Lamarque* (9th Cir. 2004) 357 F.3d 943, 949.

Moreover, the unjustified excusal of juror number two changed the composition of the jury. Juror number two was African-American, as is appellant. (RT 1710-1711.) The alternate that replaced this juror was not African-American. (CT 521.) Juror number two had never been the victim of a crime. (CT 51) However, the alternate had been the victim of a burglary and had a cousin that had been murdered. The alternate stated in her questionnaire that as a result of these incidents she did not believe that the justice system worked properly because no one was either charged or convicted for these crimes. (CT 531.) In addition, juror number two did not have any relatives or friends in law enforcement, while the alternate who replaced her did. (CT 57, 537.)

Because the unjustified excusal of juror number two changed the composition of the jury to the detriment of appellant, not only was he prejudiced in the guilt phase trial but the removal of juror number two made the penalty phase decision unreliable as well. Therefore, the guilty verdicts and death sentence must be reversed.

IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING WILLARD LEWIS TO TESTIFY THAT HE HEARD A CO-DEFENDANT AT THE SCENE IDENTIFY APPELLANT BY NAME

A. Introduction

Appellant argues that the trial court committed prejudicial error by allowing the prosecution to introduce the inadmissible hearsay testimony of witness Willard Lewis that he overheard co-defendant Higgins say, "Come on, Don." (AOB 81.) Appellant explains that no valid hearsay exception applied that would have justified the admission of this testimony (nor was one ever suggested or applied at trial by any party or by the trial court) and that its admission also violated appellant's federal constitutional rights. (AOB 81-94.) Respondent argues in response that the trial court properly overruled appellant's hearsay objections because the statement, "Come on, Don," could have been admissible under several exceptions to the hearsay rule, including the exception for excited utterances and the exception for statements made in

furtherance of a conspiracy, and that any federal constitutional error was waived. (RB 63.) As shown below, this statement was inadmissible under any exception to the hearsay rule. Furthermore, its admission was highly prejudicial to Appellant's case. Finally, this issue was not forfeited by defense counsel's failure to specifically object on federal constitutional grounds, and in any event, this Court should decide the issue.

B. There is No Exception Under Which the Statement in Question Constituted Admissible Hearsay; The Exceptions for Excited Utterances and Statements Made in Furtherance of a Conspiracy are Both Inapplicable.

Respondent argues that the trial court properly overruled appellant's hearsay objections because the statement, "Come on, Don," was admissible under several exceptions to the hearsay rule, including the exception for excited utterances and the exception for statements made in furtherance of a conspiracy. (RB 63.) Respondent is wrong.

First, with respect to the excited utterance exception to the hearsay rule (Evidence Code section 1240), respondent argues that the statement was an excited utterance because it was made immediately after the shooting and the speaker, Higgins, blurted it out without time for reflection, and that it was Higgins' uninhibited expression of his impressions and belief that he was speaking to "Don" and that "Don" needed to move away from the victim so they could avoid discovery. (RB 64.) Respondent is incorrect that the excited

utterance exception applies in the instant case, where the statement did not purport to describe or explain an act or condition perceived by Higgins (the fact that he thought he was speaking to "Don" is not a perception for the purposes of the statute, as explained below), nor was it made under the stress of excitement caused by Higgins' perception thereof.

The cases relied on by respondent do not support respondent's position that the excited utterance exception is applicable here. In *People v. Farmer* (1989) 47 Cal.3d 888 (disapproved on other ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6), cited by respondent, this Court explains that, "To come within the spontaneous statement exception to the hearsay rule, an utterance must first purport to describe or explain an act or condition perceived by the declarant. (Evid. Code, § 1240, subd. (a).) Secondly, the statement must be made spontaneously, while the declarant is under the stress of excitement caused by the perception." (*Id.* at p. 901.)

The two requirements of the excited utterance exception to the hearsay rule – that the declarant must have perceived what he describes or explains and that the statement be made spontaneously, while the declarant is under the stress of excitement caused by the perception – are clearly not met in the instant case. First, Higgins' statement, "Come on, Don," does not purport to describe or explain anything that Higgins perceived. If, as respondent argues,

the statement was based on Higgins' perception that he was talking to "Don," then the second requirement (that the statement is under the stress of excitement *caused by the perception*) is not met, since clearly whatever stress Higgins may or may not have been under was not caused by his perception that he was talking to someone named Don.

In cases where the excited utterance exception has been found applicable, the statement made by the declarant pertains directly to the startling incident that caused the declarant's stress. For example, in *People v. Raley* (1992) 2 Cal. 4th 870, cited by respondent, the declarant was a victim whose excited utterances described the sexual assaults perpetrated on her by the defendant immediately after the attack. (*Raley, supra*, at pp. 891-892. Similarly, in *Farmer*, the victim made the statements immediately after being shot three times in the mouth and stomach. (*Farmer, supra*, at pp. 901-902.) Finally, in the third case cited by respondent, *People v. Poggi* (1988) 45 Cal.3d 306, the victim declarant's statements recounted the details of the rape and stabbing attack upon her and gave a description of the perpetrator who had committed these acts. (*Id.* at 316, 320.) Here, the statement, "Come on, Don," unlike those utterances deemed admissible in the cases cited by respondent, does not describe a startling event perceived by the declarant, Higgins.

Second, to constitute an excited utterance, the statement must be made spontaneously, while the declarant is under the stress of excitement caused by the perception. "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. The 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." (*People v. Raley* (1992) 2 Cal.4th 870, 892-893, quoting *People v. Farmer, supra*, at pp. 903-904.) In the instant case, there was no evidence that Higgins' statement, "Come on, Don," was made under the stress of excitement caused by Higgins' perception that he was talking to a person named Don. In contrast, the statement, "Come on, Don," is not a perception at all, but rather a request or command, and thus does not qualify as an excited utterance.

With respect to the hearsay exception for statements made in furtherance of a conspiracy (Evidence Code section 1223), respondent argues that the statement in question was admissible as a statement made in furtherance of a conspiracy in that Higgins was participating in a conspiracy with appellant and Flagg to rob, sexually assault, and murder the victim and the statement was made during Higgins' participation in the conspiracy. (RB 65.)

In order for a declaration to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 63.) Evidence is sufficient to prove a conspiracy to commit a crime if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. (*People v. Rodrigue*s (1994) 8 Cal.4th 1060, 1135.) In *Rodrigues*, cited by respondent, the court found sufficient evidence of a conspiracy where there was evidence from which the jury could reasonably infer that the two male assailants agreed and coordinated with each other to rob and steal from the victims, such as the fact that they gave and took instructions from each other. (*Id.*) In the instant case, there was much weaker evidence to base the conclusion that a conspiracy existed.

C. The Statement Violated Appellants Right to Confrontation Under the Sixth Amendment And Right to Due Process Under the Fourteenth Amendment

Respondent contends that appellant's Sixth and Fourteenth Amendment rights were not violated. Respondent is wrong.

It is well established that the due process clause requires hearsay evidence to have some level of reliability. "[W]e may agree that considerations of due process, wholly apart from the Confrontation Clause,

might prevent convictions where a reliable evidentiary basis is totally lacking." (*California v. Green* (1970) 399 U.S. 149, 163, fn. 15; see also *Manson v. Braithwaite* (1977) 432 U.S. 98, 106 [due process clause forbids testimony that lacks "sufficient aspects of reliability" to be evaluated by the jury]; *United States v. Shoupe* (6th Cir. 1977) [holding that disavowed, unsworn and uncorroborated hearsay statement was insufficiently reliable to satisfy due process.].)

D. Appellant Did Not Forfeit His Claim that the Admission of the Statement Violated Appellant's Federal Constitutional Rights.

Respondent argues that appellant forfeited his claims that the statement violated his federal constitutional rights by failing to object on this basis at trial. (RB 66.) Respondent cites *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044; *People v. Bolin* (1998) 18 Cal.4th 297, 320; *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) These cases are not dispositive as applied here, as they are distinguishable from the instant case.

First, in *People v. Mitcham*, this Court found that the defendant's contention that his confrontation clause rights were violated was forfeited where his counsel did not seek total exclusion of the statement but rather requested only that it be admitted solely against his co-defendant and that the jury be so admonished. (*People v. Mitcham*, 1 Cal.4th at 1044.) Even so, the Court in *Mitcham* went on to evaluate the merits of the argument. (*Id.*) Here,

unlike in *Mitcham*, counsel *did* seek complete exclusion of the statement, "Come on, Don."

Second, the case of *People v. Saunders* is inapplicable here as it concerns the failure of trial counsel to object to a procedural defect – specifically, the trial court's error in discharging the jury before the jury had determined the truth of the alleged prior convictions. (*People v. Saunders*, 5 Cal.4th at 589-590.) Here, the error was of a different kind and magnitude – the Confrontation Clause violation was not a simple procedural defect relating to the truth of any prior convictions.

In this case defense counsel made a hearsay objection. The purpose of the hearsay rule is to "preclude a class of evidence considered to be generally less reliable than in-person testimony of events observed by a testifying witness." (*United States v. Hernandez* (10th Cir. 2003) 333 Fed.3d 1168, 1179.)

Otherwise stated, the purpose of the hearsay rule is to prohibit the use of unsworn, uncross-examined testimony as substantive evidence in a criminal case. (*United States v. Carmichael* (6th Cir. 2000) 232 F.3d 510, 521; see also *United States v. Hernandez*, *supra*, 333 Fed.3d at p.1179 [the purpose of the hearsay rule is to "preclude a class of evidence considered to be generally less reliable than in-person testimony of events observed by a

testifying witness.".]. Similarly, the purpose of the Confrontation Clause is to "ensure reliability of evidence, ... by testing in the crucible of cross-examination." (*Crawford v. Washington*, supra, 541 U.S. at p. 61.)

The Eighth Amendment and article I, section 17 of the California Constitution likewise insure the reliability of judgments in death penalty cases. (*Satterwhite v. Texas* (1988) 486 U.S.249, 262-263.)

In this case defense counsel's specific hearsay objection should be deemed adequate to have given the court and prosecutor an opportunity to "prevent error" or to "take ... steps designed to minimize the prospect of reversal." (*People v. Partida* (2005) 37 Cal.4th 428,.434; cf. *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029 [Confrontation Clause error waived with respect to the denial of mistrial motions brought on grounds other than introduction of hearsay.].) Accordingly, no useful purpose would be served were this Court to refuse to consider appellant's Sixth, Eighth and Fourteenth Amendment challenges. (*People v. Partida*, *supra*, 37 Cal.4th at p. 436.)

Defense counsel's hearsay objection was clearly directed to keeping unreliable evidence from the jury. The hearsay objection should be deemed adequate to have given the court and prosecutor an opportunity to "prevent

error" or to "take ... steps designed to minimize the prospect of reversal." (*People v. Partida*, *supra*, 37 Cal.4th at p. 434.)

Even assuming, arguendo, that defense counsel forfeited the right by failing to specifically object does not mean that this Court is obliged as a matter of law to refrain from addressing such constitutional questions on the merits. (*Orr v. Orr* (1979) 440 U.S. 268, 275.) A reviewing court may consider any claim despite the lack of an objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 820, 843, fn. 8.) No useful purpose would be served were this Court to refuse to consider appellant's Sixth and Eighth and Fourteenth Amendment challenges, or their California counterparts. (*People v. Partida*, *supra*, 37 Cal.4th at p. 436.)

E.. The Admission of the Statement Was Prejudicial

Respondent argues that assuming the admission of the statement constituted federal constitutional error, such error was harmless because the jury had sufficient additional evidence that appellant was present at the crime scene. (RB 72-73.) As noted in Appellant's Opening Brief (AOB 92-95) as well as in Section IV. B. *infra*, admission of the statement was not harmless where the bulk of the evidence (and the entirety of the direct evidence) placing appellant at the crime scene came from the inherently unbelievable, unreliable,

untrustworthy testimony of Willard Lewis and where the tainted evidence (the inadmissible statement, "Come on, Don.") was highly prejudicial

Respondent argues that even if the trail court erred in admitting the statement, the error was harmless because the statement contains indicia of reliability, and because other evidence corroborated appellant's presence at the crime scene. (RB 65-66.) To establish a claim that the statement contains significant indicia of reliability, respondent makes much of the purported fact that Higgins "blurted out" the statement, "Come on, Don," claiming that the "blurting out" creates an indicia of reliability to the statement. (RB 64, 65.)

However, it was *Willard Lewis* who testified that he heard that statement made. Lewis was an informant who testified in the hope of getting his sentence reduced. The jury questioned the truthfulness of his testimony when it asked for readback of the testimony of the public defender who had represented Lewis and who contradicted much of Lewis's testimony. (CT 786; RT 3697-3702.) Thus, his reliability is less than stellar and cannot be used to establish an indicia of reliability as to the statement he claims to have heard. Further, the substance of the statement itself, "Come on, Don," does not indicate the kind of urgency that respondent alleges, and does not itself provide evidence of "blurting out." Thus, respondent is incorrect that the statement contains any indicia of reliability. Further, the one syllable word reported by

Lewis as "Don," could readily be misheard; the statement he purportedly heard uttered could have easily been "Ron," or "Jon," or "Juan" rather than "Don."

As noted, Higgins' statement, combined with the other unreliable and inherently unbelievable testimony of Willard Lewis, is the central evidence placing appellant at the scene of the crime and casting him in the role of the shooter. As such, its admission was not harmless.

Moreover as argued in appellant's opening brief and reiterated below, the trial court compounded this error by failing to give a cautionary instruction regarding the use of this statement by the jury. Appellant devoted a significant portion of his argument in the AOB to demonstrating why the error was not harmless; in the interests of judicial economy, those arguments are not reiterated here.

Last but not least, even if this one error were not so prejudicial as to deprive appellant of a fair trial, when it is considered in cumulation with other errors, the result was to produce a trial that was fundamentally unfair. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill*, supra, 17 Cal.4th at pp. 844-845.) It was error for the court to admit the statement and this error was prejudicial.

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V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO GIVE A CAUTIONARY INSTRUCTION TO THE JURY REGARDING THE CO-DEFENDANT'S STATEMENT IDENTIFYING APPELLANT

A. Introduction

In his Opening Brief, appellant argues that the trial court committed prejudicial error by failing to give the jury, sua sponte, a cautionary instruction regarding the out-of-court, damaging statement allegedly made by appellant's co-defendant Higgins that placed both appellant and co-defendant Higgins at the scene of the crime. (AOB 95-104.) Respondent argues in response that no cautionary instruction was required because the statement was not an admission or confession. (RB 77-79.) Respondent is incorrect.

As explained in appellant's Opening Brief, courts have not distinguished between actual admissions and other damaging statements for the purposes of the cautionary instruction, and in fact the statement need not even be incriminating to qualify as an admission. (AOB 101; *People v. Carpenter* (1997) 15 Cal.4th 312, 392-393 (superseded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106); *People v. Beagle* (1972) 6 Cal.3d 441, 455; *People v. James* (1987)

196 Cal.App.3d 272, 286-287; *People v. Lopez* (1975) 47 Cal.App.3d 8, 12; *People v. Aho* (1984) 152 Cal.App.3d 658, 663; *People v. Perkins* (1982) 129 Cal.App.3d 15, 23.)

B. The Trial Court Erred by Failing to Give a Cautionary Instruction

In *People v. Carpenter*, *supra*, this Court explained that it had not distinguished between actual admissions and pre-offense statements of intent in requiring trial courts to give cautionary instructions sua sponte. (*People v. Carpenter, supra,* 15 Cal.4th at pp. 392-393.) This Court stated, "The rationale behind the cautionary instruction suggests it applies broadly. The purpose of the cautionary instruction....would apply to any oral statement of the defendant, whether made before, during, or after the crime." (*Id.*) In *People v. Aho*, the appellate court explained that "'Statements to be admissions need not be incriminating. Further, the instructions require the jury to determine for itself if an admission was in fact made.'" (*People v. Aho, supra*, 152 Cal.App.3d at p. 663, quoting *People v. Perkins, supra,* 129 Cal.App.3d at p. 23.)

Even so, the statement in question inculpated both appellant and the declarant in that it placed both of them at the scene of the crime. In fact, respondent argues in Section IV of Respondent's Brief that the statement, "Come on, Don," inculpated appellant and his co-defendant, Higgins, in the

crime in that the statement was a plea to appellant that he needed to "move away from the shooting victim and get going so that they could avoid discovery." (RB 64.) Respondent cannot have it both ways and now argue, for a different purpose, that the statement did not inculpate either appellant or the declarant.

Further, in order to justify respondent's position that no cautionary instruction was necessary, respondent relies on its position that the statement was not a party admission but rather was admissible hearsay, thereby establishing its reliability and negating the need for a cautionary instruction. (RB 78.) As explained in detail in Section IV, *supra*, the statement was inadmissible hearsay and should not have been admitted at all. Additionally, in admitting the statement, neither the prosecutor nor the trial court specified any exception to the hearsay rules justifying the admission of the statement, and no argument was made at trial that the statement was made under circumstances that heightened its reliability.

Respondent further argues that the error was not of constitutional dimension. Here, too, respondent is wrong. As appellant argues in his Opening Brief, the failure to give a cautionary instruction that limits a verbal admission so that it does not violate the Sixth Amendment is an error that violates the federal constitution. (AOB 102; *United States v. Marsh*

(1998) 144 F.3d 1229, 1240-1241. The cases relied on by respondent are not dispositive and are factually dissimilar. In *Estelle v. McGuire*, the defendant argued that a state law jury instruction was incorrectly given, and the United States Supreme Court explained that the fact that the instruction was allegedly incorrect under state law did not provide a basis for habeas relief because the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Here, in contrast, the issue does not concern the fine tuning of a state evidentiary rule or the tinkering with the language of a jury instruction, but rather concerns the trial court's complete failure to give a required instruction, the absence of which deprived appellant of due process of law.

C. The Error was Prejudicial

Lastly, respondent argues that the trial court's error in failing to give the cautionary instruction was harmless. For the same reasons stated in Appellant's Opening Brief (AOB 92-94) and in Argument IV, *supra*, the error was not harmless beyond a reasonable doubt.

The many cases in which this Court has found that the failure of the trial court to issue a cautionary instruction was not prejudicial, there has been a lack of a reasonable probability that if the instruction had been

given, the jury would have found that the statements either were not made or were not reported accurately. (*People v. Beagle, supra,* 6 Cal.3d at p. 456; *People v. Bemis* (1949) 33 Cal.2d 395, 400.)

In *Beagle*, two witnesses overheard the statement in question. (*Beagle, supra*, at p. 456.) Here, in contrast, had the trial court issued the cautionary instruction, there is a reasonable probability that the jury would have found that the statement was either never made or not reported accurately, as the only witness that reported the statement was the unbelievable and untrustworthy Willard Lewis.

Without the admission of the statement from Willard Lewis along with Lewis' unreliable identification, there is no evidence that places appellant at the scene of Dannie Kim's murder. All of the other evidence, including the evidence relating to appellant's location at the casino and possession of the murder weapon days later, do not place appellant at the scene of Kim's murder that night.

In short, had the statement been excluded or a cautionary instruction issued, there would have been no evidence placing appellant at the scene of the Kim murder. Hence, the error was prejudicial.

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VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY THAT A ROBBERY IS STILL IN PROGRESS FOR THE PURPOSES OF THE FELONY MURDER RULE AS LONG AS THE PURSUERS ARE ATTEMPTING TO CAPTURE THE ROBBER OR REGAIN THE STOLEN PROPERTY AND HAVE CONTINUED CONTROL OVER THE VICTIM

A. Introduction

Appellant argues in his Opening Brief that the trial court prejudicially erred in instructing the jury that a robbery is still in progress so long as the immediate pursuers are attempting to capture the perpetrator or to regain the stolen property and have continued control over the victim, thus violating appellant's rights under the Sixth, Eighth and Fourteenth Amendments. (AOB 104-111.) Respondent contends that the instruction was not in error. (RB 84-93.) Respondent is wrong.

B. The Trial Court Erred in Instructing the Jury that a Robbery is Complete Only When the Perpetrator Has Eluded His Pursuers

In his Opening Brief, appellant argues that the trial court's instruction to the jury that the robber must have eluded any pursuers before a robbery can be completed improperly required the jury to use a subjective standard as to the defendant's state of mind. (AOB 106-108.) Further, the

unconstitutionally vague instruction violated appellant's rights to due process of law. (AOB 108-109.) Appellant explains that because the language of the instruction regarding pursuers was inapplicable to the facts in the instant case (which respondent concedes), the language not only was confusing to the jury but also required the jury to use a subjective standard dependant on the actions of third parties. (AOB 106-109.)

Respondent speculates in response that a reasonable juror would have understood that the robbery was ongoing until the perpetrators reached a place of temporary safety, whether or not they were being pursued. (RB 88.) Contrary to respondent's position, it is wholly unreasonable to expect that the jury would categorically choose to ignore the plain language of the instruction that the robbery is still in progress "so long as immediate pursuers are attempting to capture the perpetrator or to regain the stolen property," and instead focus solely on the brief language in the instruction that a robbery is complete when the perpetrator, "has reached a place of temporary safety...". (RB 85, 88.)

Counter to respondent's argument that CALJIC 1.01 remedied the error by leading the jurors to conclude that the perpetrator was liable if he did not reach a place of temporary safety regardless of any pursuit (RB 88), in fact, CALJIC 1.01 made clear to the jury that it was the jury's duty *not* to

single out any particular sentence or any individual point or instruction (e.g. the issue of temporary safety) and ignore the others (e.g. the issue of pursuers). (3 CT 688.) Thus, under the law as instructed by the trial court, the jury would have been remiss if it had acted as respondent contends it should have in ignoring the express language of the instruction.

Regarding the flaw in the instruction requiring the jury to use a subjective standard in determining the reasonableness of a defendant's expectations regarding a pursuit, respondent contends that the issue is irrelevant because there was no pursuit in this case and, in any case, the instruction did not mandate a subjective standard. (RB 89.) Respondent is incorrect in this respect, too.

Again, respondent completely ignores the express language of the instruction regarding pursuers, wrongly presumes that the jury ignored it, too, and contends that appellant failed to point to where in the instruction a subjective standard is required. Conveniently, respondent's attempt to ignore the improper language of the instruction allows respondent to deny the error, but nonetheless the error exists, as appellant indeed points out in his Opening Brief. (AOB 106-107.)

Specifically, the instruction regarding pursuers hinges a defendant's culpability on the actions of third party pursuers, whom the defendant may

be unaware of and incapable of ascertaining. (AOB 106.) Further, the third paragraph of the instruction, as noted in Appellant's Opening Brief, relies on the mental state of the defendant to determine when the robbery terminates because it requires the defendant to determine when he or she is no longer being pursued, a standard that is unconstitutionally vague. (AOB 107-109.)

The cases cited by respondent holding that the critical concept in determining when a robbery terminates is not whether there were any pursuers, but rather is an objective determination of whether the perpetrator has reached a place of temporary safety, do not undermine appellant's argument. (RB 88-89; *People v. Salas* (1972) 7 Cal.3d 812, 823-824 [stating that jury instructions about immediate pursuit may have been erroneous but finding no prejudice.]; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560 [holding that whether or not a perpetrator has reached a place of temporary safety is an objective standard and does not consider whether the defendant believed that he or she had reached a safe location.].

What these cases clarify, and what appellant argues, is that the correct determination of whether a robbery has ended is an objective test that does not focus on whether or not a defendant is being pursued. Particularly, in the instant case, where there were no pursuers, the language

about pursuers in the instruction is irrelevant, confusing, vague and misleading to the jury, and violative of the constitutional rights of appellant in that it created an impermissibly subjective standard.

C. The Errors Were Prejudicial

Appellant argues in his Opening Brief that instructional errors violating constitutional rights fall under the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 118, and that under this test, the error prejudiced appellant because there was no evidence that the items were not taken from the victim after the killing, or on a contrary theory, that the items were *not* taken from the victim long before the killing and after the defendants had reached a place of safety. Thus, but for the erroneous instruction, the jury could have found that the defendants had reached a place of temporary safety and that the robbery had ended before the killing. (AOB 110.)

Respondent tacitly agrees that the *Chapman* standard applies, but misses the point of appellant's argument by stating simply that it was up to the jury to determine whether or not the defendants had reached a place of temporary safety. (RB 92.) While it is true that the determination of whether or not the robbery was completed was for the jury to decide, the erroneous instruction rendered the jury incapable of correctly making this

determination, and thereby prejudiced appellant's rights to a fair trial, due process of law, and to a death sentence with the heightened reliability required by the Eighth Amendment.

VII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INSISTING ON FURTHER DELIBERATIONS AND REFUSING TO DECLARE A MISTRIAL AFTER THE JURY DECLARED IT WAS DEADLOCKED

A. Under Penal Code Section 1140, The Trial Court Was Required to Declare a Mistrial when the Jury Declared it was Hopelessly Deadlocked

Appellant argues in his Opening Brief that the trial court erred in insisting on further deliberations rather than declaring a mistrial when the jury announced it was hopelessly deadlocked. (AOB 113-119.) Appellant explains that the trial court must exercise its power without either express or implied coercion of the jury, and in failing to inquire as to the numerical breakdown of the jury, the trial court could not insure that its actions were not coercive. (*Ibid.*) In response, respondent claims that the trial court properly exercised its discretion in refusing to declare a mistrial and that the court did not act coercively. (RB 93-99.) Appellant disagrees.

Respondent concedes that the trial court must exercise its discretion without either express or implied coercion of the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of

compromise and expediency, and must act carefully to avoid its actions being perceived as coercive. (AOB 116; RB 96-97.) Respondent erroneously contends, however, that under the circumstances of the instant case, the trial court did not either expressly or impliedly coerce the jury. Again, respondent is wrong.

In reaching its conclusion, respondent cites the case of *People v. Beardslee* (1991) 53 Cal.3d 68, 97, for the proposition that the trial court was required to at least consider how it could best aid the jury. (RB 97; *Beardslee*, *supra*, at p. 97.) Presumably, respondent cites *Beardslee* to argue that the trial court was merely attending to its duty to aid the jury when it insisted on further deliberations. Respondent is wrong in two respects. First, the *Beardslee* case is not relevant here because the issues in *Beardslee* pertained not to a deadlocked jury but rather concerned the question of the manner and extent to which the trial court had a duty to respond to a jury question.

Second, and most important, the trial court here went beyond helpfulness to the point of coercion when it insisted that the jury continue deliberations after the jury clearly indicated it was hopelessly deadlocked. The foreperson, on behalf of the jury as a whole, and then each individual juror, informed the trial court that neither further deliberations, rereading of

instructions or testimony, clarification of instructions, nor viewing of exhibits could not help the jury reach a verdict. (RT 5075-5077.) While the trial court's investigation into the jury's situation was certainly a helpful attempt to figure out if and how the court could assist the jury, the court's insistence thereafter that the jury continue deliberations despite its clear indication that doing so would not help it reach a verdict, was not helpful. Rather, the trial court's directions went beyond helpfulness to the point of implied coercion. If any action could have helped the trial court determine how best to assist the jury, it would have been to poll the jury as to the jury's numerical split, which the trial court refused to do.

Ironically, while respondent insists that the trial court had a duty to determine how best to assist the jury, respondent simultaneously contends that the trial court was not required to poll the jury as to its numerical split. (RB 96-97.) As appellant explains in his Opening Brief, by refusing to inquire of the jury's numerical split, as requested by appellant's trial counsel, the trial court could not have known whether or not requiring the jury to continue deliberations was coercive. (AOB 117-119.)

Respondent acknowledges that inquiry into the numerical split of the jury is permissible under *People v. Breaux* (1991) 1 Cal.4th 281, 319, but contends that it was not required in this case. (RB 97.) Aside from being

inconsistent with respondent's position that the trial court had a duty to do all it could to assist the jury, respondent's erroneous conclusion also ignores the particularized facts of the instant case as well as this Court's clear statement that "a neutral inquiry into numerical division, properly used, is an important tool in ascertaining the probability of agreement." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 776, fn. 14.)

When the facts are viewed as a whole, and the trial court's failure to inquire as to the numerical split of the jury is seen in context, it is apparent that the trial court's decision to deny the mistrial motion was clear error. First, at the guilt phase of the trial, the trial court inquired as to the numerical breakdown of the jury when it hung on two of the special circumstances. (RT 3745-3754.) Second, as noted above, the trial court polled every juror and each one stated that the jury could not be helped to reach a verdict. Third, the court was aware that the jury had asked the court the consequence of its not reaching a sentencing verdict. Finally, the court was aware that the jury had taken five ballots regarding appellant's sentence, and in the last two there had been no change in numerical voting. (RT 5075.) Knowing all this, the trial court should have known that without polling the jury as to its numerical split, it could not have known whether requiring further deliberations was coercive.

Further, the additional cases relied on by respondent to support its position that the trial court did not err in refusing to declare a mistrial are inapposite. Respondent relies on *People v. Bell* (2007) 40 Cal.4th 582 to argue that denial of mistrial was appropriate under the circumstances. (RB 96-97.) However, the *Bell* case is distinguishable in that in *Bell*, the court did not inquire of the jury as to whether further deliberations would help it reach a verdict. In contrast, here, the trial court was aware that each and every juror had expressed certainty that further deliberations would not lead to a jury verdict; the jury informed the trial court that rereading instructions or testimony would not help it reach a verdict, nor would clarifying the instructions or viewing the exhibits. (RT 5075-5077.)

Similarly, the circumstances in *People v. Sheldon* (1989) 48 Cal.3d 935, cited by respondent, are distinguishable from the instant case. In *Sheldon*, the jury announced it was deadlocked after only one ballot. Additionally, as in the instant case, the trial court inquired if the jury was hopelessly deadlocked and whether rereading of the instructions or testimony might help. Unlike appellant's case, however, several jurors expressed the hope that further instructions from the court might assist in bringing about a verdict. One juror believed that further deliberations would be futile, but another juror disagreed and expressly requested a rereading of

the instructions. (*People v. Sheldon*, *supra*, at p. 958.) By contrast, in the instant case multiple ballots had failed to yield a verdict. Every single juror indicated that the jury was hopelessly deadlocked and that rereading the testimony and/or instructions would not help. (RT 5075-5077.) Despite this, the trial court ordered the jury to return to deliberations which, under these circumstances, coerced the jury into reaching a verdict.

B. The Trial Court's Refusal to Declare a Mistrial Violated Appellant's Rights Under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution

Appellant maintains that his federal constitutional rights were violated by the trial court's insistence that the jury continue deliberations, which implicitly (but clearly) communicated to the jury the court's desire for a unanimous verdict. (AOB 120.) Appellant cites the case of *Quong Duck v. United States* (9th Cir. 1923) 293 F. 563, to support its position that the trial court's communication to the jury of its desire for a unanimous verdict may have caused the jurors to feel disapprobation if they were to cause a mistrial. (AOB 120.) In *Quong Duck*, the Ninth Circuit Court of Appeals reversed the defendant's conviction based on its finding that the trial judge's insistence that the jury continue deliberations "impressed the jurors with the belief that the court meant that it was their duty to bring in a verdict against the defendant." (*Id.* at p. 564.)

Respondent claims that *Quong Duck v. United States* (9th Cir. 1923) 293 F. 563, 564, is distinguishable in that the trial court in *Quong Duck* explicitly told the jury it should render a verdict. (RB 99.) Respondent ignores the myriad ways in which the trial judge in the instant case impliedly communicated to the jury that it should render a verdict. For example, the trial court insisted on further deliberations despite the fact that the jury had taken five ballots but still had failed to reach agreement; the jury had expressly told the court that they had no hope of reaching agreement even with rereading of the instructions or testimony, or other assistance from the court. Further, the trial court acted coercively when it presumptively attributed the jury's failure to reach a verdict to fatigue. (RT 5079-5080.) Yet no jury member indicated that fatigue was the reason behind the deadlock.

Appellant further argues that the trial court erred in failing to advise the jury not to surrender conscientiously held beliefs simply to secure a verdict. (AOB 120.) Respondent argues in response that the trial court was not required to remind the jurors of their duty not to surrender conscientiously held beliefs simply to secure a verdict because, under *United States v. Mason* (9th Cir. 1981) 658 F.2nd 1263, such an admonition is only required when the court issues an "*Allen* charge," (*Allen v. U.S.*

(1896) 164 U.S. 492) which the court did not do in the instant case. (RB 98.)

Respondent misinterprets *Mason*. In that case, although the Circuit Court was analyzing the validity of an "*Allen*" charge that reminded the jury of the importance of securing a verdict, the court's statement that "it is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party," was clearly not limited to cases in which an *Allen* charge was given to the jury. (*Mason*, *supra*, at p. 1268.) Furthermore, respondent's distinction that this rule applied only where *Allen* charges are issued is a distinction without a difference when applied to the current case, where the court's insistence that the jury continue deliberations despite being hopelessly deadlocked had the same intent and effect as a characteristic *Allen* charge. The trial court erred in not declaring a mistrial; appellant's death verdict must be reversed.

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VIII.

THE TRIAL COURT ERRED BY REFUSING TO ANSWER THE JURY'S QUESTION AS TO WHAT WOULD HAPPEN IF THEY COULD NOT REACH A VERDICT

A. Appellant Did Not Waive His Claim that the Trial Court Erred in Refusing to Answer the Jury's Question Because The Trial Court Had a Sua Sponte Duty to Answer Appropriately

Appellant argues in his Opening Brief that the trial court had a mandatory duty to clear up the jury's expressed confusion regarding what would happen if the jury deadlocked as to the penalty, as it had done when the jury asked a similar question during the guilt phase deliberations. (AOB 124-127.)

Respondent claims in response that appellant waived this claim because he did not object to the court's proposed admonition to the jury to go home and resume deliberations in the morning. (RB 100.) Respondent is wrong.

First, the court's admonition to the jury to go home and resume deliberations in the morning was not issued in response to the jury's question as to what would happen if the jury deadlocked as to the penalty. Rather the directive was given later, in response to the jury's indication to the court that it was hopelessly deadlocked. (RT 5070, 5071-5073.) Whether or not appellant objected to the trial court's instruction to the jury

to resume deliberations the next morning is irrelevant to the instant issue, concerning the trial court's failure to answer the jury's question regarding the consequences of not reaching a penalty verdict.

Most important, the trial court had a sua sponte duty to adequately answer the jury's question whether or not appellant's counsel objected to the trial court's instruction in response to the jury's question, particularly since the trial court gave an answer to a similar question during the guilt phase of the trial. (AOB 123-124; CT 789; RT 3723.)

B. The Trial Court's Failure to Answer the Jury's Question Was Error

Finally, respondent contends that even had appellant not waived the issue, there is no merit to the contention that the trial court improperly addressed the jury's question. (RB 100-102.) Respondent is wrong. The trial court's refusal to answer the jury's question about the result of their deadlocking as to penalty was clear error as it left the jury confused as to the applicable law and may well have led the jury to believe the entire guilt phase and penalty phase would need to be retried, thus causing the jury to vote for death so as to avoid that result.

The cases cited by respondent to support its position are distinguishable. Respondent cites *People v. Cooper* (1991) 53 Cal.3d 771 (mistakenly cited as *People v. Rodrugues*) and *People v. Gurule* (2002) 28

Cal.4th 557 to argue that the court acted rightly in refusing to answer the jury's question. In his Opening Brief, Appellant acknowledges this Court's holdings that an instruction detailing the consequences of a hung jury may cause confusion, but differentiates the instant case from those cases. (AOB 126.) Specifically, in the instant case, the jury's question was not a broad one, as in *Cooper* and *Gurule*, but rather specifically asked if a deadlock on penalty would result in the guilt phase and penalty phase having to be retried.

Further, the jury had asked a similar question regarding the effects of a deadlock during guilty phase deliberations, and at that time the trial court answered the question. (CT 789, 790; RT 3723.) The refusal of the trial court to answer the question as to the penalty phase where it had answered a similar question during the guilt phase of the trial may well have caused additional confusion and led the jury to believe that the entire guilt and penalty phases would need to be retried.

Finally, even if the trial court refused to answer all of the proffered contingencies in the jury's question, at least the court could have prevented the possible confusion of the jurors by answering their question as to whether appellant would need to be retried by answering only as to the guilt phase. A simple, plain statement as to the guilt phase would not carry the

potential for confusion warned against in *Gurule*, and would have cleared up the jurors' mistaken assumptions of law. As detailed in Appellant's Opening Brief, the trial court has a mandatory duty to clear up the jury's expressed confusion as to the meaning or application of the law. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-613; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.)

C. The Error Was Prejudicial

Respondent argues that a violation of Section 1338 does not warrant reversal unless the court finds beyond a reasonable doubt that the error contributed to the verdict. (RB 102.) Respondent is wrong because the error in question was of federal constitutional magnitude, violating appellant's Sixth and Fourteenth Amendment rights and calling into question the reliability of the death sentence under the Eighth Amendment. Because of the trial court's failure to answer at least the question about retrying the guilt phase, the jury's ultimate verdict may have been based on considerations other than the individualized sentencing decision required by the Constitution in a death case. In such a case, the "reasonably possibility" harmless error standard applies. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Under either standard, the error was prejudicial given that the trial court answered the jury's similar question during guilt phase

deliberations but refused to answer it during penalty deliberations, likely causing some jurors to believe that both the guilt and penalty phases would have to be retried, which in turn may have caused these jurors to vote for death over life.

IX.

THE TRIAL COURT PREJUDICIALLY ERRED IN RESTRICTING DEATH QUALIFICATION VOIR DIRE OF THE JURY

A. The Trial Court Improperly Restricted Voir Dire in Violation of Appellant's Sixth, Eighth, and Fourteenth Amendment Rights.

Appellant argues in his Opening Brief that the trial court erred in restricting the death qualification voir dire of the jury by prohibiting appellant from asking whether, based on the facts of the case, the prospective jurors would automatically vote for death. (AOB 132-140.) The error violated appellant's federal and state constitutional rights to an impartial penalty jury and to a reliable penalty determination. (AOB 133-134.)

Respondent contends that the trial did not confine appellant to questioning prospective jurors as to what was charged in the information but rather only prohibited appellant from asking prospective jurors to prejudge which factors they would find aggravating or mitigating. (RB 105-107.) Respondent is wrong.

Respondent correctly sets forth the law established by this Court that death-qualification voir dire must not be so abstract that it fails to identify jurors whose death penalty views would prevent them from properly performing their duties, but must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (RB 104-105, citing *People v. Coffman* (2004) 34 Cal.4th 1, 47, quoting *People v. Cash* (2002) 28 Cal.4th 703, 721-722.) However, respondent mistakenly contends that the trial court did not err on the side of abstraction but rather correctly restricted appellant from asking the prospective jurors to prejudge.

In fact, appellant's trial counsel agreed with the court that it would be improper to ask the jurors to prejudge what their potential decision would be in a death penalty case. (RT 724-725.) Appellant's trial counsel stated that, "The only thing I think you can do is go into some facts of the case, based on these facts, would you automatically vote death, and never consider a life without possibility of parole." The trial court promptly responded, "I think that you're in treacherous waters, Mr. Leonard." The court further stated, "They know what the general allegations are. If you want to say you've heard the general allegations, you know, with those general allegations, in mind, you know, are you in a position where you're

automatically going to go one way or the other." (RT 724-725.) Based on these statements from the trial court, it is clear, as it was to appellant's trial counsel, that the trial court went beyond disallowing questioning that required the juror to prejudge the penalty based on a summary of likely evidence in aggravation and mitigation (which appellant's counsel never sought to do), and instead erred on the side of abstraction, permitting only questioning limited to the general allegations.

The jury did not know anything about the case except for the allegations that were read to them by the trial court. The trial court never went into any of the details of the case. While appellant's counsel did bring out a few facts of the case, the trial court's prohibition did not allow counsel from inquiring as to how other factors in aggravation might have affected their ability to be fair and impartial. Trial counsel informed the court that he desired to voir dire regarding some facts of the case. (RT 725.) These facts would most likely have included appellant's allegedly stalking and targeting both victims at the casino, that the attempted murder of Dassopoulos involved similar facts as that of the Kim murder, as well as appellant's possession of a weapon and fights in jail. However, as a result of the trial court's ruling trial counsel was prohibited from asking the jurors if these factors would cause them to automatically vote for death and never

consider a verdict of life without the possibility of parole. It was obvious that trial counsel felt impeded from asking the jurors about any additional facts since trial counsel's subsequent voir dire omitted any mention of these facts.

As appellant points out in his Opening Brief, this Court has repeatedly permitted much more expansive death-qualification voir dire than that proposed here and has overturned cases where such questioning was prohibited in numerous situations not unlike the instant case. (AOB 134-140, citing *People v. Noguera* (1992) 4 Cal.4th 599, 645-646 [finding proper the trial court's decision to allow the prosecutor to ask prospective jurors whether they would automatically vote for life imprisonment if the defendant was only 18 or 19 at the time of the murder.]; *People v. Livaditis* (1992) 2 Cal.4th 759, 772 [upholding dismissal for cause of juror who could not vote for the death penalty because of the lack of a prior murder.]; *People v. Rich* (1988) 45 Cal.3d 1036, 1104-1005 [sanctioning a stipulated statement of specific facts of the crime, including the number of victims and the age, sex and manner of death of one, would cause jurors to vote automatically for death.]; and *People v. Cash*, *supr*a, 28 Cal.4th 703 [reversing the death verdict where the trial court prohibited defense counsel from questioning the jurors about prior murders as aggravating evidence.].)

In the instant case, like those cited, it was critical that appellant be able to determine whether or not the circumstances of the crimes he was charged with and the alleged factors in aggravation would induce a juror to vote automatically in favor of death, regardless of the law or of the other mitigating evidence in the case. (AOB 133.)

Respondent mischaracterizes certain facts from the voir dire in an apparent effort to claim that the trial court merely restricted appellant's counsel from seeking to compel a prospective juror to commit to vote in a certain way and did not prohibit questioning on aggravating circumstances. First, respondent claims that appellant's trial counsel asked juror 6265 whether or not, based on what he knew about the case, he would find appellant guilty or not guilty. (RB 103, 107.) This is inaccurate. Appellant's trial counsel asked the juror whether, assuming the jury found appellant guilty of the charged crimes, he would automatically vote for death. The juror said that there was a good possibility he or she would automatically vote for death. In follow up to that answer, appellant's trial counsel asked whether in some cases the juror would say that the defendant deserves only death, and the juror said "That is correct." Appellant's trial counsel then asked whether given what little the juror knew about the case, "what would you say?" The juror answered, "Not Guilty." Given that

appellant's trial counsel had asked the juror to assume, hypothetically, that the jury had already found appellant guilty, and given also the penalty-phase oriented context of the questioning, it is unequivocal that trial counsel was asking whether or not the juror would automatically vote for death, not whether or not he thought appellant was guilty of the charged crimes. (RT 722-724.)

Second, respondent claims that appellant, in support of his contentions that the trial court improperly restricted his death-qualification voir dire, points only to his trial counsel's voir dire of prospective juror 6265, thus implying that appellant's voir dire was not restricted as to any of the other prospective jurors. This is incorrect. Appellant points to the trial court's restricting his voir dire of prospective juror 6265 because this was the first juror he questioned. (RT 720-721.) The trial court ruling that occurred during the questioning of juror 6265 improperly restricted appellant's questioning of the subsequent jurors. Trial counsel clearly felt impeded, given that after the trial court's ruling trial counsel did not bring up any of the prejudicial facts that a reasonable trial counsel would want to raise during voir dire.

Finally, respondent claims that *People v. Cash*, *supra*, 28 Cal.4th 703, is not on point, but that *People v. Jenkins* (2000) 22 Cal.4th 900, is

more closely analogous to the instant case. Again, respondent is mistaken. As noted above, in *People v. Cash*, this Court explained that, "death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." (*Cash*, *supra*, at 721-722.) In *Cash*, this Court cites *People v. Jenkins* as an example of the latter case, explaining that in *Jenkins*, it was not error for the trial court to "refuse to allow counsel to ask [a] juror given 'detailed account of the facts' in the case if she 'would impose' [the] death penalty. (*Cash*, *supra*, at p. 722, citing *People v. Jenkins*, *supra*, at pp. 990-991.) Here, unlike in *Jenkins*, appellant never suggested that he would offer any juror detailed accounts of the facts and then ask the juror whether or not, given those facts, he or she would impose the death penalty. Rather, appellant only proposed to inquire as to whether the prospective jurors, based on certain facts in the case, would *automatically* vote for the death penalty and would not consider life without the possibility of parole.

In contrast to *Jenkins*, *Cash is* similar to the instant case. In *Cash*, this Court found that the trial court erred in preventing all death-qualification voir dire beyond that set forth in the information. (*Cash*, *supra*, 28 Cal.4th 703, 719.) Here, as in *Cash*, counsel sought to inquire of the jury whether certain facts relevant to the instant case might compel a juror to vote automatically for death, the trial court ruled that counsel could not go beyond the bare allegations read to the jury. (RT 722-725.) In *Cash*, this Court was clear that restricting the death-qualification voir dire in such a manner was error, and reversed the death judgment, stating that in deciding where to strike the balance in a particular case, trial courts *may not* strike the balance by precluding mention of any general fact or circumstance not expressly pleaded in the information. (*Cash*, *supra*, at p. 722.)

B. The Error Was Prejudicial

Respondent argues that any error in the trial court's prohibition on trial counsel's inquiry into a juror's ability to fairly determine penalty was waived because appellant had peremptory challenges left when the jury was sworn. (RB 107.) Respondent is wrong.

As appellant points out in his Opening Brief, because of the trial court's error, it is impossible to know whether any of the individuals seated

as jurors held a disqualifying view of the death penalty. (AOB 141.) Thus, appellant could not have known at the time he was using his peremptory challenges whether any of the prospective jurors harbored a biased view of the death penalty because the trial court disallowed him from so inquiring. To now blame appellant for his inability to uncover and act accordingly regarding jurors' potential bias that he was precluded from uncovering due to the trial court's restrictive ruling, is unfair.

As explained in *People v. Cash*, a defendant cannot identify a particular biased juror where he is denied an adequate voir dire: "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 cannot be dismissed as harmless." (*People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

Here, too, it is equally impossible for this Court to determine from the record whether any of the individuals seated as jurors held an impermissible view of the death penalty. As a result, the error cannot be found harmless. Appellant's sentence of death must be reversed.

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THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN HIS OPENING STATEMENTS BY ARGUING THAT THE JURY ACTS AS THE CONSCIENCE OF THE COMMUNITY

A. The Prosecutor's Comment Was Improper and Violated Appellant's Rights Under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution

In his Opening Brief, appellant argues that the prosecutor committed misconduct during his opening statement by making inflammatory comments to the jury that it should act collectively as the conscience of the community in reaching its verdict. (AOB 142-145.) Respondent contends that the prosecutor's comments did not constitute misconduct. (RB 109-114.)

According to respondent, in order for the prosecutor's comments to constitute misconduct under California law, the prosecutor must have used deceptive or reprehensible methods to attempt to persuade the jury, and that in this case there is no misconduct because the prosecutor did not invite the jurors to abrogate their personal responsibility to determine the appropriate punishment. (RB 109.) However, as appellant notes in his Opening Brief, it is not necessary that the methods used by the prosecutor must be found to have been "deceptive or reprehensible" in order to find prosecutorial

misconduct; in fact, a determination of bad faith by the prosecutor is *not* required to find misconduct. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Hill* (1998) 17 Cal.4th 800, 822–823 & fn. 1.)

Respondent cites *People v. Zambrano* (2007) 41 Cal.4th 1082, to demonstrate an instance where this Court has found that a prosecutor's inappropriate comments did not rise to the level of misconduct. (RB 109-110.) However, *Zambrano* is distinguishable in several respects. First, this Court in *Zambrano* held that the defendant waived his prosecutorial misconduct claim because he failed to object to the prosecutor's statements at trial. Moreover, this Court found that the prosecutor's reference to the "collective conscience" did not invite the jury to abrogate its responsibility in deciding the penalty. (*Id.* at 1177-1178.) In the instant case, however, the prosecutor first implied that the aggravating factors would outweigh the mitigating factors so that death would be appropriate. The prosecutor then followed this up by telling the jurors that in making such a decision (i.e., imposing the death penalty) they would be acting as the conscience of the community. (RT 3810.) By doing so the prosecutor was asking the jury to abrogate its responsibility in deciding the penalty.

In *Zambrano*, this Court did not state that references to the conscience of the community are per se acceptable, but rather that it

depends on the surrounding factors. In *Zambrano*, the court found that the prosecutor's remarks, made during the closing statement, were not inflammatory. (*Id.* at 1177-1178.)

However, in the instant case, where the prosecutor stated that the jurors would find death the appropriate penalty and they should do so as the conscience of the community, such remarks were indeed inflammatory. The prosecutor's statements conveyed to the jury the prosecutor's belief that the conscience of the community would demand that appellant be sentenced to death, and he, in effect, instructed the jury to vote in that manner. By doing so, the prosecutor obliquely (but explicitly) urged the jury to send a message to the larger community by sentencing appellant to death.

Moreover, in telling the jury that the community would want appellant sentenced to death, the prosecutor thereby relieved the jurors from their duty (as stated in the jury instructions) to judge the case according to their *individual* consciences rather than based on how they believe their friends, colleagues or neighbors might vote. Thus, the prosecutor's appeal to the jury to act collectively as the conscience of the community was a blatant directive by the prosecutor to inflame the jury's emotions against appellant.

Further, the fact that the statement was made during the prosecutor's opening statement, rather than closing argument, at a time when the prosecution was not supposed to be arguing but rather setting forth the evidence, heightened the inflammatory nature of the statements: The prosecutor told the jurors, even before they had begun to hear the penalty evidence, that the evidence would support a death verdict, that they were standing in for the community, that they must make their decision collectively, acting as the conscience of the community. The opening statement is a time when the jury is expecting a simple summary of the upcoming evidence, not an argument as to how it should be interpreted and decided. The prosecutor's statement had an additional aura of authority and appeared as a directive as to how the jury should vote. (*See United States v. Young* (1985) 470 U.S. 1, 18-19 [prosecutor's statements "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."].)

Respondent also argues that the prosecutor's statements were not deliberately injected to incite the jury against appellant. Respondent is wrong, as noted above. The remarks were indeed inflammatory, particularly because they were made during opening statements in a capital penalty trial, and partly because they relieved the jurors of their duty to judge the case

according to their *individual* consciences. There is a critical distinction between the trial judge instructing the jury that they are acting as the conscience of the community and the prosecutor doing so. The trial judge is acting in a neutral capacity, and his statements could suggest equally that the community conscience might *not* demand death for appellant, but rather desire a life sentence.. However, coming from the prosecutor, who is an *advocate*, it is clear that he is telling the jury that the community demands that the defendant be sentenced to death. Thus, courts have noted that a prosecutor may not urge jurors to convict a criminal defendant in order to protect community values. (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1149 [reversal based on improper prosecutorial comments that were clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact.]; *see also United States v. Johnson* (8th Cir. 1992) 968 F.2d 768, 771 [finding that prosecutor's comments appealed to the jurors to be the conscience of the community in an improper and inflammatory manner and depriving appellant of his right to a fair trial.].)

Improper suggestions by a prosecutor are apt to carry much weight against the accused. (*Berger v. United States* (1935) 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629.) The prosecutor was aware of the specific role of opening statements to summarize the upcoming evidence as opposed to the

arguments allowed during closing arguments. In the cases cited by respondent finding no error, the statements by the prosecutor that the jury should act as the conscience of the community were all given at closing, when it was clear that the prosecutor was making an argument to the jury rather than an effort to summarize and instruct on what was to come at the trial. Additionally, the fact that the statement was made during the penalty phase of a capital case is important because of the heightened reliability concerns in capital cases and the necessity for the sentencing decision to be based upon proper concerns. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189; *Cunningham v. Zanf* (11th Cir. 1991) 928 F.2d 1006, 1020.)

B. The Error Was Prejudicial

Respondent argues that because appellant was purportedly the ringleader and shooter, there is no reason to believe the result would have been different absent the prosecutor's misconduct. If anything, the fact that appellant, by the jury's verdict, was more culpable than the other defendants, made the misconduct even more likely to prejudice appellant.

Further, "'a single misstep' on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated." (*United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146, 1150.) Here, the

inflammatory remarks made during opening statement cannot be said to be harmless.

XI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED TO APPELLANT'S CASE, VIOLATES THE UNITED STATES CONSTITUTION

In response to the claims raised in Argument XII of appellant's Opening Brief, respondent correctly notes that these claims have been previously rejected by this Court. (RB 114-124.) However, for the reasons set forth in the opening brief, appellant continues to maintain that the Court's decisions on these issues were wrongly decided and that California's death penalty statutes are unconstitutional. (See AOB 146-186.)

Therefore, this Court should reconsider its rejection of these arguments, and find that California's death statutes are unconstitutional.

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CONCLUSION

For all the foregoing reasons, as well as those set forth in Appellant's opening brief, the convictions and judgment of death must be reversed.

Dated: April 20, 2010

Respectfully submitted,

RICHARD P. SIREF
Attorney for Appellant
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CERTIFICATE OF WORD CONTENT

I, Richard P. Siref, do hereby certify that the text of Appellant's Reply brief consists of 16,251 words in 13 point font.

April 20, 2010

RICHARD P. SIREF
Attorney for Appellant
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DECLARATION OF SERVICE BY MAIL

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CASE NUMBER:
S080837

DECLARATION OF SERVICE

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 110 West "C" Street, Ste. 1100, San Diego, California 92101. I served the APPELLANT'S REPLY BRIEF of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectfully as follows:

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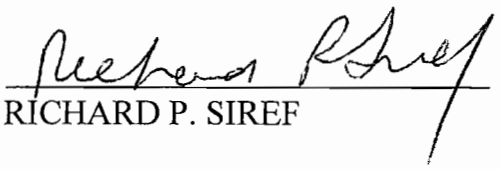

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